STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA STATE UNIVERSITY EMPLOYEES UNION, SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 2579 Charging Party, v. TRUSTEES OF THE CALIFORNIA STATE UNIVERSITY, Respondent.	Case No. LA-CE-1166-H PERB Decision No. 2384-H June 30, 2014

Appearances: Brian Young, Lead Labor Relations Representative, for California State University Employees Union, Service Employees International Union Local 2579; Daniel A. Ojeda, University Counsel, for Trustees of the California State University.

Before Martinez, Chair; Huguenin and Banks, Members.

DECISION

BANKS, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the California State University Employees Union, Service Employees International Union Local 2579 (CSUEU) from the PERB Office of the General Counsel's dismissal of its unfair practice charge. The charge alleged that the Trustees of the California State University (University) violated section 3571, subdivisions (a), (b) and (c), and section 3580.5, subdivision (a), of the Higher Education Employer-Employee Relations Act (HEERA),[1] by refusing to provide information pertaining to the University's investigation of a complaint by one CSUEU bargaining unit member against another; by destroying records relevant to a negotiated complaint resolution process; by unilaterally changing its policy for

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

maintaining records pertaining to employee complaints; and, by allowing a supervisor to represent a non-supervisory employee in a collectively-bargained complaint proceeding. The Office of the General Counsel dismissed the charge for failure to state a prima facie case as to each of these theories and for lack of jurisdiction as to the allegation that the University violated HEERA section 3580.5.

On appeal, CSUEU argues that it lacked notice of any perceived deficiencies in the charge before dismissal, and that, in dismissing the charge, the Office of the General Counsel acted contrary to PERB's case processing requirements and principles of due process by resolving various factual and legal issues. CSUEU urges the Board to reverse the dismissal and issue a complaint. The University argues that CSUEU's charge fails to state a prima facie case, that the Office of the General Counsel's warning letter was properly served and that CSUEU therefore had sufficient notice of the deficiencies in its charge before dismissal, that the substantive issues raised in CSUEU's appeal are without merit, and that the dismissal should therefore be affirmed.

The Board has reviewed the entire record in this matter, including CSUEU's initial charge, its first and second amended charges, the University's position statements, and the Office of the General Counsel's warning and dismissal letters. In light of applicable law,[2] we have determined that the Office of the General Counsel failed to consider the factual allegations and legal theories presented in the operative second amended charge, thereby depriving CSUEU of notice and opportunity to correct any deficiencies before dismissal, as

[2] In reviewing the dismissal of a charge, the Board assumes the essential facts alleged in the charge are true. (*San Juan Unified School District* (1977) EERB Decision No. 12 (*San Juan*) [before January 1, 1978, PERB was known as the Educational Employment Relations Board or EERB]; *Trustees of the California State University (Sonoma)* (2005) PERB Decision No. 1755 (*CSU Sonoma*).)

required by our regulations. (PERB Reg. 32620, subd. (d).)[3] We therefore reverse the dismissal and remand the matter to the Office of the General Counsel for further investigation of CSUEU's allegation that the University unilaterally changed its records retention policy pertaining to employee complaints, in accordance with the discussion below.[4]

Contrary to the conclusion reached by the Office of the General Counsel, we have determined that PERB has jurisdiction to consider alleged violations of HEERA section 3580.5. We have also determined that CSUEU has stated a viable legal theory and alleged sufficient facts to state a prima facie violation of that section of HEERA and/or that the University interfered with protected employee rights, in violation of HEERA section 3571, subdivision (a), by allowing a supervisor to represent a nonsupervisory employee in collectively-bargained complaint proceedings. In such circumstances, the proper course for the Board on review of a dismissal is to reverse and remand for issuance of a complaint, so that the novel issues may be decided upon a full evidentiary record and with the benefit of briefing by the parties. (*City of Pinole* (2012) PERB Decision No. 2288-M, p. 12; *Jurupa Unified School District* (2012) PERB Decision No. 2283 (*Jurupa*), p. 18.) We therefore direct the Office of the General Counsel to issue a complaint as to the University's alleged violation of section 3580.5, subdivision (a), both as a stand-alone allegation and in conjunction with section 3571, subdivision (a).

To promote consistency and administrative efficiency, we further direct the Office of the General Counsel to refrain from issuing the above-described complaint until after it

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

[4] As discussed below, because CSUEU's allegation that the University failed and refused to provide information pertaining to a bargaining-unit employee's complaint was withdrawn before the charge was dismissed, we need not address that portion of CSUEU's appeal or the Office of the General Counsel's investigation of this allegation.

has completed its investigation of the other allegations included in the charge. HEERA sections 3563.2 and 3563.3, and PERB Regulation 32635 recognize the broad authority of the Board to investigate and remedy allegations of unfair practices. As part of that authority, the Board may sever, consolidate, expedite, place in abeyance, or otherwise alter the timeline(s) or sequence in which it investigates some or all of the allegations in a charge to promote uniformity in decisions and administrative efficiency. (*Mount Diablo Unified School District, et al.* (1977) EERB Decision No. 44 (*Mount Diablo*), p. 2; *Washington Teachers Association (McFarland)* (1990) PERB Order No. Ad-208; see also *Unit Determination for Professional Scientists and Engineers, Lawrence Livermore National Laboratory, of the University of California* (1983) PERB Decision No. 246b-H (*Unit Determination (LLNL)*), p. 2 regarding similar Board discretion to suspend unit determination proceedings for administrative efficiency.)

In reviewing the dismissal of a charge containing multiple, factually distinct allegations, the Board may direct the issuance of a complaint as to some allegations, while remanding others to the Office of the General Counsel for further investigation of any factual or legal issues that were not fully or properly considered before the charge was dismissed. (*Jurupa, supra,* PERB Decision No. 2283; *California State University, Hayward* (1987) PERB Decision No. 607-H (*CSU Hayward*); *State of California (Employment Development Department)* (1985) PERB Decision No. 483-S.) We follow this approach in the present appeal because, while the Office of the General Counsel's investigation of the operative second amended charge was incomplete, we see no reason to require further investigation of those issues for which the charging party has already alleged sufficient facts to state a prima facie case. (*Orange Unified School District* (2000) PERB Decision No. 1416; *Desert Sands Unified School District* (2001) PERB Decision No. 1468.) However, to avoid the unnecessary

complication and risk of error that comes with processing different parts of a charge along separate timelines, and to ensure that all of the factual and legal issues in the charge are given full and fair consideration (see, e.g., *State of California (Departments of Personnel Administration, Mental Health and Developmental Services)* (1985) PERB Decision No. 542-S), the best course is for the Office of the General Counsel, after completing its investigation, to issue one complaint that includes all matters in the charge deemed appropriate for hearing.

