

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



WENJIU LIU,

Charging Party,

v.

TRUSTEES OF THE CALIFORNIA STATE
UNIVERSITY (EAST BAY),

Respondent.

Case No. SF-CE-1009-H

PERB Decision No. 2408-H

January 13, 2015

Appearances: Wenjiu Liu, in propria persona; Dawn S. Theodora, University Counsel, for Trustees of the California State University (East Bay).

Before Martinez, Chair; Winslow and Banks, Members.

DECISION

WINSLOW, Member: This case comes before the Public Employment Relations Board (PERB or Board) on exceptions filed by Wenjiu Liu (Liu) to a PERB administrative law judge's (ALJ) proposed decision (attached). The complaint alleged that the Trustees of the California State University (East Bay) (CSUEB) violated the Higher Education Employer-Employee Relations Act (HEERA)¹ by interfering with Liu's rights to utilize the grievance process in violation of HEERA section 3571(a).

The ALJ dismissed all of the allegations in the complaint, except for the allegation that CSUEB failed to implement the resolution of a grievance that required a written apology to Liu for the alleged misconduct of CSUEB Dean Teresa Swartz. With respect to that allegation, the ALJ concluded that CSUEB interfered with Liu's right to process grievances on his own behalf, and ordered the CSUEB to issue the apology.

The Board has reviewed the formal hearing record in its entirety. The record as a whole supports the findings of facts in the proposed decision, and that decision is well-

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

reasoned and consistent with applicable law. We find Liu's exceptions to be not in compliance with PERB Regulation 32300² and without merit. Accordingly, the Board hereby affirms the proposed decision and adopts it as the decision of the Board itself.

DISCUSSION

PERB Regulation 32300 governing exceptions to proposed decisions states, in relevant part:

- (a) The statement of exceptions or brief shall:
 - (1) State the specific issues of procedure, fact, law or rationale to which each exception is taken;
 - (2) Identify the page or part of the decision to which each exception is taken;
 - (3) Designate by page citation or exhibit number the portions of the record, if any, relied upon for each exception;
 - (4) State the grounds for each exception.
- (b) Reference shall be made in the statement of exceptions only to matters contained in the record of the case.
- (c) An exception not specifically urged shall be waived.

The Board need not consider exceptions which do not at least substantially comply with this regulation. (*Los Rios College Federation of Teachers (Sander, et al.)* (1995) PERB Decision No. 1111.)

Liu failed to comply with PERB Regulation 32300(a)(2) by failing to state the specific issues of procedure, fact, law or rationale to which each exception is taken, failing to identify any page or part of the ALJ's proposed decision to which any exception was taken, and failing

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

to state the grounds for each exception. While Liu cited to the record for some of his exceptions, he omitted citations to the record for the majority of his exceptions.

Liu's exceptions either have no material relevance to the present case, including his request that another case in which he was the charging party, (PERB Case No. SF-CE-995-H) be deferred to arbitration, or concern issues that have already been resolved in *Trustees of the California State University (East Bay) (Liu)* (2014) PERB Decision No. 2391-H.

In light of this finding and Liu's failure to satisfy the above-cited requirements, we hereby deny Liu's exceptions and adopt the ALJ's proposed decision.

ORDER

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. SF-CE-1009-H, it is found that California State University (East Bay) (CSUEB) violated the Higher Education Employer-Employee Relations Act (HEERA) section 3571(a) by failing to issue an apology to Wenjiu Liu (Liu) after that remedy was granted through the grievance process. The remaining allegations are hereby DISMISSED.

Pursuant to sections 3563(h) and 3563.3 of the Government Code, it is hereby ORDERED that CSUEB, its governing board and its representatives shall:

A. CEASE AND DESIST FROM:

1. Interfering with employee rights to participate in the grievance process.

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

1. Issue an apology to Liu in accordance with the university president's adopted June 8, 2012, Faculty Hearing Committee's recommended decision. The apology must be issued by a college dean or university administrator with a similar or higher standing than the former college dean, who left the university's employment.

2. Within ten (10) workdays of the service of a final decision in this matter, post at work locations where notices to employees in CSUEB customarily are posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the CSUEB, 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. In addition to the physical posting requirement, the Notice shall be posted by electronic message, intranet, internet site and any other electronic means customarily used by CSUEB to regularly communicate with its employees in the bargaining unit to which Liu belonged.

3. Written notification of the actions taken to comply with this Order shall be made to the General Counsel of the Public Employment Relations Board or the General Counsel's designee. CSUEB 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 Liu.

Chair Martinez and Member Banks 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. SF-CE-1009-H, *Wenjiu Liu v. Trustees of the California State University (East Bay)*, in which all parties had the right to participate, it has been found that the Trustees of the California State University (East Bay) (CSUEB) violated the Higher Education Employer-Employee Relations Act (HEERA), Government Code section 3560 et seq., by failing to issue an apology to Wenjiu Liu (Liu) after that remedy was granted through the grievance process.

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

A. CEASE AND DESIST FROM:

1. Interfering with employee rights to participate in the grievance process.

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

1. Issue an apology to Liu in accordance with the university president's adopted June 8, 2012, Faculty Hearing Committee's recommended decision. The apology must be issued by a college dean or university administrator with a similar or higher standing than the former college dean, who left the university's employment.

Dated: _____

TRUSTEES OF THE CALIFORNIA STATE
UNIVERSITY (EAST BAY)

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



WENJIU "JERRY" LIU,
Charging Party,

v.

TRUSTEES OF THE CALIFORNIA STATE
UNIVERSITY (EAST BAY),

Respondent.

UNFAIR PRACTICE
CASE NO. SF-CE-1009-H

PROPOSED DECISION
(November 25, 2013)

Appearances: Wenjiu "Jerry" Liu, in propria persona; Dawn S. Theodora, University Counsel, for the Trustees of the California State University (East Bay).

Before Shawn P. Cloughesy, Chief Administrative Law Judge.

PROCEDURAL HISTORY

This case alleges that a higher education employer interfered with an employee's rights in utilizing the grievance process. The employer denied committing any unfair practices, and, as an affirmative defense, contended that the complaint was, in whole or in part, barred by the statute of limitations.

On June 14, 2012, Wenjiu "Jerry" Liu (Liu) filed an unfair practice charge (charge) against the Trustees of the California State University (East Bay) (CSU). On September 4, 2012, Liu filed an amended charge which added, among other allegations, that CSU utilized law enforcement at Faculty Hearing Committee grievance hearings and that Associate Provost Linda Dobb (Dobb) was assigned to write grievance responses when she said she would recuse herself from the process.

On December 28, 2012, the Office of the General Counsel of the Public Employment Relations Board (PERB) issued a complaint alleging that California State University, East Bay (CSUEB) violated Higher Education Employer-Employee Relations Act (HEERA) section

3571(a)¹ as interfering with Liu's rights to participate in the grievance process by: stating it had no intent to withdraw his disciplinary actions or grant his request for tenure and promotion; hiring a grievance administrator without the authority to respond to Liu's email messages; authoring grievance responses by someone other than the assigned grievance administrator; defying Faculty Hearing Committee recommendations by adopting the recommendations and then failing to take action on them or stalling Liu's arbitration requests; failing to issue an apology after adopting such a remedy; refusing to adopt a recommendation of conducting an audit; refusing to withdraw a disciplinary action against Liu; allowing Associate Provost Linda Dobb (Dobb) to participate as a grievance administrator for grievances filed against her; utilizing law enforcement at Faculty Hearing Committee grievance hearings; and refusing to organize Faculty Hearing Committee grievance hearings because Liu made a typographical mistake in the selection of the type of grievance (contractual or statutory) he was pursuing.

On January 3, 2013, the hearing was scheduled for April 2 through 5, 2013.

On January 16, 2013, CSUEB answered the complaint, denying any violation of HEERA, and including affirmative defenses such as the statute of limitations.

On March 5, 2013, Liu filed a request to consolidate his three unfair practice cases: PERB Case Nos. SF-CE-995-H and SF-CE-1009-H, and PERB Charge No. SF-CE-1021-H. Complaints had been issued on PERB Case Nos. SF-CE-995-H and SF-CE-1009-H. By March 15, 2013, a warning letter was issued on PERB Charge No. SF-CE-1021-H. Liu also requested that the matters be expedited.

On March 15, 2013, a prehearing conference was conducted in Oakland. The motion to consolidate was denied. The Administrative Law Judge (ALJ) declined to take any action on

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

PERB Case No. SF-CE-1021-H as the matter was under the jurisdiction of the General Counsel's Office and not the Administrative Law Division. The ALJ considered that he was already expediting the remaining cases in that he had given them priority over other pending cases.

Formal hearing was conducted from April 2 through 5, 2013. On April 4, 2013, the ALJ took official notice of all of Respondent's Exhibits as well as the September 14, 2012 testimony of CSUEB Chief of Police James Hodges (Chief Hodges) in PERB Case No. SF-CE-995-H. Additionally, those parts of Grievances 1 through 43 of Liu's exhibits which were admitted in PERB Case No. SF-CE-995-H were also to be admitted in PERB Case No. SF-CE-1009-H. The ALJ also hereby takes official notice of the May 18, 2012 prehearing conference transcript in PERB Case No. SF-CE-995-H.²

Motion to Recuse the ALJ

On June 20, 2013, after receiving the dismissal of the allegation in PERB Case No. SF-CE-995-H which was issued on May 8, 2013, Liu requested the ALJ recuse himself from issuing a decision on PERB Case No. SF-CE-1009-H. The ALJ allowed CSU until July 5, 2013 to respond. On June 28, 2013, Liu stated that the ALJ was delaying the matter by allowing CSU until July 5, 2013 to respond and asked special permission from the Board to recuse the ALJ. Liu also asked to reopen/rehear both cases. On July 9, 2013, the ALJ declined to recuse himself and declined to reopen/rehear the case and issued a detailed 16-page ruling with attachments. On July 9, 2013, Liu asked the Board for special permission to appeal the ALJ's ruling. On November 22, 2013, the Board issued its order summarily denying Liu's

² On May 20, 2013, the ALJ gave the parties an opportunity to object to the admission of the May 18, 2012 prehearing conference transcript. On this occasion, Liu responded that he objected to any overlapping of the evidentiary records of SF-CE-995-H and SF-CE-1009-H. The ALJ took official notice for the purpose of providing a foundation for the expediting of grievances and the agreed stipulation to changing the character of Grievance 21.

“filing” as he did not comply with the requirements of PERB Regulation 32155(c), however, Liu can include in his exceptions to the ALJ’s proposed decision that “certain remarks made by the ALJ during the formal hearing demonstrate the ALJ’s alleged prejudice against him.” (*Wenjiu Liu v. Trustees of the California State University (East Bay)* (2013) PERB Order No. Ad-404-H, p. 4.) The ALJ therefore issued this proposed decision in light of the Board’s order, Liu’s ability to object as to the ALJ’s alleged bias in his exceptions and Liu’s March 5, 2013 request that the proposed decision in this matter be expedited.

Motion to Exclude CSU’s Brief

The deadline for the submission of post-hearing briefs was originally set for May 17, 2013,³ but was extended to June 14, 2013, and then to July 1, 2013, at the request of Liu. No reply briefs were scheduled. When the ALJ originally set the briefing deadline, he stated that the briefs needed to be submitted by close of business with a “proof of service that day.” CSU sent its post-hearing brief in an envelope with a postage machine’s postmark of July 1, 2013 and a proof of service executed by Theodora on the same day. Theodora also sent a courtesy copy of the post-hearing brief by email to the ALJ and Liu on July 1, 2013 at 7:33 p.m. Liu sent his post-hearing brief by mail with a United States Postal Service (USPS) postmark on July 1, 2013, but his proof of service by mail did not list the County in which the declarant resided, the address of the declarant, or a sufficient description of the documents served.⁴ Liu did not send an electronic digital copy of his brief on July 1, 2013.