FACTUAL[5] AND PROCEDURAL HISTORY

CSUEU is the exclusive representative of employees in several bargaining units at the University, including clerical and administrative support employees in bargaining unit 7, and technical and professional employees in bargaining unit 9. Muneca Williams (Williams) and Tonya Belcher (Belcher) are University employees and members of bargaining units 7 and 9, respectively. They work in the Information Technology Department at the University's Dominguez Hills campus. Belcher is Williams' "lead" person.

Ronald Bergmann (Bergmann) is the supervising administrator (also referred to as an "MPP") of both Williams and Belcher. CSUEU alleges that Bergmann is a "supervisory employee" within the meaning of HEERA, which includes:

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[5] Because this matter comes before the Board following dismissal without a hearing, we are not concerned here with making findings of fact or weighing the parties' conflicting allegations. (*Eastside Union School District* (1984) PERB Decision No. 466 (*Eastside*).) Rather, at this stage of the proceedings, we treat CSUEU's factual allegations as true and consider them in the light most favorable to them. (*San Juan, supra,* EERB Decision No. 12; *Golden Plains Unified School District* (2002) PERB Decision No. 1489 (*Golden Plains*).)

Pursuant to PERB Regulation 32620(c), the Office of the General Counsel may consider additional information provided by the respondent, when such additional facts are provided under oath, complement without contradicting the facts alleged in the charge, and are undisputed by the charging party. (*Service Employees International Union #790 (Adza)* (2004) PERB Decision No. 1632-M; *Lake Tahoe Unified School District* (1993) PERB Decision No. 994; *Riverside Unified School District* (1986) PERB Decision No. 562a (*Riverside*).)

> any individual, regardless of the job description or title, having authority, in the interest of the employer to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if, in connection with the foregoing, the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

(HEERA, § 3580.3.) Specifically, CSUEU alleges that Bergmann "has the authority to hire, dismiss, demote, promote, and discipline" both Williams and Belcher.

The University does not dispute Bergmann's status as a supervisor. A position statement filed by the University in response to the present charge includes a memo from the University's assistant vice president of human resources, dated August 23, 2011, which confirms Bergmann's authority to perform various "supervisory" functions within the meaning of the statute. These include the authority to assign and direct work performed by Williams and Belcher, to deal with any deficiencies in Belcher's and/or Williams' work performance through a process called the "performance management system," to devise, implement and enforce procedures governing Williams' and Belcher's work processes, including procedures for monitoring and correcting employee attendance, and to determine the forms of corrective action necessary to improve the "interpersonal skills" of employees under his supervision.

The Collectively-Bargained and University Dispute Resolution Procedures

At all times relevant to this appeal, CSUEU and the University have been parties to a collective bargaining agreement (CBA) that includes a grievance procedure ending in binding arbitration. The grievance and arbitration procedures are set forth in Article 7 (Grievance Procedure) of the CBA. Article 8 of the CBA (Complaint Procedure) also includes a complaint resolution procedure for disputes in which CSUEU or a CSUEU-represented employee alleges "a violation, misapplication, or misinterpretation of a specific term(s) [sic] of a CSU policy governing working conditions or CSU work rule." Unlike disputes that are subject to Article 7, disputes covered by the Article 8 complaint procedure may, by mutual agreement,

end in mediation, but are not subject to binding arbitration. Both the Article 7 grievance procedure and Article 8 complaint procedure include various "steps" or levels of appeal and a dispute filed under one process may be transferred to the other at any time before it reaches the second step of the process in which it was initiated.

By Executive Order No. 928 (EO 928), the University also has a system-wide complaint procedure for claims arising under Executive Order No. 927 (EO 927), which is the University's system-wide discrimination, harassment and/or retaliation policy. By its terms, the EO 928 complaint procedure is available to employees who are not eligible to file a discrimination, harassment or retaliation complaint or grievance under the terms of a CBA or whose CBA incorporates the EO 928 process for such purposes.

CSUEU alleges that Articles 8 (Complaint Procedure) and 25 (Non-Discrimination) of the CBA incorporate the EO 928 complaint process for resolving non-arbitrable disputes involving allegations of discrimination and/or harassment. Section 8.34 of Article 8 includes language which clearly contemplates that allegations of sexual harassment and discrimination may be processed under the Article 8 complaint procedure.[6] Although the University characterizes the EO 928 complaint process as "non-contractual," its position statements do not specifically deny CSUEU's allegation that the parties have agreed to incorporate the EO 928 complaint process into the CBA and, for the purpose of this appeal, we accept CSUEU's allegation that the CBA incorporates the EO 928 process for non-arbitrable disputes involving allegations of discrimination and/or harassment.[7]

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[6] Section 8.34 of the Article 8 complaint procedure requires that "all settlements related to sexual harassment and discrimination complaints shall be confidential."

[7] The parties' positions on this issue are not entirely clear. An exhibit attached to CSUEU's first amended charge, and incorporated by reference into the second amended charge, includes University correspondence which asserts that, pursuant to a "Side Letter of

Both the Article 8 and the EO 928 complaint procedures provide employees with the right to representation at each step of the process, including at any meetings convened to investigate and resolve the dispute informally. Under Article 8, the representative "shall be a Union Representative *or an employee* who, at the complainant's request, may be present at all levels through Level III." (Emphasis added.)[8] Section 8.35 of Article 8 further provides that "[a]n employee" may present a complaint and have the complaint adjusted "without the intervention of the Union," provided that the adjustment "is not inconsistent with the terms of a written agreement then in effect," that the University "will not agree to a resolution of a complaint until [CSUEU] has received a copy of the complaint and the proposed resolution,"

Agreement," complaints brought under the University's EO 928 process "are not grievable under Articles 7 and 8 of the Contract." The document also asserts that the CBA "does not cover procedures of representation under [EO] 928." These passages may be read as a denial by the University that the parties have agreed to incorporate the EO 928 complaint process into the CBA. However, other than these passages in the CSUEU's exhibits, the parties' pleadings do not mention or discuss the existence of a side letter governing the relationship between the EO 928 complaint process and the CBA. Nor was any side letter or similar document produced as part of the Office of the General Counsel's investigation of the charge. Although a charge must be dismissed when the respondent can establish an affirmative defense as a matter of law based on undisputed facts (*Metropolitan Water District of Southern California* (2009) PERB Decision No. 2055-M, p. 4, fn. 4), including in instances where the charging party undermines its own case by providing documents that *clearly demonstrate* that material allegations are false (*Los Angeles Community College District* (2000) PERB Decision No. 1377, adopting dismissal letter at p. 3, fn. 4), here there appears to be a genuine factual dispute as to whether the parties have agreed to incorporate the EO 928 complaint process into the CBA. Because CSUEU's allegation that the EO 928 process is incorporated into the CBA is not positively contradicted by undisputed facts, at this stage of the proceedings we must accept it as true (*Sacramento City Unified School District* (2010) PERB Decision No. 2129, pp. 5-6, 7, 13; *CSU Sonoma, supra,* PERB Decision No. 1755-H, p. 6) and allow the matter to proceed to a hearing where the parties may present their respective evidence and arguments as to the existence or meaning of any disputed terms in their agreement. (*Long Beach Community College District* (2000) PERB Decision No. 1378, pp. 5-6; *Riverside, supra,* PERB Decision No. 562a, pp. 5-6, 11-12, and 13-14.)

[8] Article 8 does not define the term "employee" and CSUEU has not provided the CBA's "recognition clause" or similar language to indicate whether, within the context of the CBA, the term refers specifically to *bargaining-unit* employees, or *any* University employees.

and, that CSUEU has had the opportunity to file a response to any proposed resolution of a complaint.[9]

Similarly, the EO 928 complaint process guarantees the "claimant," or "complainant," i.e., the employee who has made an informal complaint or who is eligible to make a formal complaint, the right to representation at all steps of the informal and formal options within the complaint resolution process. The "respondent," i.e., the employee who is the subject of the EO 928 complaint, is also permitted to have a representative in instances where, if the allegations were true, the accused employee could reasonably anticipate discipline.

At the option of the complainant, the Article 8 complaint procedure may be initiated through either an informal resolution process, or through the formal (written) process. The informal option involves a meeting with, and verbal response from, the "immediate non-bargaining unit supervisor," if the complainant is an employee. If an informal complaint is not satisfactorily resolved, or if the complainant elects to use the formal process, the complaint is initiated at Level I of the process by completing and submitting to the appropriate University administrator a pre-printed form. The form shall be "agreed to by the parties and provided by

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[9] When referring to an employee's "right to representation," the parties' pleadings and other correspondence do not always indicate whether the right referred to is contractual or statutory. However, the "right to representation" provided for by Article 8 is, in all material respects, identical to the language of HEERA section 3567 and we therefore find it unnecessary to resolve this issue. HEERA section 3567 reads as follows:

> 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. The employer shall not agree to resolution of the grievance until the exclusive representative has received a copy of the grievance and the proposed resolution, and has been given the opportunity to file a response.

CSUEU" to the complainant. The form shall include various categories of information, including "the name and telephone number of the representative, if any," and "the name and address of the Union, *if the representative is acting as an agent of the Union.*" (Emphasis added.)

Williams' Complaint Against Belcher

On or about July 27, 2011, Williams initiated an EO 928 complaint with the University, which alleged that Belcher had harassed Williams and created a hostile work environment. It is undisputed that the University processed Williams' complaint in accordance with the provisions of the EO 928 process. On July 28, 2011, Assistant Vice President of Human Resources Mark Seigle (Seigle) sent a memorandum to Belcher informing her that she was the subject of an EO 928 complaint alleging hostile work environment/harassment and advising her of the right to union representation for the investigation. Seigle's memorandum characterized the investigation as "confidential" and stated that Belcher "must not discuss this investigation with any person who does not have a legitimate business need to know this information." Specifically, Seigle's memorandum instructed Belcher to "refrain from discussing this case with your co-workers and immediate supervisors." Despite these instructions, Seigle's memorandum indicates that a copy was to be forwarded to Bergmann.

In or about August 2011, Seigle met with Williams to investigate Williams' complaint. CSUEU alleges that, at Williams' request, Bergmann accompanied and "represented" Williams at this meeting, in violation of HEERA section 3580.5. The University denies that Bergman "represented" Williams and insists that he "did not say a word" during the meeting. However, the University's position statement asserts that the EO 928 process "allows employees to have a representative of their choosing present" at such meetings, and that Williams "availed herself *of this right* by asking Bergmann to be there" as a "support person." (Emphasis added.)

On or about August 15, 2011, and as part of his investigation into Williams' complaint, Seigle met with Belcher and a CSUEU representative and posed a series of 18 questions which, along with Belcher's responses, Seigle wrote down. At the end of the meeting, Seigle took these hand-written notes with him and did not provide a copy to Belcher or her CSUEU representative.

On or about August 23, 2011, Seigle notified Belcher in writing that he had concluded his investigation and determined that there was insufficient evidence to demonstrate "probable cause" that Belcher had discriminated against or harassed Williams. However, Seigle also concluded that, in various instances, Belcher had acted "inappropriately" towards Williams. As a result, Bergmann directed Belcher to attend a workshop to improve her interpersonal skills. Seigle's memorandum encouraged Belcher and Williams "to work with Dr. Bergmann" to improve their business relationship, to be "civil to each other during working hours," and to "work together so that you can both do your jobs." It also advised Belcher that, "Any questions [regarding Belcher's or Williams'] work performance will be dealt with by Dr. Bergmann through the performance management system." Seigle's August 23, 2011 memorandum indicates that a copy of the document was to be placed in Belcher's personnel file as a record of the investigation and findings of Williams' complaint against Belcher.[10]

Belcher's Complaint Against the University

In response to Seigle's memorandum, Belcher requested that Seigle provide Belcher with various categories of information, including a copy of the 18 questions posed to Belcher at the August 15, 2011 meeting along with Seigle's hand-written notes of Belcher's responses

[10] In response to a complaint filed by Belcher (discussed below), Siegle later determined that the written findings of his investigation should not be placed in Belcher's personnel file and stated that they would remain only in the University's investigation file.

to those questions. The University has refused to produce this information, asserting that Seigle destroyed his notes upon concluding the investigation.