³ During the last day of hearing, Liu advocated for the matter to be submitted without briefing and transcripts.

⁴ The proof of service leaves blank the space for inserting the County of residence for the declarant, leaves blank the space for inserting the residence address or business address of the declarant, and describes the document as a “Letter by Jerry Liu.”

On July 13, 2013,⁵ Liu filed a motion to “reject” CSU’s post-hearing brief as being untimely because it did not have a USPS postmark and that the proof of service was defective as it was signed by Theodora who Liu considered to be a party in the case. On July 22, 2013, CSU responded that Liu’s contentions were not supported by PERB Regulations 32212 and 32140(a), or any other precedent, and that its post-hearing brief was timely. CSU argued that Liu’s proofs of service were consistently invalid and left out information required by PERB Regulation 32140(a)(2), (4), and (5).

PERB Regulations 32212 and 32140(a) provide:

32212. Briefs and Oral Argument. Prior to the close of the hearing, the Board agent shall rule on any request to make oral argument or to file a written brief. The Board agent shall set the time required for the filing of briefs. Any party filing a brief shall file the original and one copy with the Board agent. Service and proof of service of the brief pursuant to Section 32140 are required.

32140. Service (a). All documents referred to in these regulations requiring “service,” except subpoenas, shall be considered “served” by the Board or a party when personally delivered, when deposited in the mail or with a delivery service properly addressed, when sent by facsimile transmission in accordance with the requirements of Sections 32090 and 32135(d), or when sent by electronic mail in accordance with the requirements of Section 32091, 32135(d) and 32140(b). All documents required to be served shall include a “proof of service” declaration signed under penalty of perjury which contains the following information: (1) The name of the declarant; (2) the county and state in which the declarant is employed or resides; (3) a statement that the declarant is over the age of 18 years; (4) the address of the declarant; (5) a description of the documents served; (6) the method of service and a statement that any postage or other costs were prepaid; (7) the name(s), address(es) and, if applicable, fax number(s) or electronic mail address(es) used for service on the party(ies); and (8) the date of service.

⁵ Liu sent an email to the ALJ on July 2, 2013 stating CSU’s post-hearing brief was untimely. The ALJ directed Liu to submit a proper written motion on the matter (rather than an email). PERB Regulation 32190 requires that motions be in writing with a proper proof of service. Liu finally did so on July 13, 2013.

(Emphasis added.)

Liu contends that the ALJ set a date for submission of the post-hearing briefs to be “postmarked” on July 1, 2013. He cites to the transcripts of the prior proceeding (PERB Case No. SF CE-995-H) in support of this contention. However, the transcript of the instant proceeding demonstrates that the ALJ stated that the post-hearing briefs should be mailed by close of business with a “proof of service that day.” Both Liu and CSU submitted their post-hearing briefs with a postmark of July 1, 2013, and both had proofs of service executed on July 1, 2013. CSU also sent an email attachment of their brief at 7:33 p.m.

Liu did not establish that CSU’s brief was submitted after the close of business on July 1, 2013. The postmark of a private vendor does not demonstrate that the post-hearing brief was submitted after close of business and the regulation does not specify that only USPS postmarks are valid. Additionally, as of July 1, 2013,⁶ PERB Regulation 32140(a) no longer required that a declarant “not be a party to the case” and it was Liu who requested that the submission date be extended to July 1, 2013. Even if the former regulation applied, Theodora would not be considered a party, but a representative of a party. On the other hand, Liu’s proof of service was clearly defective and omitted those sections in the declaration of service specifically required by the regulation. However, as no prejudice has been demonstrated as to the admission of the post-hearing briefs (neither party was able to see the other’s brief before they submitted them), and both briefs were mailed or provided to the other party on July 1, 2013, both post-hearing briefs will be considered.

FINDINGS OF FACT

⁶ Former PERB Regulation 32140(a)(3) provided that the proof of service include “a statement that the declarant is over the age of 18 years and not a party to the case.” (Emphasis added.)

Jurisdiction

CSU is a higher education employer under HEERA section 3562(g). CSUEB is a university within the CSU system. The California Faculty Association (CFA) is the exclusive representative of an appropriate bargaining unit of employees, which includes Assistant Professors, under HEERA section 3562(i). Liu was a higher education employee under HEERA section 3562(e) and an Assistant Professor employed with CSUEB.

Education Code section 89542.5

Education Code section 89542.5 sets forth the statutory Faculty Hearing Committee grievance/disciplinary process for academic employees:

- (a) The Trustees of the California State University shall establish grievance and disciplinary action procedures for all academic employees, including all temporary employees who have been employed for more than one semester or quarter, whereby all of the following requirements are satisfied:
 - (1) Grievances and disciplinary actions shall be heard by a faculty hearing committee composed of full-time faculty members, selected by lot from a panel elected by the campus faculty, which shall make a recommendation to the president of the state university.
 - (2) The grievance or disciplinary hearing shall be open to the public at the option of the person aggrieved or the person charged in a disciplinary hearing.
 - (3) Each party to the dispute shall have the right of representation by a faculty adviser or counsel of his or her choice and to be provided access to a complete record of the hearing.
 - (4) If there is disagreement between the faculty hearing committee's decision and the state university president's decision, the matter shall go before an arbitrator whose decision shall be final.
 - (5) The costs incurred in arbitration shall be paid by the state university.

[¶ ... ¶]

- (b) For purposes of this section, a “grievance” is an allegation by an employee that the employee was directly wronged in connection with the rights accruing to his or her job classification, benefits, working conditions, appointment, reappointment, tenure, promotion, reassignment, or the like. A grievance does not include matters, such as the salary structure, which require legislative action.

[¶ . . . ¶]

- (d) If the provisions of this section are in conflict with the provisions of a memorandum of understanding reached pursuant to Chapter 12 (commencing with Section 3560) of Division 4 of Title 1 of the Government Code, the memorandum of understanding shall be controlling without further legislative action, except that, if the provisions of a memorandum of understanding require the expenditure of funds, the provisions shall not become effective unless approved by the Legislature in the annual Budget Act.

(Emphasis added.)

Collective Bargaining Agreement

Collective Bargaining Agreement (CBA) Article 10 sets forth the “Grievance Procedure” between the CFA and CSU, and provides in pertinent part:

10.1 The purpose of this Article is to provide a prompt and effective procedure for the resolution of disputes. The procedures hereinafter set forth shall, except for matters of discipline as set forth in Article 19 herein, be the sole and exclusive method for the resolution of disputes arising out of issues covered by this Agreement and those matters subject to grievance under Section 89542.5 of the Education Code. It is the express understanding of the parties that these procedures meet or exceed the requirements of the Education Code pursuant to Government Code Section 3572.5(3)(b)(1).^[7]

⁷ HEERA section 3572.5(3)(b)(1) provides:

Notwithstanding the inclusion in Section 89542.5 of the Education Code, except with respect to paragraph (5) of subdivision (a) of that section, of a provision providing that, if the statute is in conflict with a memorandum of understanding reached pursuant to this chapter, the memorandum of understanding shall be controlling without further legislative

Definitions

10.2 As used herein:

- a. The term “grievance” when CFA or an employee(s) is (are) the grievant shall mean an allegation that the CFA, an employee or a group of employees have been directly wronged by a claimed violation, misapplication, or misinterpretation of a specific term or provision of this Agreement. The term “grievance” when an employee is the grievant shall mean an allegation that the employee was directly wronged in connection with the rights accruing to his or her job classification, benefits, working conditions, appointment, reappointment, tenure, promotion, reassignment, or the like, including but not limited to rights arising under this Agreement. A grievance does not include matters such as salary structure, which require legislative action; or the merit pay programs (Post Promotion Increases and Equity Increases) as defined in Article 31, which provide for their own binding appeals processes.
- b. The term “grievant” or “grievants” shall mean:
 1. For statutory grievances: any faculty unit employee(s) who has/have been employed for more than one semester or quarter who allege(s) s/he/they has/have been directly wronged as defined in section 10.2a above, either individually or as a group.
 2. For contract grievances: any faculty unit employee(s) who allege(s) s/he/they has/have been directly wronged as defined in section 10.2a. The term “grievant” shall also mean the CFA when alleging a grievance on behalf of itself, or on behalf of a unit member or a group of unit members in accordance with section 10.2a above. The CFA shall not grieve on behalf of unit members who do not wish to pursue individual grievances.

action, unless the memorandum of understanding requires the expenditure of funds, that section, except for paragraph (5) of subdivision (a) of that section, provides a minimum level of benefits or rights, and is superseded by a memorandum of understanding only if the relevant terms of the memorandum of understanding provide more than the minimum level of benefits or rights set forth in that section, except for paragraph (5) of subdivision (a) of that section.

- c. The term “employee” in this Article shall mean a member of the bargaining unit.
- d. The term “appropriate administrator” as used in this Article shall mean the individual who has been designated by the President to act pursuant to the procedures set forth in this Article.

[¶ . . . ¶]

Grievance Procedure

Level I – Campus Level

10.4 A grievant eligible to grieve pursuant to provision 10.2 of this Article may file a Level I grievance with the President no later than forty-two (42) days after the event giving rise to the grievance, or no later than forty-two (42) days after the grievant knew or reasonably should have known of the event giving rise to the grievance. In all grievances, the grievant shall state clearly and concisely on a grievance form:

- a. with regard to a statutory grievance, the right(s) the grievant alleges were violated as set forth in provision 10.2a above. When claiming a violation of the collective bargaining Agreement, the term or terms of the Agreement alleged to have been violated, misinterpreted, or misapplied;

[¶ . . . ¶]

10.6 At the time of filing of a grievance by an individual employee or group of employees the grievant shall make an election by using the appropriate grievance form between the two procedures set forth below: (1) Faculty Hearing Committee or (2) Contractual Procedure. Failure of the employee(s) to make an election in the appropriate box on the grievance form as between Faculty Hearing Committee and Contractual Procedure shall result in the automatic processing of his/her grievance under the Contractual Procedure. In the cases of grievances filed by the CFA, the CFA may not, on behalf of itself or an employee or group of employees, elect to process a grievance under the Faculty Hearing Committee procedure, but must in all cases process its grievances under the Contractual Procedure.

10.7 Within fourteen (14) days after the Level I filing as provided in provision 10.4a. above, the appropriate administrator shall hold a meeting with the grievant and the grievant’s representative, if any, at a mutually acceptable time at the campus where the

grievant is employed. At this meeting the grievant shall fully present its case, including all relevant facts, arguments and proposed remedies being sought. In the event that the grievant and appropriate administrator cannot successfully resolve the grievance, then the appropriate administrator shall respond in writing to the grievant no later than fourteen (14) days after the Level I meeting. Such response shall include a statement of reasons for any denial of the grievance.

Faculty Hearing Panel and Faculty Hearing Committee Procedures

[¶ . . . ¶]

Appeal to Faculty Hearing Committee

10.11 In the event the grievance is not settled to the grievant's satisfaction at the Level I meeting or by the Level I response by the appropriate administrator, the individual employee grievant (or group of employees) may file a grievance appeal with the Academic Vice President/Provost[,] President or designee no later than fourteen (14) days after receipt of the Level I response, for hearing before a Faculty Hearing Committee composed of full-time faculty members, selected by lot from a Campus Faculty Hearing Panel elected by the campus faculty pursuant to the election procedures set forth above. The grievant shall attach a copy of the Level I grievance filing and the Level I response together with any documents presented at Level I.