On or about September 2, 2011, Belcher filed a complaint against the University under the Article 8 complaint procedure. Belcher's complaint alleged violations of various provisions of the CBA, EO 927, EO 928, and HEERA. In substance, it alleged that the University had violated Belcher's confidentiality by allowing or authorizing Bergmann to involve himself in Williams' complaint against Belcher, that Bergmann's attendance in the EO 928 complaint proceedings on behalf of Williams along with his position as the supervisor of both Williams and Belcher constituted a conflict of interest, and that Seigle had improperly destroyed documents pertaining to Williams' complaint against Belcher.

On or about October 12, 2011, Seigle issued the University's first level response to Belcher's complaint. The University's response denied that Bergmann "advocated" for Williams during the investigation of her complaint against Belcher. However, it also asserted that the EO 928 complaint procedure "allow[s] for an employee to choose any representative to accompany him or her" in EO 928 proceedings, including his or her supervisor, and that, *pursuant to her right to representation*, Williams was "entitled in this type of complaint to select Dr. Bergmann to accompany her to a meeting with the campus administrator."

On January 9, 2012, Belcher appealed her complaint to Level II and an amended version of the complaint with additional exhibits was filed with the University on January 24, 2012.

On or about February 9, 2012, the University issued its Level II response, signed by Associate Dean Joanne Zitelli. Like the Level I response, the Level II response denied each of the allegations of the complaint. Like the University's Level I response, the Level II response also asserted that, pursuant to Williams' "right to representation," Bergmann agreed to

accompany her to the August 15, 2011 meeting at which she initiated her complaint against Belcher. The February 9, 2012 Level II response is the last piece of correspondence associated with Belcher's complaint in the investigative file of the Office of the General Counsel.

CSUEU's Unfair Practice Charge

On June 1, 2012, CSUEU filed its initial unfair practice charge (UPC) in this case. The charge alleged that the University had violated section 3571, subdivisions (a),[11] (b)[12] and (c)[13] and section 3580.5[14] of HEERA, by destroying documents that were necessary and relevant for processing a complaint on behalf of a CSUEU bargaining unit member, and by allowing a supervisory employee to represent a non-supervisory CSUEU bargaining unit member in grievance proceedings.

On July 31, 2012, CSUEU filed an amended UPC, which alleged that the University had violated HEERA section 3571, subdivisions (a) and (c), by unilaterally changing its records retention policies when it destroyed documents that were relevant and necessary for processing a complaint arising under a collectively-bargained agreement. The amended charge also reiterated CSUEU's allegation that the University had violated HEERA section 3580.5, by

[11] HEERA section 3571, subdivision (a) makes it unlawful for a higher education employer to "[i]mpose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter."

[12] HEERA section 3571, subdivision (b) makes it unlawful for a higher education employer to deny to an employee organization any rights guaranteed by HEERA.

[13] HEERA section 3571, subdivision (c) makes it unlawful for a higher education employer to "[r]efuse or fail to engage in meeting and conferring with an exclusive representative."

[14] HEERA section 3580.5 states, in pertinent part, that "[s]upervisory employees shall not participate in the handling of grievances on behalf of nonsupervisory employees."

permitting a supervisor to represent a CSUEU bargaining unit member in a contractual grievance or complaint procedure.

On August 1, 2012, the University submitted a position statement which admitted various facts alleged in CSUEU's charge, denied others, and denied any wrongdoing. Specifically, the University admitted that Williams had filed a discrimination and harassment complaint against Belcher, pursuant to a complaint resolution procedure authorized by EO 928. The University further admitted that, at Williams' request, Bergmann, the supervisor of both Williams and Belcher, accompanied Williams to a meeting of the University's complaint resolution procedure, as "a support person" and "pursuant to [Williams'] right to representation." The University's position statement denied that Bergmann conducted or spoke at the meeting and concluded that Bergmann therefore did not "participate" in the "handling of [a] grievance[] on behalf of" Williams, in violation of HEERA section 3580.5, subdivision (a). As an alternative defense, the University asserted that the EO 928 complaint procedure is "non-contractual" and therefore does not constitute "grievance" proceedings within the meaning of HEERA section 3580.5, subdivision (a).

The University also denied that it had failed and refused to provide information, as alleged in the charge. Its position statement asserted that, because "neither HEERA nor any other laws require that the University preserve notes generated during a complaint investigation for ... later use by the union," the University was authorized to destroy such records, once it had investigated and determined the merits of Williams' complaint. Additionally, the University argued that it had no duty to produce the requested records, because they no longer existed at the time of the request.

On August 8, 2012, the University submitted a second position statement, which responded to the unilateral change allegation included in the first amended UPC. The

University's second position statement asserted that CSUEU's first amended UPC failed to identify any policy or practice requiring the University to retain "documents related to [employee] complaints," and that "there is no policy that prevents the [U]niversity from discarding these types of records." The University's second position statement asserted that CSUEU had failed to state a prima facie case of a unilateral change, because, to the extent CSUEU's allegations relied on the existence of a CSU records retention policy, such policy is "clearly within the employer's managerial rights," "outside the scope of representation," and "of no concern to employees."

On August 31, 2012, CSUEU faxed to PERB what it characterized as a "second amended charge." The filing consisted of the standard UPC form, a one-page "statement," an attachment, and proof of service.[15] The "statement" consisted of a series of bullet points which included various changes to be made to the text of the statement included with CSUEU's first amended charge. Specifically, these amendments included withdrawing the allegations pertaining to CSUEU's failure/refusal to provide information allegation,[16] and providing additional information in support of CSUEU's unilateral change allegation.

The second amended UPC also reiterated, in slightly revised form, CSUEU's allegation that Bergmann, a supervisor, had unlawfully represented a non-supervisory, bargaining unit employee in a "contractual complaint procedure." The second amended UPC now alleged that

[15] As discussed below, while PERB's file includes only the facsimile version of the second amended UPC, the University does not contend that the document was not properly served by U.S. Mail, as indicated in the proof of service. The University also filed a second position statement specifically responding to the second amended UPC, which indicates that the University did, in fact, receive the document.

[16] The first bullet point in the statement of the second amended UPC states that CSUEU "withdraws its reference in paragraph one of the first amended charge regarding right to information for the grievance or complaint process."

this conduct violated HEERA section 3571, subdivision (d), instead of, or in addition to, section 3580.5.[17]

On September 27, 2012, the Office of the General Counsel issued a warning letter, which did not acknowledge or respond to the amendments included in CSUEU's *second* amended charge, which was filed with PERB on August 31, 2012 – almost one month before the warning letter. Instead, the warning letter advised CSUEU that its *first* amended charge failed to state a prima facie case for any of the theories included in the charge, and that, if the charge was not amended or withdrawn on or before October 9, 2012, it would be dismissed.

In addition to rejecting CSUEU's allegations that the University had failed and refused to provide information, and that it had unilaterally changed its records retention policy, the Office of the General Counsel also rejected CSUEU's allegation that a University supervisor had unlawfully represented a non-supervisory, bargaining unit employee in collectively-bargained grievance or complaint proceedings. Specifically, the warning letter stated that PERB lacks jurisdiction to consider alleged violations of HEERA section 3580.5, and that CSUEU's *first* amended charge included insufficient information to demonstrate that

[17] HEERA section 3571, subdivision (d) makes it unlawful for a higher education employer to "[d]ominate or interfere with the formation or administration of any employee organization, or contribute financial or other support to it, or in any way encourage employees to join any organization in preference to another." For PERB's treatment of identical language in the Educational Employment Relations Act (EERA), § 3540 *et seq.*, regarding employer domination and unlawful assistance to an employee organization, see *Redwoods Community College District* (1987) PERB Decision No. 650; and *Oak Grove School District* (1986) PERB Decision No. 582 (*Oak Grove*); see also *Redwoods Community College Distr. v. Public Employment Relations Bd.* (1984) 159 Cal.App.3d 617, 623-624 (agency and court interpretations of one California public-sector labor relations statute are instructive for interpreting other statutes contain similar or identical language). As discussed below, because no information was included in CSUEU's charge that would appear to support a subdivision (d) violation, and because CSUEU's appeal makes no mention of this theory, we consider this allegation withdrawn and do not address it as part of the appeal.

Bergmann was acting as an agent of the University or with actual or apparent authority at the time he allegedly attended a complaint meeting on behalf of a bargaining unit employee.

The Office of the General Counsel also concluded that CSUEU's factual allegations regarding Bergmann's involvement in the complaint resolution proceedings failed to state a prima facie case of interference with employee rights, in violation of HEERA section 3571, subdivision (a). In this regard, the warning letter repeated its conclusion that the information provided by CSUEU failed to demonstrate that Bergmann was acting as an agent of the University or with actual or apparent authority at the time he allegedly attended a complaint meeting on behalf of a non-supervisory, bargaining unit employee. Although not fully explained, the Office of the General Counsel also appears to have rejected CSUEU's interference allegation, because, according to the warning letter, HEERA does not guarantee the particular rights which CSUEU contends were interfered with by the supervisor's alleged conduct.

Because CSUEU did not withdraw or further amend its charge before the October 9, 2012, deadline specified in the warning letter, on October 23, 2012, the Office of the General Counsel dismissed the charge. The dismissal letter noted that the charge had been amended on July 31, 2012, but made no reference to the additional amendments included in the second amended UPC filed on August 31, 2012. The dismissal letter also referenced the same deficiencies stated in the warning letter but included no additional or different analysis to address the amendments included in CSUEU's second amended UPC.

On November 8, 2012, CSUEU filed the present appeal. The appeal asserts two general categories of errors: (1) CSUEU's representative did not receive the Office of the General Counsel's warning letter and thus had no notice of deficiencies before the charge was

dismissed; and (2) the Office of the General Counsel improperly resolved contested factual and legal issues against CSUEU.

CSUEU contends, among other things, that it was improper for the Office of the General Counsel to credit the University's assertion that the EO 928 complaint procedure is "not contractual" and therefore not subject to HEERA section 3580.5's prohibition against supervisory employees participating in the "handling of grievances on behalf of non-supervisory employees." The appeal also asserts that the EO 928 complaint procedure is incorporated into the parties' CBA by Articles 8 (Complaint Procedure) and 25 (Non-Discrimination), and that an EO 928 complaint is therefore a "grievance" within the meaning of HEERA section 3580.5, subdivision (a).

With respect to CSUEU's failure/refusal to provide information allegation, the appeal asserts that the University "was bound by its previous[ly] published policies and regulations to maintain records and provide access to employees and representatives." CSUEU also contends that the Office of the General Counsel was not authorized to accept the University's contrary factual or legal assertions, namely, that its records retention policy does not cover the category of information requested, that the University is legally privileged to destroy investigative notes so long as it does so consistently, and that the University's interpretation and application of its records retention policy is not within the scope of representation.

DISCUSSION

A. Case-Processing Issues and CSUEU's Right to Notice before Dismissal.

CSUEU contends that it did not receive the Office of the General Counsel's warning letter until after October 23, 2011, when the charge was dismissed, thereby depriving it of notice and opportunity to correct any perceived deficiencies. The University contends that the warning letter was correctly addressed and properly served on CSUEU's designated

representative, in accordance with PERB Regulation 32140, that CSUEU therefore "had ample opportunity to present its case … by filing not only the original charge but *two* amendments to it" (emphasis original), and that CSUEU's "conclusory and unsubstantiated" claim that it never received the warning letter provides no basis for relief from the dismissal.

PERB Regulation 32620, subdivision (d), requires the investigating Board agent to "advise the charging party in writing of any deficiencies in the charge in a warning letter, unless otherwise agreed by the Board agent and the charging party, prior to dismissal of any allegations contained in the charge." Pursuant to this regulation, the warning letter must "identify the facts obtained from the charge or any response to the charge which reveal a deficiency in the charge" and a dismissal must likewise identify, in writing, the deficiencies in the charging party's allegations that form the basis for the decision to dismiss.

PERB Regulation 32621 permits the charging party to amend its charge at any time before the Board agent issues or refuses to issue a complaint. An amended charge must meet all of the procedural requirements of an original charge, as specified in PERB Regulation 32615. It must include, among other things, a "clear and concise statement of the facts and conduct alleged to constitute an unfair practice." Additionally, it "must contain all allegations on which the charging party relies." (PERB Reg. 32621.) Our regulations place no limit on the number of times a party may amend a charge before a warning letter issues or before the charge is dismissed. New allegations included in an amended charge may not be dismissed merely because they are not found within the original charge. (*California State University* (1990) PERB Decision No. 853-H (*CSU*), p. 7.)