10.12 Within seven (7) days after the filing of the grievance appeal as provided in a. above, the Academic Vice President/Provost or designee and Chairperson of the Faculty Hearing Panel shall jointly schedule the selection of the Faculty Hearing Committee. The membership of the Faculty Hearing Committee shall be selected by lot from the Campus Faculty Hearing Panel and shall consist of three (3) members and one (1) alternate. No Faculty Hearing Panel member may serve on a Faculty Hearing Committee if s/he has been directly involved with or a party to matters related to a grievance submitted by the employee to a faculty hearing. Each Faculty Hearing Committee shall be appointed and serve on an ad hoc basis until the Committee has issued its decision on the grievance in question. Participation on a Faculty Hearing Committee shall be considered "service" to the campus community for all applicable purposes.

[¶ . . . ¶]

10.16 Conduct of the hearing shall be at the discretion of the Faculty Hearing Committee but shall be open to the public at the discretion of the person aggrieved.

[¶ . . . ¶]

Presidential Review

10.20 The Faculty Hearing Committee shall provide the President, the grievant and the grievant's representative (if any) with a copy of its written grievance decision recommendation at the time it is issued. Within twenty-one (21) days of the President's receipt of the decision, s/he shall inform the grievant and Faculty Hearing Panel Chairperson in writing of her/his determination to accept and implement the recommended decision of the Faculty Hearing Committee or to reject said determination. In the event the President determines to reject the recommended decision of the Faculty Hearing Committee, s/he shall provide a statement of reasons for said decision.

10.21 If the President rejects a recommended decision of the Faculty Hearing Committee to sustain the grievance in question, the grievant may elect to go before an arbitrator whose decision shall be final. Such election shall be made by certified mail, return receipt requested, directed to the Office of Labor Relations in the Office of the Chancellor within seven (7) days of receipt of the President's decision. The grievant may also request arbitration by transmittal by telefax. If telefax transmittal is used, the receiving party shall fax back a copy of the cover letter with the signature of the receiving party acknowledging receipt, as well as the date of receipt. A telefax transmittal request for arbitration shall not be considered accomplished in the absence of such date and signature on the cover letter. Failure to request arbitration within seven (7) days of receipt of the President's decision shall constitute a waiver of the right to an arbitration hearing, and the President's decision shall be final and binding. Said arbitration shall be conducted according to the rules and procedures set forth in Article 10.27 below.

10.22 If the President concurs with a decision of the Faculty Hearing Committee to deny the grievance in question, said decisions shall be final and binding, and not subject to arbitration.

Contractual Procedure

10.23 If the grievant elects to pursue the Contractual Procedure (and in all CFA-filed grievances), within fourteen (14) days after the filing of the grievance, the President shall hold a meeting with

the grievant and the grievant's representative, if any, at a mutually acceptable time and location. The President shall respond in writing to the grievant, no later than fourteen (14) days after the Level I meeting. Such response shall include a statement of reasons for any denial of the grievance.

Level II – Office of the Chancellor

10.24 In the event the grievance is not settled to the grievant's satisfaction at Level 1, the grievant may file a Level II grievance with the Office of the Chancellor no later than fourteen (14) days after the Level I was response. . . .

[¶ . . . ¶]

10.26 If the grievance has not been settled at Level II, then within (42) days after receipt of the Level II decision or the expiration of the time limits for filing such decision, the CFA, upon the request of the grievant may request arbitration by giving notice to that effect, . . . directed to the designated individual in the Office of the Chancellor. . . . Representation at the arbitration shall be by CFA only.

(Emphasis added.)

Background

CSUEB hired Liu as an Assistant Professor to work in the College of Business and Economics (CBE or College), Department of Accounting and Finance (Department), in the 2005-2006 academic year. Professor Micah Frankel (Frankel) is the Department Chair. Professors Terri Swartz (Swartz) and Jagdish Agrawal (Agrawal) are the CBE Dean and Associate Dean, respectively. James Houpis (Houpis) and Dobb are the Provost and Associate Provost, respectively. Mo Qayoumi (Qayoumi) had been the CSUEB University President until June 30, 2012 and Leroy Morishita (Morishita) started as the University President on July 1, 2012.

Liu, or CFA on Liu's behalf, filed approximately 43 grievances between November 17, 2010 and June 19, 2012. Dobb, as the Associate Provost, was the "appropriate

administrator” designated by the University President to respond to or process grievances on behalf of CSUEB.

No Intent to Withdraw Disciplinary Actions

On or about June 1 and 6, 2011, President Qayoumi denied Liu tenure and promotion to Associate Professor. On June 9, 2011, a CFA representative filed a grievance pursuant to the “contractual procedure” regarding Liu’s denial of tenure and promotion. On August 24, 2011, Provost Houpis issued the final disciplinary letter suspending Liu from September 19 through December 13, 2011. On September 22, 2011, Liu appealed the suspension to arbitration. In November 2011, Liu was terminated from CSUEB. In November 2011, CSU University Counsel Andrea Gunn (Gunn) emailed Liu confirming that he intended to appeal the termination to arbitration.

On February 21, 2012, CFA sent a letter to Liu stating it was withdrawing its representation on his contractual grievance from his denial of tenure and promotion. Without CFA representation, Liu could not proceed to arbitrate his denial of tenure and promotion.

On March 27, 2012, PERB issued a complaint alleging that CSUEB had retaliated against Liu by, inter alia, denying him tenure and promotion, and suspending and dismissing him because of his protected activity in violation of HEERA section 3571(a). On March 29, 2012, PERB set an informal settlement conference for May 7, 2012.

On April 5, 2012, Liu sent an email to CSU Vice Chancellor of Human Resources Gail Brooks (Brooks) arguing that PERB stated that CSUEB’s actions of suspending and terminating him were retaliatory in violation of HEERA section 3271(a). Liu requested that CSUEB immediately withdraw his two disciplinary actions which would demonstrate that:

1) CSUEB was not in contempt of PERB; 2) CSUEB would avoid a ruling that it engaged in an illegal retaliatory action; and 3) CSUEB would save taxpayer money from being spent on the

arbitration process. Liu requested a response by April 13, 2012. After receiving CSUEB's response, Liu explained he would contact the American Arbitration Association (AAA). Liu copied AAA in the email. Liu explained that he sent this email because PERB had just issued a complaint on these matters.

On April 6, 2012, Liu emailed Brooks again and requested that CSU remove Gunn from the case as she was part of the retaliatory actions taken against him. Liu then requested that his two disciplinary actions be withdrawn and he be granted tenure and promotion.

On April 11, 2012, Gunn sent Liu an email stating that CSUEB had no intent of withdrawing his two pending disciplinary actions nor granting his request for tenure or promotion. Gunn sent a copy of the email to President Morishita, Brooks and an AAA representative.

On May 21, 2012, Liu filed Grievance 41, a contractual grievance, that he had been wrongfully denied his tenure and promotion.

Dobb as Appropriate Administrator for Grievances Filed against Her

CBA Article 10.12 prohibits a Faculty Hearing Committee (FHC) panel member who is directly involved with or a party to matters related to a grievance from serving on the FHC panel of that grievance. CFA and CSU published a document entitled, "A Statutory Grievance Administrative Hearing Manual," (hearing manual) which provided:

What if a Committee Member has a Conflict of Interest?

If an individual selected for a specific committee believes that he or she should not sit on a Faculty Hearing Committee in a particular case because of a provision in the CFA/CSU agreement, other controlling CSU policy, personal or professional association with the grievant, or other material reason, then the individual should notify the Faculty Hearing Panel chair of his or her intent to withdraw. If the chair or administrator agree that the individual should not participate, then he or she will then be replaced by the alternate. . . . No less than 7 days prior to the commencement of the hearing, the grievant may request removal

of a Hearing Committee member for cause. The grievant shall be required to state in writing the specific grounds for such objection. If the CSU administrator and Faculty Hearing Panel chair agree, the challenged Hearing Committee member shall be removed and replaced by the alternate. If they do not agree, the matter shall [be] referred to the systemwide level and the procedure described in Section 11 will be followed.

Neither the CBA nor the hearing manual address whether a person designated as an “appropriate administrator” can conduct a Level 1 meeting when the focus of that grievance is against the appropriate administrator’s conduct. CSU Senior Director for Academic Human Resources Margaret Merryfield (Merryfield), who had familiarity with the CBA and the hearing manual, opined that it was the best practice in that situation to assign another appropriate administrator to conduct the Level 1 meeting and write its response. Liu filed six grievances against Dobb. Liu contended that Dobb should not be the appropriate administrator in any grievance filed against her.

1. Grievance 11

On May 17, 2011, Liu filed Grievance 11 against Dobb. Specifically, Liu alleged that on May 9, 2011, while Dobb was conducting an informal grievance meeting on Grievance 6, she stated that Liu was also hired by Dean Swartz.⁸ Dobb also allegedly placed a University Police Department (UPD) officer two yards from him during that meeting. Dobb, on the other hand, contended that the UPD officer was outside the small conference room where the grievance meeting was held, but within the confines of the Provost’s office suite. Associate Dean James Okutsu (Okutsu) was assigned as the appropriate administrator of Grievance 11 instead of Dobb.

On June 15, 2011, Okutsu issued his Level 1 response, denying the grievance, and stating in his conclusion:

⁸ Dobb admitted that she made a mistake as to who hired Liu.

It appears that Ms. Dobb has attempted to address the concerns Dr. Liu has expressed in this statutory grievance. When accused of bias, she recused herself from hearing Dr. Liu's grievances. Because Dr. Liu wishes to have each and every statutory and contractual grievance he has filed heard at a formal [1]level, Ms. Dobb's office is arranging to do so.

On June 15, 2011, Dobb's confidential assistant, Audrey Wade (Wade), notified Liu that the Grievance 11 Level 1 response was ready to be picked up at the Provost's Office. On the same day, Dobb sent Liu an email which included an attachment of the grievance response which Liu could print. On May 25, 2012, Grievance 11 was withdrawn.

2. Grievance 16

On June 17, 2011, Liu filed Grievance 16, a statutory grievance, which alleged that Dobb "handpicked" Okutsu to be the "appropriate administrator" for the Grievance 11 Level 1 response and had her confidential assistant Wade present during the Level 1 meeting. Dobb was also alleged to have written the Level 1 response for Associate Dean Okutsu in Grievance 9.

In Grievance 9,⁹ Okutsu issued his Level 1 response on June 9, 2011, and used words such as "unhappy" in the grievance response, which Liu contends was Dobb's favorite word to use in grievance responses. Okutsu was not sure whether he placed the word "unhappy" in the grievance response or not. On June 14, 2011, Liu stated that Okutsu told him that Okutsu was only present to take notes and pass them on to Dobb. Okutsu denied passing his notes to Dobb for her to write the Level 1 response. Okutsu explained that he prepared the responses and provided them to Dobb for revision. The revisions did not impact the accuracy of his findings or substantive content of his response.

⁹ Grievance 9 did not deal with Dobb. Professor Gary McBride (McBride) was alleged to have been allowed to not teach in Winter 2011, but engaged in an outside business and received a raise. Liu alleged that Professor McBride was given these benefits in exchange for giving negative reviews of Liu in his retention process.

Grievance 16 was assigned to Associate Dean James Zarrillo (Zarrillo) to be the appropriate administrator who conducted the Level 1 response on June 28, 2011. In Zarrillo's grievance response, he stated Liu did not demonstrate bias toward him and that a series of adverse decisions did not constitute bias. On July 6, 2011, Liu appealed the grievance to the second level. The grievance was withdrawn by Liu on May 25, 2012.

3. Grievance 17

On June 30, 2011, Liu filed Grievance 17, a statutory grievance, alleging that Dobb ignored Liu's request to investigate biased actions taken against him in the denial of his early tenure and promotion, the 2009-2010 academic year retention process, and the 2010-2011 tenure and promotion process. On July 7, 2011, Wade emailed Liu that the Provost's Office had received Grievance 17 and that Zarrillo was not going to conduct the Level 1 meeting.

The emailed closed with:

In addition, please note that Ms. Dobb, Interim Associate Provost will be hearing the matter in her official role and capacity as the University's appropriate administrator and that it is no longer necessary for you to send emails to [D]r. Okutsu or Dr. Zarrillo.

On the same day that Liu received the email, he sent an email to Wade, while copying President Morishita, Okutsu and Zarrillo, stating that it was unfair for Dobb to preside over grievances filed against her. Neither a Level 1 meeting nor FHC hearing was conducted and the grievance was withdrawn on May 25, 2012.

4. Grievance 18

On June 30, 2011, Liu filed Grievance 18 alleging that Dobb retaliated against him by issuing him a September 20, 2010 reprimand after he sent Dobb an email on September 27, 2010 complaining of Dean Swartz. Neither a Level 1 meeting nor FHC hearing was conducted and the grievance was withdrawn on May 25, 2012. No evidence was presented that Dobb played any role as the appropriate administrator in this grievance.

5. Grievance 33

On January 17, 2012, Liu filed Grievance 33 alleging that Dobb was present at a Threat Assessment Team meeting on January 6, 2011 in which team members plotted to have Liu denied tenure/promotion. Neither a Level 1 meeting nor FHC hearing was conducted and the grievance was withdrawn on May 25, 2012. No evidence was presented that Dobb played any role as the appropriate administrator in this grievance.

6. Grievance 40

On January 1, 2012, Liu filed Grievance 40, a statutory grievance, which alleged that Dobb had been spreading rumors that Liu had been stalking people. Neither a Level 1 meeting nor FHC hearing was conducted and the grievance was withdrawn on or about May 25, 2012. No evidence was presented that Dobb played any role as the appropriate administrator in this grievance.

Arthurlene Towner as the Appropriate Administrator

Arthurlene Towner (Towner) was a former Professor at San Francisco State University, Associate Dean and Dean at CSUEB for 18 years, and Associate Provost at CSUEB for three years. She retired from CSU in September 2009. In those years that Towner was the Associate Provost, she was involved in the faculty grievance process and was able to resolve most potential grievances before they were filed.

In early May 2012, Towner was hired by CSUEB as a retired annuitant to provide Level 1 responses to Liu's remaining grievances and to represent CSUEB at FHC hearings. One of the reasons that Towner was retained was her familiarity with the faculty grievance process, including her familiarity with the role of the appropriate administrator under CBA Article 10.

On May 15, 2012, Liu emailed President Morishita, Provost Houpis, and Associate Provost Dobb that he filed grievances against Dobb and requested that CSUEB “completely, 100% remove” Dobb from any part of the grievance process. On the same day, Liu emailed President Morishita that he believed Dobb was drafting responses to his grievances.

On May 22, 2012, the ALJ issued a written ruling in PERB Case No. SF-CE-995-H deferring to arbitration all four grievances related to the 1) disciplinary suspension, 2) the disciplinary termination, 3) the denial of tenure and promotion, and 4) the issuance of the Penal Code section 626.4 order restricting Liu from campus grounds. The ruling stated in part:

Accordingly, the motion to defer to arbitration is granted. This complaint is deferred to arbitration and is placed in abeyance. After 90 days has passed from the issuance of this ruling, the ALJ will determine the status of the grievance/arbitration proceedings, and whether the parties are meeting their obligation to process the grievances/arbitrations and what action, if any, should be taken. The June 7 and 8, 2012 hearing dates are cancelled. The parties are strongly encouraged to take all permissible actions which advance grievances concerning the denial of tenure and promotion and the issuance of the Penal Code section 626.4 order to the arbitration level.

(Emphasis added; footnote omitted.)

On May 23, 2012, Liu emailed President Morishita that Dobb should not be allowed to read his grievances; make arrangements for Level 1 meetings; select faculty panels; read, write or revise Level 1 responses; read, write or revise FHC recommendations; or read, write or revise the President’s decisions.

On May 25, 2012, Theodora sent Liu an email stating that Towner had forwarded his May 25, 2012 “Statement on Withdrawing Majority of Grievances” and confirmed that Liu had withdrawn all grievances, except Grievances 6, 9, 10, 21, 29, 36, 27, 39, and 41.

On May 29, 2012, Theodora sent a letter to Liu clarifying that she was assigned as University Counsel for all CSUEB legal matters and was CSUEB’s counsel of record before

PERB. She clarified that she was to move Liu's grievances through the grievance process toward a prompt resolution.

Towner issued Level 1 responses for Grievances 6, 7, 31, 32, 36, 37, 39, 42, and 43¹⁰ on May 23, 2012; June 18, 2012; and July 11, 2012. Liu was not present at the Level 1 meetings for Grievances 6, 7, 31, and 32. Towner stated she wrote each and every one of these grievance responses without the assistance of Dobb or Theodora and considered herself an independent thinker. Towner admitted that she consulted Dobb when she needed information or documentation, but Dobb never revised her responses. No one ever instructed Towner to deny all of Liu's grievances.

Grievances 3, 5 and 28: Failure to Implement Decision by Withdrawing Disciplinary Actions

On April 24, 2012, an FHC hearing was held regarding Grievances 3, 5, and 28¹¹ regarding the violation of office hour policies by Department Chair Frankel and Professors Nancy Mangold (Mangold) and McBride. As a remedy, Liu requested that Department Chair Frankel and Professors Mangold and McBride be terminated from employment.

In its April 24, 2012 recommendation, the FHC found:

The Committee finds that Dr. Liu's requested remedy, of termination of the Department Chair and two professors to be excessive. However, we do want to point out to the Department Chair and Faculty, that granting exceptions and benefits to some and not others without transparency can create an appearance of unfairness and consequent resentment. We further recommend a modification of University and College Office Hours policies that

¹⁰ Grievances 42 and 43 were filed after May 25, 2012, when Liu withdrew a majority of his grievances.

¹¹ Grievance 3 alleged that Chair Frankel and Professors Mangold and McBride violated the office hours policy in Winter Quarter 2011. Grievance 5 alleged further office hours violations in Spring Quarter 2011 by Chair Frankel and Professor McBride. Grievance 28 continued the office hours grievances by contending that Chair Frankel and Professors Mangold and McBride violated the office hours policy in Fall Quarter 2011. Liu closed out Grievance 28 by stating that the three faculty members retaliated against Liu.

allow for fair and transparent exceptions based on clear and public standards.

During the course of the hearing, Dr. Liu also raised many issues that seemed to pertain to grievances he filed with the Administration other than those in front of this Committee. That evidence was not considered in this hearing, as it will be more appropriate in a different hearing where such grievances may be heard.

While Dr. Liu's concern for fairness and equity is to be commended, we hold that the appropriate remedy for the minor violations at the heart of these three grievances is a modification of existing policies and procedures.

(Emphasis added.)

On May 2, 2012, President Morishita sent a letter to Liu notifying him of his decision that he supported the FHC recommendation.

On May 7, 2012, Liu emailed President Morishita and copied Provost Houppis. Liu requested a one-hour meeting with President Morishita to discuss his May 2, 2012 decision. Specifically, Liu demanded that President Morishita issue him a letter of apology for retaliating against him. Liu then noted that the suspension action taken against him included an allegation that he “engaged in inappropriate and stalking-like behavior by taking photographs in and around Department and College facilities, including classrooms.”¹² Liu explained that these photos included documenting the various office hours violations in his grievances. Liu summarized his request by stating:

Since you support the faculty panel recommendation which stated, “Dr. Liu’s concern for fairness and equity are to be commended,” I ask that you to take the following actions,

- 1) Write me a letter apologizing that CSUEB has engaged [in] direct retaliation actions against me for filing these 3 grievances.

¹² The FHC recommendation made no reference to any disciplinary action taken against Liu. There was no evidence presented that the FHC issued its remedy that Liu be “commended” in light of any knowledge of Liu’s pending disciplinary actions.

- 2) Immediately withdraw the two disciplin[ary] actions against me.
- 3) Agree to financially compensate me for the tremendous emotional stress and public humiliat[ion] against me imposed under the two disciplin[ary] actions.

Secondly, I ask you to take discipline against Chair Frankel, Dr. Mangold, and Dr. McBride.

[¶ . . . ¶]

Please respon[d] to this email in three days by 4:00 p.m. on Wednesday, May 9, 2012.

On May 9, 2012, Liu sent another email to President Morishita reminding him that his deadline was that day. Provost Houpis responded to Liu by providing in pertinent part:

[T]he President has concurred with the faculty hearing committee decision as communicated to you in a letter dated May 2, 2012. Pursuant to article 10.22 of the faculty collective bargaining agreement, the president's decision is final and binding, and not subject to arbitration. This process related to grievances 3, 5, and 28 has now concluded.

Grievance 6: Failure to Implement Decision by Issuing Liu a Written Apology

On April 25, 2011, Liu submitted Grievance 6 with the Provost's Office alleging that on March 28, 2011, Dean Swartz "spoke in a firm tone" to him to leave the Valley Business and Technology (VBT) Building Room 408 when he was checking his emails at a computer. Liu contended that Dean Swartz violated the CSU Statement on Collegiality and requested an apology from Dean Swartz. On May 16, 2011, Towner appeared for the Level 1 meeting, but Liu did not show. On May 23, 2011, Towner issued her Level 1 response ruling only on the issue of whether Dean Swartz violated Liu's right to access VBT 408.

On or about June 8, 2012, the FHC rendered its decision which stated in part:

Decision/Remedy with Rationale: The committee recommends that Dean Swartz issue the grievant a written apology for her inappropriate behavior on the day of the incident. We also

suggest that written policies be posted with respect to the use of the VBT Lab, and for the withdrawal of rooms in VBT from regular use during inventory checks. We are also concerned about plausible allegations concerning Dean Swartz's generally inappropriate conduct towards the business school faculty, and suggest that the university further investigate that conduct as well as the allegations of fostering a hostile working environment.

(Emphasis added.)

On June 19, 2012, Dean Swartz met with Provost Houpis stating that she was going to retire as she was emotionally spent from the mistreatment she received from Liu. She considered herself to be suffering from a hostile working environment and was in fear of her personal safety. Provost Houpis did not anticipate Dean Swartz's retirement.

On June 22, 2012, President Morishita issued his decision in Grievance 6 and wrote Liu stating in pertinent part:

As provided in Article 10.19 of the CBA, the committee granted your grievance. In addition, the committee provided three remedies. This letter is to inform you that in accordance with CBA Article 10.20 I accept their decision, and I am referring the committee's decision and their recommendation to Provost Houpis for appropriate action.

(Emphasis added.)

On June 27, 2012, Dean Swartz sent a memo out to the College Faculty announcing her retirement. After the announcement, Dobb telephoned Dean Swartz and asked if she was going to write a letter of apology to Liu. Dean Swartz stated that she would not do so as it was Liu who had threatened and harassed her. Dobb did not think she had the authority to order Dean Swartz to apologize as Dean Swartz did not believe Dobb and her were on the same "level."¹³ Provost Houpis never asked Dean Swartz to apologize. He spoke to two of the witnesses to the event, Associate Dean Jagdish Agrawal (Agrawal) and Wanda Davenport, who did not think Dean Swartz said or did anything wrong.