In the present case, CSUEU filed a first amended UPC on July 31, 2011, and PERB's file indicates that the second amended UPC was transmitted to PERB by facsimile on August 31, 2012. The facsimile transmittal included proof of service and the University does

not contend that it was not properly served with the document. Although PERB's files include only the fax copy of the document, and thus give no indication that the original document was received by mail or private delivery service, PERB's regulations state that a document is considered "filed" with the agency "when received during a regular PERB business day by facsimile transmission at the appropriate PERB office together with a Facsimile Transmission Cover Sheet," and when the party filing the document by facsimile also deposits the document, with proof of service, in the U.S. Mail or private delivery service. (PERB Reg. 32135, subds. (b), (c).) Because CSUEU complied with the requirements for fax filing a document and, because the warning and dismissal letters give no indication that the second amended UPC was rejected as an incomplete filing, we consider the second amended UPC to have been "filed" with PERB before the Office of the General Counsel dismissed the charge. In fact, the second amended UPC was actually received by PERB either by mail, facsimile, or both, approximately one month before the Office of the General Counsel issued its warning letter. Additionally, because PERB's regulations place no limit on the number of times a party may amend its charge, so long as the amendments are filed before the charge is dismissed (*CSU, supra*, PERB Decision No. 853-H, p. 7), the Office of the General Counsel should have considered the *amended* allegations included in CSUEU's most recent filing, i.e., the *second* amended UPC, before issuing its warning letter, and certainly before dismissing the charge. (PERB Reg. 32620, subd. (d).)

Arguably, the second amended UPC does not include "all allegations on which the charging party relies," as required by PERB Regulation 32621, because it appears instead to reference and make minor changes to the text of the *first* amended UPC rather than including a new and "complete" statement of the charge with *all* of the allegations included in one document. Without expressly saying so, it appears that CSUEU intended for the second

amended UPC to incorporate by reference and amend the text of the first amended UPC. PERB has previously allowed parties to employ this device. (*Reed District Teachers Association, CTA/NEA (Reyes)* (1983) PERB Decision No. 332, p. 6; see also *CSU Hayward, supra,* PERB Decision No. 607-H, p. 21 [PERB regional attorney properly advised the charging party, a layperson, whether new facts warranted filing a separate charge or an amendment to the existing charge].)

While the second amended UPC was hardly a model of clarity, we think CSUEU's intent to incorporate by reference and further amend the text of the first amended UPC was sufficiently apparent from the face of the document that the Office of the General Counsel should have accepted and addressed the amendments identified in the *second* amended UPC before dismissing the charge. Alternatively, to the extent the Office of the General Counsel refused to consider CSUEU's second amended UPC, *because* it did not contain, in a single document, "all allegations on which the charging party relies," we hold that, as with other perceived deficiencies in a charge, the Board agent's warning letter must identify and explain to the charging party the reason(s) for refusing to consider an "incomplete" or otherwise deficient filing.

In either event, it should be clear from the warning and dismissal letters *which* version of a charge and *which* allegations have been considered, when the Office of the General Counsel refuses to issue a complaint.[18] Under the circumstances, even assuming CSUEU

[18] It is also possible that the investigating Board agent chose to consider the first amended UPC, because it appeared to be the version most favorable to CSUEU's case. (See PERB Reg. 32645; and *Golden Plains, supra,* PERB Decision No. 1489.) As noted above, the second amended UPC includes no facts to support its allegation of employer domination or interference with the formation or administration of an employee organization under HEERA section 3571, subdivision (d). Again, however, if this was the Office of the General Counsel's reason for ignoring the more recently filed second amended UPC, then, "unless otherwise agreed by the Board agent and the charging party, prior to dismissal of any allegations

received the Office of the General Counsel's warning letter before the charge was dismissed, it would still not have received adequate notice of deficiencies in the charge, as required by PERB regulations and decisional law, because the warning and dismissal letters provide no explanation for the Office of the General Counsel's failure to consider the timely filed amendments included in the *second* amended UPC. Where the investigation of a charge does not adequately address all allegations included in the charge, the matter must be remanded for further investigation (*County of Alameda* (2006) PERB Decision No. 1824-M (*Alameda*)) or, if it is apparent that the dismissed charge has stated a prima facie case, for reversal and issuance of a complaint. (*CSU Hayward, supra*, PERB Decision No. 607-H.) Because the warning and dismissal letters did not discuss the information and allegations included in the operative version of the charge or, alternatively, explain why the Board agent's investigation focused instead on an earlier version, we reverse the dismissal and remand the matter to the Office of the General Counsel subject to the following discussion.

B. CSUEU's Allegation that Bergmann's Conduct Violated HEERA.

CSUEU alleged that Bergmann's attendance "on behalf of" Williams at the EO 928 complaint meeting violated HEERA section 3580.5, subdivision (a), which prohibits supervisory employees from "participat[ing] in" the "handling of grievances" on behalf of nonsupervisory employees. CSUEU asserts two, alternative theories with regard to Bergmann's conduct. First, CSUEU argues that Bergmann's "representation" of Williams interfered with CSUEU's right, as the exclusive representative, to represent bargaining-unit employees in complaint proceedings, in

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contained in the charge," the Board agent should issue a warning letter which clearly indicates *which* allegations have been considered and found deficient. (PERB Reg. 32620, subd. (d).)

violation of HEERA section 3571, subdivisions (c) and, derivately, (a).[19] Second, CSUEU asserts that Bergman's admitted attendance "on behalf of" Williams violates section 3580.5, subdivision (a), and/or constitutes interference with employee rights, in violation of HEERA section 3571, subdivision (a).