¹³ Dean Swartz and Dobb occupied the same classification level, however.

On June 29, 2012, the CSUEB Provost Office announced that Professor Agrawal was named as the CBE Interim Dean and he started on July 1, 2012.

On August 16, 2012, CBE Interim Dean Agrawal wrote to Liu:

Provost Houpis asked me to respond to your request for a letter of apology from Dean Swartz. As you know, Dr. Swartz has retired and is no longer working at CSU East Bay. She will not be writing you a letter. I am the Interim Dean of the College of Business and Economics. I will ensure that the hours which VBT 408 may be used by faculty and staff are clearly communicated and posted to avoid any confusion from occurring in the future.

Dean Agrawal, who had been present during the March 28, 2011 incident, did not issue an apology on Dean Swartz's behalf as he did not believe she did anything wrong. Dean Agrawal just heard Dean Swartz tell Liu in a normal tone of voice that if he wanted to access his email, he needed to do it from his office.

On August 17, 2012, Liu wrote President Morishita stating that he refused to accept Dean Agrawal's letter and that CSUEB was to provide him with a "sincere apology" from Dr. Swartz containing "at least 200 words." No apology was forthcoming.

Towner Not Responding to Liu's Emails

On Sunday, June 3, 2012, at 10:33 p.m., Liu sent Towner an email proposing times to meet on June 4, 2012 for a Level 1 grievance meeting. The next morning Theodora replied stating that Towner had forwarded the email to her to respond stating that Towner would accommodate his request for a 1:00 p.m. start time. Liu later asked Towner what Theodora's role was in responding to his emails. Towner replied that Theodora was designated by the campus to handle those emails in regards to scheduling and expediting the grievance process. Liu stated Towner told him that Theodora was also a grievance hearing officer. Towner denies referring to Theodora as a grievance hearing officer. Theodora was never present at any of the grievance hearings.

Grievance 21: Writing of Level 1 Response

On November 17, 2011, Liu filed Grievance 21, a statutory grievance, which was later changed to a contractual grievance on May 21, 2012¹⁴ and revised again on May 25, 2012. Specifically, Liu contended that CSUEB violated CBA Article 10.36 (retaliation for filing grievances) and Government Code section 8547.3 (California Whistleblower Protection Act) by issuing a Penal Code section 626.4 order restricting Liu from the CSUEB campus grounds and terminating his employment.

On June 6, 2012, Liu sent Towner an email which reflected what he discussed with Towner at the end of the faculty hearing. Liu stated that Towner should write the Level 1 responses based upon facts presented at the Level 1 meeting and that it would be an unfair practice for Towner to write based upon what Theodora told her.

On June 8, 2012, Towner wrote a seven-page Level 1 response which stated in part:

Article 10.2 of the Collective Bargaining Agreement is limited to alleged violations, misapplications, and/or misinterpretations of a specific term or Article of the CFA/CSU Collective Bargaining Agreement. California Government Code section 8547.3 (Whistleblower Protection Act) allegations are being or have been investigated through a separate process pursuant to CSU Executive Orders 929 and/or 1058, and is not part of the Collective Bargaining Agreement. Since this is a contractual grievance, it is restricted to claimed violations, misapplication or misinterpretation of a specific term or Article of the CFA Collective Bargaining Agreement (Article 10.2). Thus, Dr. Liu's assertion regarding California Government Code section 8547.3 **will not** be addressed by this reviewer.

¹⁴ On May 18, 2012, a prehearing conference was held in PERB Case No. SF-CE-995-H, to decide CSUEB's motion to defer all four adverse actions to arbitration, including the Penal Code section 626.4 order. In CSUEB's response, it agreed to waive procedural defects as to these four grievances. (May 22, 2012, Ruling on Motion to Defer.) Upon questioning from the ALJ, CSUEB contended that it could stipulate with Liu to change Grievance 21 from a statutory grievance to a contractual grievance or Liu could re-file the grievance as a contractual grievance. CSUEB was unsure what CFA would do with these changes. Grievance 21 was therefore later changed to a contractual grievance.

(Emphasis in original.)

On June 11, 2012, both Towner and Liu attended an FHC grievance hearing for Grievance 10.¹⁵ At the end of the hearing, Liu asked Towner whether she knew what “1058” was. Towner was exhausted and asked him what he was talking about. Liu asked again. Towner replied that she did not know what he was talking about and would talk to him later.

On June 12, 2012, Liu sent Towner an email arguing that since Towner did not know what Executive Order 1058 was, her grievance response was written by a lawyer who was not present at the hearing. Liu asked Towner to contact him if he was mistaken. Towner did not respond. Again, at the PERB hearing, Towner denied that Theodora wrote any of her grievance responses.

Grievance 39: Implementation of FHC Remedy Requesting Audit

On January 17, 2012, Liu filed Grievance 39. Liu contended that Dean Swartz wasted \$60,000 by rewarding her friends with unmerited research grants and instructional improvement grants and Liu did not receive the same support.

On August 2, 2012, the FHC conducted a hearing and issued its recommendation on August 16, 2012. Specifically, the panel recommended:

The committee finds that the evidence presented raised concerns about Dr. Liu’s treatment by administrative colleagues, but it does not support a finding that Dr. Liu was directly harmed by Dean Swartz. The evidence also raises serious concerns about the professionalism and equity of the instructional improvement grants. In light of the evidence reviewed, the faculty panel recommends that the University undertake a formal audit of the internal granting opportunities executed within the College of Business during the timeframe of Dr. Liu’s employment. . . .

An audit of the granting opportunities executed within the College of Business would serve both Dr. Liu and the University in that the outcome would surely make much clearer the case of impropriety and unfairness within the College of Business,

¹⁵ Grievance 10 concerned Dean Swartz’s hiring of a personal friend at CSUEB.

positive or negative, while providing the University with clear data on whether or not wrongdoing had occurred.

(Emphasis added.)

On August 28, 2012, President Morishita issued his decision stating in part:

As provided in Articles 10.19 to 10.22 of the CBA, I accept the FHC's decision that you did not meet the burden of proof that you were directly harmed by Dean Terri Swartz, and that there is no remedy to be provided to you.

The FHC also suggested that an audit of the College of Business and Economics internal grant programs be conducted. I am copying Provost James Houppis and Interim Dean Jagdish Agrawal^[16] on this recommendation so they can determine an appropriate course of action.

On August 29, 2012, Liu sent an email to President Morishita stating that since President Morishita "did not agree to the Faculty Panel's recommendation of an audit," he requested arbitration pursuant to CBA Article 10.21. On August 30, 2012, Liu made a similar request of CSU Senior Labor and Employee Relations Manager Maria Osorio (Osorio) and the AAA. Osorio responded to AAA explaining that CSU took the position that Liu was not entitled to arbitration and stated:

The Faculty Hearing Committee did not sustain the grievance referenced in Dr. Liu's email . . . , rather the Faculty Hearing Committee denied the grievance. Specifically, the committee held that "the evidence presented raised concerns . . . but it does not support a finding that Dr. Liu was directly harmed . . ." As such Dr. Liu is not entitled to arbitration.

On September 7, 2012, CSU Manager of Labor Relations Kevin Downes (Downes) wrote AAA that CSU did not hold that Liu was entitled to arbitrate the grievance as President Morishita concurred with the FHC recommendation and, therefore, CBA Article 10.22 applied to prohibit arbitration.

¹⁶ Dean Agrawal did not play any part in deciding whether an audit should be conducted or not, but did provide information to the auditors.

On September 7, 2012, CSU Associate Vice Chancellor of Labor Relations John Swarbrick (Swarbrick) wrote Liu notifying him that an audit would soon begin in accordance with the recommendation of the FHC.

On September 25, 2012, CSUEB Vice-President of Administration and Finance Brad Wells (Wells) emailed Liu notifying him that his office was conducting an audit of the CBE internal granting opportunities between academic years 2005-2006 and 2011-2012. Wells stated the audit was underway and was expected to be completed in 60 days.

On December 14, 2012, Wells responded to an email from Liu stating that his office encountered unexpected delays during the audit, but they were near completion.

On December 28, 2012, Liu emailed Wells setting a deadline of January 13, 2013 at 1:00 p.m. to provide him the completed audit. On February 1, 2013, Liu emailed President Morishita expressing his disgust toward CSUEB and requesting them to reply that day and provide an explanation as to when CSUEB planned to release the document.

Wells explained that he had a single internal auditor in the Department of Risk Management and Internal Control (Risk Management). Unexpectedly, Risk Management received two other CSU systemwide internal audit requests at the same time as the CBE audit. The internal auditor's time was redirected to complete the systemwide internal audit reports and the CBE audit was "spread out" over a longer period of time.

On February 15, 2013, the CSUEB Risk Management released its 11-page internal audit report entitled, "Faculty Grants funded by the College of Business and Economics." The report itself states that the fieldwork for the audit was conducted between mid-September 2012 and mid-January 2013. The report was emailed to Liu on February 15, 2013.

Grievances 42 and 43: Refusal to Change Grievance from Contractual to Statutory

On June 19, 2012, Liu filed Grievance 42 requesting to change the grade submission procedure and Grievance 43 alleging that Dean Swartz assigned summer teaching assignments only to those who were loyal to her. The grievances had the box "The Contractual Procedure" checked. Towner conducted the Level 1 meetings of the grievances on June 28, 2012.

At the Level 1 meeting, Liu stated that he made a mistake and requested that the contractual grievance be changed to a statutory grievance. Towner responded that she needed to check if Liu could change the character of the grievance. Liu stated at the hearing that both he and Towner agreed to change the contractual grievance to a statutory grievance and both signed it, but the form did not include Towner's signature.

On June 29, 2012, Theodora emailed Liu and copied Towner stating that CSUEB would not change Grievances 42 and 43 from contractual to statutory as Liu clearly elected the contractual procedure pursuant to CBA Article 10.6. On July 5, 2012, Liu emailed Towner and President Morishita that in his last grievance meeting with Towner, he changed the "typo" on the grievance form to statutory. On this occasion, Liu's email did not state that Towner agreed with this change. Theodora responded to Liu's email that CSUEB would not agree to change the contractual grievance to a statutory grievance and that Liu's next appeal of the grievance would go to the CSU Office of the Chancellor.

In Towner's Level 1 responses, dated July 11, 2012, she wrote:

During the meeting, Dr. Liu requested that the elected procedure be changed to a "statutory grievance." Regarding the request to change (or convert) the grievance from a contractual grievance to a statutory grievance, the request is denied. The collective bargaining agreement is clear and unambiguous. Specifically, Article 10.6 states: "At the time of filing of a grievance by an individual employee or group of employees the grievant shall make an election by using the appropriate form between the two procedures set forth below: (1) Faculty Hearing Committee or (2) Contractual Procedure. . . ." There is no provision in the collective bargaining agreement that permits conversion from one procedure to another. Had the parties intended to permit

converting grievances, they would have included such language—but they did not. In addition, it should be noted that this is not Dr. Liu’s first grievance, nor is it his second, or even his fifth. Rather, this is the forty-second [and forty-third] grievance filed by Dr. Liu. As such, he is thoroughly familiar with the grievance process. Moreover, although not directly on point as conversions were not agreed upon by the Parties, it is too late for the university to accommodate the request because there are insufficient faculty working during the summer to accommodate two more faculty hearing committees [footnote omitted], in addition to the three already scheduled. Therefore, as previously noted, CSU East Bay denies the request to change this grievance from “contractual” to “statutory.” Dr. Liu was informed of this decision on June 29, 2012.

Grievance 43: Whether Towner Wrote the Grievance Response

On July 11, 2012, Theodora sent Liu the Level 1 response for Grievance 43 written by Towner. On July 16, 2012, at 3:05 p.m., Liu forwarded Towner an email stating that he cannot accept her decision as it should be a statutory grievance and appealed it and requested an FHC hearing. At 3:06 p.m., an automated response email from Theodora was sent to Liu that she was out of the office on vacation even though Liu had not included her as an addressee.

Law Enforcement Present at FHC Hearings

CSUEB has a “Workplace Safety and Security Policy,” which provides in pertinent part:

California State University recognizes that workplace violence is a critical problem requiring strict attention and has therefore adopted a policy of no tolerance towards this problem and adopted the Work Place Safety and Security Plan, as the campus general plan to increase workplace safety and security.

Consistent with this policy, acts or threats of physical violence, including intimidation, harassment, and/or coercion, which involve or affect the university or which occur on property owned or operated by the Board of Trustees, will not be tolerated. Acts or threats of violence include conduct which is sufficiently severe, offensive, or intimidating to alter the employment conditions at the University or to create a hostile, abusive, or intimidating work environment, for one of several employees.

Examples of workplace violence include, but are not limited to the following:

1. All threats or acts of violence occurring on university premises, regardless of the relationship between the University and the parties involved in the incident.

[¶...¶]

Specific examples of conduct that may be considered threats or acts of violence include, but are not limited to the following:

[¶...¶]

2. Threatening an individual or his/her family, friends, associates, or property with harm.

On March 1, 2010, Department Administrative Assistant Jeannie Gee (Gee) reported to the UPD a verbal altercation she had with Liu where she believed Liu confronted her regarding the whereabouts of his retention letter. Specifically, Gee complained that Liu stood too close to him and invaded her personal space.

On March 9, 2010, Dobb sent an email to Liu stating in pertinent part:

In the meantime, I think it best to let you know that your behavior recently has had the effect [of] frightening or causing concern with your fellow employees. This has resulted in one of them seeking assistance from the University Police and others approaching the Dean in the College of Business.

On or about June 28, 2010, Dean Swartz contacted Lt. Hodges¹⁷ and complained about Liu's intimidating behavior with her during a meeting where he stated that he would "fight to the death" over the right to teach a Finance course. Lt. Hodges asked Liu to come to the police station and inquired what he meant by the statement. Liu did not want to answer his question.

On September 20, 2010, Dobbs issued a written reprimand to Liu stating in pertinent part:

¹⁷ Before Chief Hodges was appointed as the Chief of Police, he was a UPD lieutenant.

Over the past few months, two individuals within the College of Business and Economics have had occasion to call the police in regards to your behavior. Before we start a new academic year, I felt it important to write you directly about your behavior and what our expectations are regarding how you interact with colleagues and staff within the University.

Remarks like I will “fight to the death for my right to teach Finance 4315” and behaviors which seem overly aggressive are inappropriate. I ask that you keep your remarks and actions brief and to the point when working with colleagues and staff. I would certainly anticipate that nothing in your behavior would occasion a call to the police department. If you are having trouble controlling your behavior or remarks, I would ask that you seek help either through your Chair or through our Employee Assistance Program.

In July 2011, Provost Office staff contacted the President’s Office and stated that they were frightened of Liu and they did not want Liu to come to the Provost’s Office again.¹⁸ The President’s Chief of Staff directed Dobb to “handle it.” Dobb discussed the matter with the Director of Human Resources and they agreed that Liu could bring his grievance(s) to the Department of Human Resources and Human Resources staff would take the grievance(s) upstairs to the Provost’s Office. On July 15, 2011, Dobb sent Liu a written notification stating that CSUEB had received a complaint of Liu’s behavior from the Provost’s Office staff and if he was to deliver anything to the Provost’s Office, he was to use the campus mail or personally deliver it to the receptionist at the Human Resources Office.

On August 24, 2011, Provost Houpis issued the final disciplinary letter suspending Liu from September 19 through December 13, 2011. The charges included intimidating Gee; attaching a Global Positioning System (GPS) tracking device to the automobile of Professor Scott Fung so that he could monitor Fung’s whereabouts to determine his outside activities; telling Dean Swartz that he would “fight to the death” and “sacrifice his life” to teach Finance

¹⁸ Dobb was unaware that her staff contacted the President’s Office about Liu.

4315; stalking Department Chair Frankel by loitering outside his office armed with a camera to take photos; and, taking photos of Frankel's students.

On September 28, 2011, at 3:30 p.m., Liu dropped off a grievance package¹⁹ at the President's Office and then walked over to the Provost's Office to drop off the same documents. The door was locked. When Provost Office employee Gina Traversa (Traversa) came to the door, she told Liu to go to Human Resources Office and not to come to the Provost's Office.

On Friday, September 30, 2011, at 11:32 a.m., Liu sent the following email to the Human Resources Director Denise Needleman (Needleman), Human Resources and Provost Office staff, Traversa, and Chief Hodges:

Dear Ms. Needleman and other Colleagues at HR department,

By this email, I want to discuss Ms. Gina Traversa's discrimination against HR staff – as second class of citizen who are inferior to her.

Two days ago, I tried to deliver a package to the Provost Office and Ms. Traversa initially refused to accept the document and asked me to go to the Human Resources department. The assumption that Ms. Traversa made about Liu, an assistant professor of finance, is that Liu is a risky person who will kill many people in the. (sic) This is obviously a criminal action of open discrimination against Liu. However, in this email, let us temporarily assume Ms. Gina Traversa's assumption is true.

Then I wish all members of the HR department to think about the following question.

If Professor Liu is risky and he may kill other people, then why did Ms. Traversa knowingly [send] Liu to HR?

It is well known that the designated campus location for faculty members to deliver grievance forms is the Provost Office.

Why is Ms. Gina Traversa asks staff members of HR to take care of things that are solely the responsibility of the Provost Office?

¹⁹ The package may have been the instant unfair practice charge.

It is very clear that Ms. Gina Traversa thinks that, at CSUEB, she is a first-class citizen. Just like the old slave-owners, to Ms. Traversa, all other CSUEB faculty and staff members are the black slaves. Those black slaves only deserve to work in the dirty cotton field, and they can not come to where the slave owners live (the CSUEB Provost Office).

Staff members of HR department are of a[n] inferior class to Ms. Traversa.

And if Professor Liu kills someone, then staff members of HR department should die first.

Here, I want to make the clear statement.

I am a very friendly person and I only take peaceful means to fight corruption, discrimination, and organized fraud at CSUEB. I will never hurt any of my colleagues at CSUEB, there is no need to think of Liu as a risky person.

In this email, I demand an immediate investigation by the Office of Equity and Diversity on Ms. Gina Traversa's open discrimination against staff members of HR department and Jerry Liu[.]

[¶ . . . ¶]

Finally, I demand a written apology from Ms. Traversa to staff members of HR department and me for her act of open discrimination.

Thank you very much for your attention.

I wish you a nice weekend!

Jerry Liu

(Emphasis added.)

After receiving the email, Chief Hodges believed that Liu was intentionally attempting to intimidate the Human Resources staff as it was addressed to them and Liu referenced "killing" them. Chief Hodges convened a Threat Assessment Team meeting between 2:00 p.m. and 3:00 p.m. Chief Hodges provided the team with his chronological history of concerns regarding Liu's behavior since March 2010 and the team discussed the

September 30, 2011 email. Chief Hodges believed that Liu was insubordinate to a direct order that Dobb gave him on July 15, 2011 and was disruptive by handing out pamphlets outside of Frankel's classroom.²⁰ The team decided that immediate action needed to be taken pursuant to Penal Code section 626.4 to order the withdrawal of the University's consent for Liu to be on campus for 14 days. The recommendation was approved by President Morishita and UPD officers served Liu with the Penal Code section 626.4 order near his office. Liu was escorted off campus grounds. Liu was informed that he was forbidden to return to campus and if he returned during the 14-day period, he would be arrested.

In November 2011, Liu was terminated for charges which included sending a threatening email on September 30, 2011, and lurking outside three professors' offices during their office hours.

On April 24, 2012, an FHC hearing was held regarding Grievance 3, 5, and 28 regarding the violation of office hour policies by Department Chair Frankel and Professors Mangold and McBride. An armed UPD officer was present in plain clothes. The hearing was held in the Bayview Room which is 50 feet by 17 feet. The officer was stationed in the back of the room near the exit door. Liu presented his case before the FHC.

On April 25, 2012, Chief Hodges emailed Liu reminding him to check in at the UPD before going anywhere on campus and that he should do so before his FHC hearing at 9:00 a.m. on April 26, 2012. Liu telephoned Chief Hodges twice that day. Chief Hodges considered Liu to be very angry and agitated. Liu objected to having to check in at the UPD and did not want any police present at the FHC hearing. He said he would be bringing the "press" with him and if he saw police, he would "take action." Chief Hodges asked him what

²⁰ Chief Hodges admitted that the impetus for calling the Threat Assessment Team meeting was the September 30, 2011 email.

type of “action” he was referring to and Liu would not answer Chief Hodges. Liu replied that he would not mind being arrested. At 10:00 p.m., Liu responded that he would not report to the UPD and UPD could arrest him if they want.

Chief Hodges reported the conversation to Wells and both agreed that an increased police presence was needed at the FHC hearing. Chief Hodges arranged an armed plain clothes officer to be inside of the Bayview Room located near the back of the room, the Chief would be armed and in plain clothes outside the hearing room and an armed uniformed officer would be in the building and available by radio call to respond if needed. Wells would also come if needed.

On April 26, 2012, Liu arrived at CSUEB and Chief Hodges greeted him in the parking lot. Chief Hodges escorted Liu to the Bayview Room.²¹ The Grievance 29 FHC panel, University Representative Edwin Waite, CFA Chapter President Jennifer Eaton and former CFA Chapter President Brian McKenzie (McKenzie) were also present. UPD Officer Dan Larson was present in plain clothes in the back. After Liu entered the Bayview Room, he turned to McKenzie and told him he could not go through with the hearing with police present. McKenzie exited the hearing room to speak with Chief Hodges. By that time, Wells had arrived. McKenzie asked if the FHC hearing could go forward with the UPD officer outside the hearing room with police observing through the glass windows. Chief Hodges replied that his decision was final. Liu exited the Bayview Room and was agitated. Liu accused Chief Hodges that his officers had “guns drawn.” Chief Hodges disputed Liu’s assertion. Liu then moved his hand to see if Chief Hodges had his gun on him at his waist. Chief Hodges brushed Liu’s hand away and instructed him never to reach for his gun. Liu then started shedding some of his clothing to prove that he did not have a gun and challenged Chief Hodges to arrest him.

²¹ The Bayview Room is a large conference room which has large glass windows where one can look inside from the entrance and see who is present and what is occurring.

The FHC panel walked out at the Bayview Room and the hearing was cancelled. The hearing was later rescheduled to June 7, 2012 and completed.

On May 2, 2012, Dobb notified Liu that Towner would be retained to work on his grievances. Dobb notified Liu that as a result of perceived threats contained in his previous emails and past actions on campus, a UPD officer would be present at all times during his grievance hearings. On May 12, 2012, Wells notified Liu that a plain clothes UPD officer would be present in the grievance hearings.