The Office of the General Counsel determined that the allegations regarding Bergmann's conduct failed to state a prima facie case of *any* HEERA violation. With respect to the alleged violation of Section 3580.5, the warning letter concluded that PERB lacks jurisdiction over this provision. The Office of the General Counsel also rejected CSUEU's separate "interference" allegation for lack of jurisdiction or perhaps lack of standing, because, according to the warning letter, the rights allegedly interfered with, i.e., those set forth in section 3580.5, are not guaranteed to employees by HEERA. Additionally, whether plead as an independent violation of Section 3580.5, an interference violation under Section 3571, subdivision (a), or as some combination of these two provisions, the warning letter asserts that CSUEU's charge "fails to

[19] As noted above, CSUEU's initial charge alleged that Bergmann's conduct at the EO 928 complaint meeting violated section 3571, subdivisions (a) and (b), whereas the first and second amended charges alleged that this same conduct violated subdivisions (a) and (c). CSUEU's appeal also makes no mention of a subdivision (b) violation. Because our regulations prohibit dismissal of an allegation without prior notice to the charging party (*Service Employees International Union, Local 715 (Langlois-Dul, et al.)* (2007) PERB Decision No. 1917-M; *Alameda, supra*, PERB Decision No. 1824-M), we cannot, in the current procedural posture of this case, dismiss CSUEU's subdivision (b) allegation. However, to the extent CSUEU has not abandoned this theory, we note that, unlike the other PERB-administered statutes, HEERA does not provide employee organizations with an independent right to represent employees, unless the organization is recognized as the exclusive representative. (*Regents of the University of California v. Public Employment Relations Board* (1985) 168 Cal.App.3d 937, 944.) The significance of this distinction is that, under HEERA, conduct that would violate employee organizational rights to represent employees in grievances under the other PERB-administered statutes must be alleged not as a violation of HEERA section 3571, subd. (b), but as either interference *with the rights of employees to be represented* (HEERA, § 3571, subd. (a)), and/or as a failure and refusal to meet and confer *with the exclusive representative*. (HEERA, § 3571, subd. (c); *Regents of the University of California* (1991) PERB Decision No. 891-H, adopting proposed decision; see also *Chaffey Joint Union High School District* (1982) PERB Decision No. 202 (*Chaffey*), p. 8; *Mount Diablo, supra,* EERB Decision No. 44; Zerger, et al., eds., *California Public Sector Labor Relations* § 30.05[1].)

demonstrate [that] Bergmann was an agent of [the University] or acted with apparent or actual authority," when he attended the EO 928 complaint meeting "on behalf of" Belcher. We address each of these concerns, beginning with the jurisdictional issues.

1. PERB's Jurisdiction Over Alleged Violations of HEERA Section 3580.5

The warning letter asserts, without explanation or citation to authority, that PERB lacks jurisdiction to enforce HEERA section 3580.5. We disagree.

The Legislature has vested PERB with initial, exclusive jurisdiction to investigate and remedy conduct which is alleged to constitute *either* unfair practices (*San Diego Teachers Association v. Superior Court* (1979) 24 Cal.3d 1) *or other violations* of the statutes we administer. (HEERA, § 3563, subds. (h), (m); see also MMBA, § 3509; Dills Act, § 3514.5; EERA, § 3541.3; Trial Court Act, § 71639.1(c); Court Interpreter Act, § 71825, subds. (b), (c); IHSSEERA, § 110015; Pub. Util. Code, §§ 99561, subd. (h); TEERA, § 99561.2.)[20] When called upon to interpret this language, California courts have repeatedly upheld PERB's authority to consider and remedy alleged violations of the PERB-administered statutes *in addition to* the unfair practice provisions of those statutes. (*Leek v. Washington Unified School Dist.* (1981) 124 Cal.App.3d 43, 48-49; *Link v. Antioch Unified School Dist.* (1983) 142 Cal.App.3d 765, 768-69; *San Jose Teachers Assn. v. Superior Court* (1985) 38 Cal.3d 839, 862-63, *cert. granted and judgment vacated on other grounds sub nom. Abernathy v. San Jose Teachers Assn.* (1986)

[20] The Meyers-Milias-Brown Act (MMBA) is codified at section 3560 et seq.; the Ralph C. Dills Act (Dills Act) is codified at section 3512 et seq.; the Educational Employment Relations Act (EERA) is codified at section 3540 et seq.; the Trial Court Employment Protection and Governance Act (Trial Court Act) is codified at section 71600 et seq.; the Trial Court Interpreter Employment and Labor Relations Act (Court Interpreter Act) is codified at section 71800 et seq.; the In-Home Supportive Services Employer-Employee Relations Act (IHSSEERA) is codified at section 110000 et seq.; and the Los Angeles County Metropolitan Transportation Authority Transit Employer-Employee Relations Act (TEERA) is codified at Public Utilities Code, section 99560 et seq.

475 U.S. 1063; see also *Compton Unified School District* (1987) PERB Order No. IR-50 (*Compton*).)

Because the Legislature delegated its authority to PERB to consider and remedy unfair practices and other alleged violations of HEERA, but included no language in the statute expressly or impliedly limiting PERB's authority to consider alleged violations of Section 3580.5, we disagree with the Office of the General Counsel's determination that PERB lacks jurisdiction to consider an alleged violation of this section of HEERA.

Having addressed any jurisdictional concerns, we now turn to consider the legislative purpose of Section 3580.5, whether CSUEU has standing to assert a violation of this provision of the statute, and whether CSUEU has alleged sufficient facts to state a prima facie case that the statute has been violated.

2. Legislative Purpose of HEERA Section 3580.5

Neither the parties nor the Office of the General Counsel have cited to any case law interpreting HEERA section 3580.5, subdivision (a), and we are unaware of any Board or court precedent on the statutory provision. Nevertheless, in light of the plain language of the statute and authorities interpreting similar language in HEERA and other labor relations statutes, we conclude that Section 3580.5's prohibition against supervisory and nonsupervisory employees participating in the handling of each other's grievances is designed to prevent a division of supervisors' loyalties between the interests of the higher education employer and the collective-bargaining interests of nonsupervisory employees. (*Vanguard Tours* (1990) 300 NLRB 250 (*Vanguard Tours*); *Jeffery Mfg. Co.* (1974) 208 NLRB 75, 83 (*Jeffery Mfg. Co.*); *United Clerical Employees v. County of Contra Costa* (1977) 76 Cal.App.3d 119, 127.) The statute's separation between supervisory and nonsupervisory employee participation in grievance proceedings and other collective-bargaining matters serves to protect *both* the employer's right to a "cadre of

[supervisory] employees whose loyalty will not be compromised by concurrent obligations to the interests of those employees who are entitled to negotiate wages, hours, and terms and conditions of employment" (*Unit Determination (LLNL), supra*, PERB Decision 246b-H, pp. 7-8), *and* the rights of rank-and-file employees to collective-bargaining representatives who are single-minded in their loyalty to the employees' interests. (*Vanguard Tours, supra,* 300 NLRB 250, 250.) We explain.