FHC meetings held after March 4, 2012, were: Grievances 3, 5, and 28 on April 24, 2012; Grievance 6 on June 8, 2012; Grievance 9 on June 4, 2012; Grievance 10 on June 11, 2012; Grievance 29 on June 7, 2012; Grievance 36 on August 1, 2012; Grievance 37 on July 31, 2012; and Grievance 39 on August 2, 2012. Chief Hodges was present at each of the FHC hearings in plain clothes with a weapon,²² except one, for which Officer Mark Engel was present.²³

²² Liu admitted that he telephoned Chief Hodges all the time as a friend and Chief Hodges never intimidated him. Liu contended he was afraid that Chief Hodges was intimidating the faculty panel. Later in his testimony, Liu stated that he also felt intimidated by UPD.

²³ Although not in the complaint, one plain clothes UPD officer was also present in the Level 1 meetings conducted by Towner after March 4, 2012: Grievance 6 on May 16, 2012; Grievance 7 on May 16, 2012; Grievance 31 on May 14, 2012; Grievance 33 on May 14, 2012; Grievance 36 on June 4, 2012; Grievance 37 on June 4, 2012; Grievance 39 on June 4, 2012; and Grievances 42 and 43 on June 28, 2012. Chief Hodges was present at each of these meetings. The Level 1 grievance meetings were held off campus in a small conference room at the Hampton Inn in Hayward about one block from campus. Liu stated that Chief Hodges sat arms-length from him. Towner stated that Chief Hodges sat further away from them. As the issue of the CSUEB's use of law enforcement at Level 1 meetings was not set forth in the charge, amended charge or complaint, it will not be considered in this proposed decision. However, if it were, the same reasoning set forth later in this proposed decision as to the use of law enforcement at Liu's FHC hearings would apply to the Level 1 meetings.

ISSUES

1. Are some of the allegations in the complaint relating to the utilization of law enforcement at FHC hearings barred by the statute of limitations?
2. Are the allegations in the complaint relating to Dobb acting as the appropriate administrator in grievances filed against her barred by the statute of limitations?
3. Did CSUEB interfere with Liu in the processing of some of his grievances?

CONCLUSIONS OF LAW

Timeliness of Allegation

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.) The six-month limitation period commences on the date that the conduct constituting an unfair practice was discovered, and not the date of discovery of the legal significance of that conduct. (*Compton Unified School District* (2009) PERB Decision No. 2016; *Empire Union School District* (2004) PERB Decision No. 1650.) A charging party bears the burden of demonstrating that the charge was timely filed. (*Tehachapi Unified School District* (1993) PERB Decision No. 1024; *State of California (Department of Insurance)* (1997) PERB Decision No. 1197-S.)

1. Utilization of Law Enforcement at FHC Hearings

Liu was aware of when CSUEB started using law enforcement in its FHC grievance hearings, as he was present. Liu filed an amended charge which included these law enforcement interference allegations on September 4, 2012. Therefore, pursuant to the six months statute of limitations in HEERA section 3563.2, only those FHC hearings which

occurred from March 4, 2012 forward will be considered for purposes of determining whether CSUEB interfered with the grievance process by utilizing a law enforcement presence at FHC hearings.

2. Dobb Allowed to Participate as an Appropriate Administrator in Grievances Filed Against Her

The grievances which were filed against Dobb were Grievance 11 which was filed on May 17, 2011 with a Level 1 written response issued by Okutsu on June 15, 2011; Grievance 16 which was filed on June 17, 2011 with a Level 1 written response issued by Zarrillo on June 28, 2011; Grievance 17 which was filed on June 30, 2011 with a July 7, 2011 notification that Dobb would be the appropriate administrator; Grievance 18 which was filed on June 30, 2011 for which a Level 1 meeting was not conducted; Grievance 33 which was filed on January 17, 2012 for which a Level 1 meeting was not conducted; and Grievance 40 which was filed on January 1, 2012 for which a Level 1 meeting was not conducted. Liu filed an amended charge which included these Dobb interference allegations on September 4, 2012. Therefore, pursuant to the six months statute of limitations in HEERA section 3563.2, only those Level 1 grievance responses filed on March 4, 2012 and forward will be considered for purposes of determining whether CSUEB interfered with the grievance process by using Dobb as the appropriate administrator in grievances filed against her. As all of the grievances were filed before March 4, 2012, had Level 1 grievance responses issued before March 4, 2012, or had a notification that Dobb would act as the appropriate administrator before March 4, 2012, those allegations relating to these matters as to Grievances 11, 16, 17, 18, 33, and 40 are dismissed as untimely.²⁴ Additionally, and in the alternative, as Grievances 18, 33, and 40

²⁴ Although not specifically charged, Liu alleged that the Level 1 response written by Okutsu in his four Level 1 responses were actually written by Dobb: Grievance 1 issued on June 13, 2011; Grievance 9 issued on June 9, 2011; Grievance 10 issued on June 13, 2011; and Grievance 11 issued on June 15, 2011. Liu stated he discovered this on June 14, 2011, when

were never officially assigned to Dobb, those allegations that Dobb handled those grievances as the appropriate administrator should be dismissed.

Interference

HEERA section 3571(a) provides in pertinent part:

It shall be unlawful for the higher education employer to do any of the following:

(a) . . . to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter. . . .

The test for whether CSU has interfered with the rights of employees under 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 which were interfered with. 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.

HEERA section 3567 provides in pertinent part:

Okutsu allegedly told him that he was only present to take notes and pass them on to Dobb. Clearly, these incidents took place before March 4, 2012, and would also be untimely and barred by the statute of limitations.

Any employee or group of employees may at any time, either individually or through a representative of their own choosing, present grievances to the employer and have such grievances adjusted, without the intervention of the exclusive representative; provided, the adjustment is reached prior to arbitration pursuant to Section 3589, and the adjustment is not inconsistent with the terms of a written memorandum then in effect.

(Emphasis added.)

In *Regents of the University of California* (1991) PERB Decision No. 872-H, the Board held that HEERA section 3567 grants employees a right to file grievances without the interference of their exclusive representative. When a grievance reaches the stage of arbitration, the individual's right to present grievances and have them adjusted comes to an end. (*Regents of the University of California* (1990) PERB Decision No. 849-H.) The "right" to an independent, neutral evaluation of your grievance is not established by HEERA. While HEERA section 3567 provides an employee the right to present grievances to his or her employer, the statute does not prescribe how the employer will process and consider such grievances and does not require a factfinding that is free of management influence or control. (*Regents of the University of California (Los Alamos National Laboratory)* (2003) PERB Decision No. 1519-H.) As the right to file grievances and have grievances considered is also set forth internally in the CBA itself, a grievant can look to those processes in determining whether his statutory rights have been interfered with.

If the harm to employee rights is slight and the employer offers justification based on operational necessity, the competing interests are balanced. (*Carlsbad, supra*, PERB Decision No. 89; *State of California (Department of Personnel Administration)* (2011) PERB Decision No. 2106a-S.) Only when the interference with employee rights outweighs the business justification for the respondent's conduct will a violation be found. (*State of California*

(Department of Corrections & Rehabilitation) (2012) PERB Decision No. 2285-S; *Carlsbad, supra*, PERB Decision No. 89.)

1. No Intent to Withdraw Disciplinary Actions or Grant Tenure and Promotion

Liu argues that Gunn interfered with his grievance process when she said CSUEB had no intent to withdraw the disciplinary actions or grant his request for tenure and promotion. On April 11, 2012, when Gunn made the statement, Liu was attempting to resolve his adverse actions as a result of the PERB complaint that had recently been issued. By April 11, 2012, the two disciplinary actions were already at the arbitration stage and CFA had already denied arbitration of his contractual grievance on tenure and promotion.²⁵ At the arbitration stage, Liu does not have a statutory right to present a grievance under HEERA section 3567. Clearly, based upon the timing of the issuance of the complaint and Liu's own testimony, he was attempting to settle his outstanding issues through an extra-contractual forum, PERB. Gunn's April 11, 2012 answer was in response to Liu's contentions which cited extensively to PERB. As a result, it is not found that this answer was an interference with Liu's right to present grievances and have them adjusted and, as a result, the allegation is dismissed.

2. Towner Having Authority as an Appropriate Administrator in Responding to Emails and Writing Level 1 Responses

CBA Article 10.2(d) defines appropriate administrator as the "individual who has been designated by the President to act pursuant to the procedures set forth in this Article." In the procedures of Article 10, an appropriate administrator may refuse to consider a grievance not filed on a grievance form or provide the appropriate grievance form (Article 10.3(b)); may set an informal conference with the grievant at the grievant's request (Article 10.5(a)); hold a Level 1 meeting with the grievant at a mutually acceptable time, and if the grievance cannot

²⁵ Dr. Liu filed Grievance 41, a contractual grievance about his tenure and promotion, after Gunn's April 11, 2012 answer.

successfully be resolved, then respond in writing to the grievant after the Level 1 meeting (Article 10.7); tape-record the proceedings of the FHC hearing (Article 10.17); represent the University at the FHC hearing (Article 10.18); and receive from grievant(s) reasonably specific requests for information (Article 10.40).

a. Responding to Liu's Emails

On June 3, 2012, Liu sent an email to Towner proposing times to meet for a Level 1 grievance meeting on June 4, 2012. Theodora responded for Towner stating that one of the times was acceptable. Towner later explained to Liu that Theodora was assigned to schedule and expedite the grievance process. On May 29, 2012, Theodora informed Liu that she was to move Liu's grievances through the grievance process toward a prompt resolution.

Article 10 does not prohibit an appropriate administrator from delegating to someone the functions of setting up acceptable meeting times. Additionally, ever since May 22, 2012, when the PERB ALJ "strongly encouraged" the parties to "take all permissible actions" to advance grievances concerning the denial of tenure and promotion and the issuance of the Penal Code 626.4 order to the arbitration level, it was appropriate for Theodora to act in a scheduling capacity to move Liu's grievances through the grievance process, especially with the tight time frames set forth for conducting FHC hearings and the number of grievances to process. These scheduling response(s) from Theodora are not evidence that she was an appropriate administrator or that Towner was not an appropriate administrator. It is not found that Liu established slight harm to his grievance rights and the allegation is therefore dismissed.

b. Writing Level 1 Responses

Towner stated that she wrote all of her responses without any assistance from Dobb or Theodora. She admitted to consulting with Dobb when she needed information or

documentation. Liu contends that Theodora must have written the Grievance 21 Level 1 response, dated June 8, 2012, because on June 11, 2012, Liu asked Towner what “1058” was at the end of the Grievance 10 FHC hearing, and Towner, at that time, did not know.

Additionally, On July 16, 2012, Liu sent an email to Towner that he could not accept her Level 1 response and wanted an FHC hearing. A vacation response message was immediately kicked back to Liu. These two events are insufficient to demonstrate by a preponderance of evidence that Theodora wrote these Level 1 responses for Towner. To ask somebody if they know an Executive Order by its number, when one is focusing on another FHC hearing establishes little, if anything, especially with the number of grievances Towner was processing at the time. As it was not demonstrated that somebody wrote the Level 1 response for Towner, it is not found that Liu established slight harm to his grievance rights and the allegation is therefore dismissed.

3. Defying Faculty Hearing Committee Recommendations

a. Grievance 6: Failing to Issue Apology

On June 8, 2012, the FHC recommended that “Dean Swartz issue a written apology for her inappropriate behavior on the day of the incident.” On June 22, 2012,²⁶ President Morishita, in accordance with CBA Article 10.20, accepted the FHC recommended decision and referred it to Provost Houpis for appropriate action. According to CBA Article 10.20, there are only two choices for the President: to “accept and implement” the FHC’s recommended decision or to “reject” the recommended decision. It is clear that of the two choices, President Morishita agreed to “accept and implement” the recommended decision. It

²⁶ CBA Article 10.20 requires the President to make his/her decision within 21 days of the receipt of the recommended decision. President Morishita could have waited until June 29, 2012 to make his decision, if he desired, which would have been after Dean Swartz announced her retirement date. It is more likely than not that President Morishita made his decision as to Grievance 6 without any knowledge of Dean Swartz pending retirement.

is also clear that the remedy of the recommended decision is that Dean Swartz issue Liu a written apology. On June 27, 2012, Dean Swartz announced her retirement and she was replaced on July 1, 2012. Dobb asked Dean Swartz about writing an apology, but she refused to do so. Provost Houpis who had authority to implement the remedy did not order Dean Swartz to issue a written apology as he conducted a separate investigation and did not believe Dean Swartz did anything wrong. Interim Dean Agrawal did not issue an apology in the place of former Dean Swartz because he was present during the incident in question and did not believe Dean Swartz did anything wrong. Neither Provost Houpis' separate investigation nor Dean Agrawal's personal observation, however, are of any consequence. President Morishita had the authority to accept and implement the FHC recommended decision and his decision is final and binding. (Article 10.22.) As a final and binding decision, for Dean Agrawal or Provost Houpis not to issue a written apology on behalf of or in the place of Dean Swartz harms Liu's right to receive the remedy he was afforded pursuant to the grievance process. As such, Liu has met a prima facie case that he suffered slight harm to his grievance rights for he did not receive a written apology from Dean Swartz or somebody standing in Dean Swartz' stead. CSU's business justification that it did not provide a written apology based upon Dean Swartz' leaving is not sufficient to rebut the prima facie case as other alternatives were available to CSUEB such as issuing a written apology in Dean Swartz' stead. It is found that CSUEB interfered with Liu's rights under the grievance process and violated HEERA section 3271(a).

b. Grievance 39: Refusing to Adopt a Recommendation to Conduct an Audit

On August 2, 2012, the FHC issued its recommended decision which found that Liu was not directly harmed by Dean Swartz. It also recommended that a faculty audit be conducted during the time of Liu's employment. On August 28, 2012, President Morishita

accepted the FHC's recommended decision that Liu did not meet his burden that he was directly harmed. Again, CBA Article 10.20 only allows the President two choices: to "accept and implement" or to "reject" the FHC's recommended decision. The President's August 28, 2012 letter is clearly more like an acceptance than a rejection. Indeed, even though the President copied Provost Houpis and Dean Agrawal to determine an appropriate course of action, on September 7, 2012, Swarbrick notified Liu that the audit would be conducted in accordance with the FHC recommendation which certified that the FHC recommended decision had been accepted and implemented by the President.²⁷ Liu, however, claims that the untimeliness of the production of the audit on February 15, 2013, which was completed over five months from the time he was told an audit would be conducted by Swarbrick, interfered with his rights pursuant to the grievance process. CSUEB offers as a business justification that Risk Management had only one internal auditor who had two systemwide requests come in at the same time as the CBE audit which delayed the completion of the audit. Five months may seem like a long time to prepare such an audit, however, in light of the other two systemwide requests, the short staff, and Liu's inability to demonstrate how he was harmed in any way by the production of the audit report, CSUEB's business justification overcame any slight harm to Liu's grievance right. Therefore, the allegation is dismissed.

c. Grievances 3, 5, and 28: Refusing to Withdraw Disciplinary Actions

On April 24, 2012, the FHC in Grievances 3, 5, and 28 issued its recommended decision which denied Liu's requested remedy of terminating Chair Frankel and Professors Mangold and McBride, but recommended a modification to the University and College Office Hours policy. In making its recommendation, the FHC made a salutary comment that

²⁷ Once CSU agreed to the audit remedy, Liu's contention that the dispute should be arbitrated was nullified as it was undeniable that the President had now accepted and would implement the FHC's recommended decision.

“Dr. Liu’s concern for fairness and equity is to be commended.”²⁸ When the President accepted the FHC recommended decision, Liu began asking for additional remedies which went beyond the remedies requested in the grievance and related more toward his retaliation case. These additional remedies extrapolated being “commended” for seeking fairness and equity among faculty as to how office hours are observed beyond the scope of the grievance/recommended decision. Indeed, the FHC recommended decision itself noted that Liu attempted to expand the scope of the hearing outside the scope of the grievance and explicitly stated that it would be more appropriate to raise these matters at a different hearing. Provost Houpis was correct: the matter was closed as final and binding once the President accepted the FHC’s recommended decision. Liu failed to demonstrate a prima facie case that slight harm was caused to his grievance rights because the President’s acceptance of the FHC’s recommended decision was limited to the FHC recommended decision itself. As a result, Liu failed to establish any harm to his grievance rights and this allegation is dismissed.

4. Utilizing Law Enforcement at FHC Grievance Hearings

On April 26, 2012, Liu told Professor McKenzie that he could not go through with the FHC hearing with a UPD officer being present in the FHC hearing room. As a result of Liu’s complaint, Professor McKenzie unsuccessfully attempted to negotiate that the UPD officer be stationed outside the hearing room. Regarding other hearings, Liu stated that Chief Hodges did not intimidate him, but he was afraid of Chief Hodges intimidating the FHC panel. However, based upon the FHC recommended decisions issued, it was clear that Liu completed all of his FHC hearings and he was allowed to audibly record any alleged event of police intimidation of the hearing.

²⁸ The determination that this comment is salutary is supported by the fact that Liu never requested a remedy that he be “commended” in the grievance.

CSU produced more than an adequate business justification to support Chief Hodges' decision to have law enforcement present during these FHC hearings and overcome any slight harm to Liu's grievance rights. Such business justification included its zero tolerance for violence policy; the March 9, 2010 email regarding Liu's frightening behavior which Liu disregarded; the September 20, 2010 reprimand about "fighting to the death" for my right to teach Finance 4315; the August 24, 2011 suspension which included as a charge the tracking of a fellow professor by GPS and "fighting to the death" to teach Finance 4315; the September 30, 2011 email to Needleman about "kill[ing]" the staff members of the HR department first; the September 30, 2011 Penal Code section 626.4 order; the November 2011 termination for the September 30, 2011 email; the April 25, 2012 refusal to come to the UPD police station prior to the next FHC hearing; and Liu's announcement that he would take some type of unspecified action if he saw police present. Clearly, Liu's actions amply justified the presence of a plain clothes UPD officer at the back of the hearing room, and one outside the hearing room, if needed. No interference of Liu's grievance rights is found and the allegation is dismissed.

5. Grievances 42 and 43: Refusing to Organize FHC Hearing

Liu selected the box, "The Contractual Procedure" for both Grievances 42 and 43. When Liu wanted to change the grievance to the statutory procedure at the Level 1 meeting, Towner said she would check into whether he could make the change. Liu's contention that both agreed to the change is not supported by the "signed" document, as both of their signatures are not present. They were also not supported by one of Liu's later emails where he no longer contended that both agreed to it. As the parties did not stipulate to the change of the character of the grievance, and the CBA does not authorize such a change. Liu has not

demonstrated any harm that he was denied his grievance rights and this allegation is dismissed.²⁹

REMEDY

PERB has broad remedial powers to effectuate the purposes of HEERA. HEERA section 3563.3 states, in relevant part:

The board shall have 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, including, but not limited to, the reinstatement of employees with or without back pay, as will effectuate the policies of this chapter.

In this case, it has been found that CSU violated HEERA section 3571(a) by failing to issue an apology after that remedy was granted through the grievance process. As a remedy to the violation, CSU should take the affirmative action of fulfilling what it granted as a remedy to Liu. Affirmative actions have been ordered in a case where the employer interfered with the grievance process. (*Modesto City Schools and High School District* (1985) PERB Decision No. 518.) It is also appropriate that CSU be ordered to cease and desist from such conduct from recurring in the future. (*Ibid.*)

Finally, it is the ordinary remedy in PERB cases that the party found to have committed an unfair practice be ordered to post a notice incorporating the terms of the order. Such an order is granted to provide employees with a notice, signed by an authorized agent, that the offending party has acted unlawfully, is being required to cease and desist from its unlawful activity, and will comply with the order. Liu instead requests that the posting be placed on the CSU systemwide website or the CSUEB campus website. In this digital age, Liu's request is

²⁹ Theodora's June 29, 2012 response that CSUEB would not agree to the change of the character of the grievance was in her role as representing the University President. President Morishita testified to forwarding emails to Theodora when those matters concerned Liu as she was the University's representative and Liu had pending litigation with CSUEB. Additionally, deciding whether to change or to agree to change the character of a grievance is not one of the designated duties of an appropriate administrator.

an alternative to the traditional employer bulletin board posting and therefore will be discussed.

The purpose of posting a notice incorporating the terms of the order is educational for the represented employees. It is to notify employees of the conduct that was found to be unlawful, assure all employees affected by the decision of their rights and PERB's conclusions, and inform employees that the controversy is now resolved and the employer is ready to comply with the remedy ordered. (*Placerville Union School District (1978) PERB Decision No. 69 (Placerville).*) The visitors to the systemwide and campus websites, however, are not only faculty or employees, but students, parents, and members of the public. Liu's request therefore is overbroad for the purposes of fulfilling the notification requirement to represented employees. Had Liu's request been a posting to some digital employee bulletin board or intranet site which CSUEB has for its employees it would have been closer to the purposes set forth in *Placerville*, however, the evidentiary record does not support such a finding for an intranet capability existing at CSU. Thus, it is appropriate to order CSU to post a notice incorporating the terms of the order herein where notices to bargaining unit employees are customarily posted. Posting of such a notice effectuates the purposes of the HEERA that employees are informed of the resolution of this matter and CSU's readiness to comply with the ordered remedy. (*Ibid.*)

PROPOSED ORDER

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. SF-CE-1009-H, *Wenjiu "Jerry" Liu v. Trustees of the California State University (East Bay)*, it is found that California State University, East Bay (CSUEB) violated the Higher Education Employer-Employee Relations Act (HEERA) section 3571(a) by failing to issue an apology to Wenjiu

Liu after that remedy was granted through the grievance process. The remaining allegations are hereby DISMISSED.

Pursuant to sections 3563(h) and 3563.3 of the Government Code, it is hereby ORDERED that California State University (CSU), its governing board and its representatives shall:

A. CEASE AND DESIST FROM:

1. Interfering with employee's rights to participate in the grievance process.

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

1. Issue an apology to Wenjiu Liu in accordance with the University

President's adopted June 8, 2012 Faculty Hearing Committee's recommended decision. The apology must be issued by a College Dean or University Administrator with a similar or higher standing than the former College Dean.

2. Within ten (10) workdays of the service of a final decision in this matter, post at work locations where notices to employees in CSU customarily are posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the 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.

3. Written notification of the actions taken to comply with this Order shall be made to the General Counsel of the Public Employment Relations Board (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 Wenjiu Liu.

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
E-FILE: PERBe-file.Appeals@perb.ca.gov

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 or received by electronic mail before the close of business, 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, 32091 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).)

**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-1009-H, *Wenjiu "Jerry" Liu v. Trustees of the California State University (East Bay)*, in which all parties had the right to participate, it has been found that the California State University violated the Higher Education Employer-Employee Relations Act (HEERA), Government Code section 3571(a), by failing to issue an apology to Wenjiu Liu after that remedy was granted through the grievance process.

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

A. CEASE AND DESIST FROM:

1. Interfering with employee's rights to participate in the grievance process.

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

1. Issue an apology to Wenjiu Liu in accordance with the University President's adopted June 8, 2012 Faculty Hearing Committee's recommended decision. The apology must be issued by a College Dean or University Administrator with a similar or higher standing than the former College Dean.

Dated: _____

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.