Under HEERA, supervisors are generally excluded from PERB's jurisdiction. (HEERA, § 3580; *CSU, supra,* PERB Decision No. 853-H; *The California State University* (1983) PERB Decision No. 351-H, p. 7l.)[21] However, supervisory employees in the higher education context enjoy some, limited rights to representation and collective bargaining. (HEERA, §§ 3581.1-3581.6.) Unlike EERA, which categorically excludes supervisory employees in K-14 education from bargaining units with nonsupervisory employees but affords them full bargaining rights in units composed solely of supervisory employees, section 3580.3 of HEERA, like section 3522.1 of the Dills Act, "clearly authorizes the Board to include in representation units employees who perform some supervisory functions" if their performance of supervisory functions is only "sporadic and atypical," if "their exercise of authority does not require the use of independent judgment, but is merely routine or clerical in nature," of if, in addition to their supervisory functions, the employees also perform rank-and-file work and are "sufficiently invested with rank-and-file interests to warrant their inclusion in bargaining units." (*Unit Determination (LLNL), supra,* PERB Decision No. 246b-H, p. 8.)

[21] See also *State of California, Department of Health* (1979) PERB Decision No. 86-S and *State of California (Department of Consumer Affairs)* (2004) PERB Decision No. 1711-S, p. 18, which interprets similar jurisdictional limits in section 3513, subdivision (c) of the Dills Act and the Bill of Rights for State Excluded Employees, §§ 3525 et seq.

For example, employees with limited supervisory functions may be included in a rank-and-file unit, when they exercise control only over work processes, which are generally managerial prerogatives, as distinguished from control or discretion over the employer's personnel policies and practices, which affect matters within the scope of representation. Thus, "lead employees," whose guidance of other employees derives from their greater experience, technical expertise or knowledge of the employer's mission and tasks, may be included in a unit with rank-and-file employees, because their own wages, hours and working conditions closely resemble those of other employees, and because their absence of control over such negotiable matters as the employer personnel policies and practices makes them sufficiently invested with rank-and-file interests to warrant their inclusion in bargaining units. (*Unit Determination (LLNL), supra,* at pp. 8-9.)

In each case, the overriding concern is to prevent actual or potential conflicts of interest or divided loyalties of supervisors because of their involvement in the collective-bargaining or grievance proceedings of nonsupervisory employees. The potential for conflict stems primarily from supervisors' authority to control or influence personnel decisions on matters falling within the scope of representation, as opposed to technical or administrative control over work processes. (*Ibid.*; see also *Regents of the University of California* (2011) PERB Decision No. 2217-H (*Regents*), adopting proposed dec. at p. 15.) The same concerns necessarily apply to the processing of grievances, which is a form of continuing negotiations between the exclusive representative and the employer over the meaning and content of the collectively-bargained agreement. (*Chaffey, supra,* PERB Decision No. 202, p. 8, citing *NLRB v. Acme Industrial Co.* (1967) 385 U.S. 432, 437 n. 2; see also *Mount Diablo, supra,* EERB Decision No. 44.) Both California and federal statutory and decisional law point to sound policy reasons for ensuring that those who represent employees in collective bargaining matters, including

grievances, are single-minded in their loyalty to the employees' interests. (*Vanguard Tours, supra,* 300 NLRB 250, 250; *Jeffery Mfg. Co., supra*, 208 NLRB 75, 83; *United Clerical Employees, supra,* 76 Cal.App.3d 119, 129.) An underlying premise of the California and federal labor relations statutes is that, while employees may choose to, or refrain from, forming, joining or participating in the activities of employee or labor organizations,[22] their freedom of choice does not extend to organizations *or individuals* acting on behalf of the employer. (HEERA, § 3571, subd. (d); see, e.g., the discussion in *Oak Grove, supra,* PERB Decision No. 582, esp. at pp. 14-15.)[23] Although CSUEU has alleged no facts to support a violation of

[22] Section 8(a)(2) of the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq., prohibits employers from dominating or interfering with the formation or administration of any "labor organization," and from providing financial or any other support to such organizations. Section 2(5) of the NLRA defines a "labor organization" broadly to include "any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work." Federal decisional law has consistently held that an employer violates section 8(a)(2), when it "deals with" a statutory "labor organization" concerning any of the matters identified in the statute, even when such "dealing" does not involve formal "bargaining" or "negotiating." (See *NLRB v. Cabot Carbon Co.* (1959) 360 U.S. 203, 210-12; *Electromation, Inc.* (1992) 309 NLRB 990, *enf'd.* (7th Cir. 1994) 35 F.3d 1148; *E.I. du Pont de Nemours & Co.* (1993) 311 NLRB 893.)

[23] When it drafted the definition of "supervisory employee" included in section 3580.3 of HEERA, the Legislature borrowed liberally, in fact *verbatim*, from section 2(11) of the NLRA and thus, we regard private-sector decisional law as highly persuasive when interpreting that provision of HEERA. (*Vallejo, supra*, 12 Cal.3d 608, 615-617.) It is true that, under the NLRA, supervisors are excluded entirely from the rights and protections afforded to nonsupervisory employees, whereas, under HEERA, supervisors are excluded from PERB's jurisdiction but have some, albeit limited, rights to seek and provide mutual aid and protection to one another and to engage in collective bargaining with the higher education employer. (HEERA, §§ 3581.1-3581.6.) Although this distinction may be significant in other contexts, it does not affect our interpretation of section 3580.5 as a statutory firewall between supervisors and nonsupervisors in collective bargaining and grievance proceedings. Indeed if anything, the fact that HEERA permits supervisors to bargain collectively and present grievances to the employer, and thus potentially blurs the line between supervisory and rank-and-file employees in ways not contemplated by the NLRA, only emphasizes the need for such a firewall to prevent conflicts of interest and to ensure that the right of employees to "full freedom of

section 3571, subdivision (d), *the principle* underlying that provision and its analogs in the NLRA and other statutes is nonetheless instructive. Succinctly stated, that principle is that an employer may not, through its representatives, sit on both sides of the table in collective bargaining matters. Indeed, it would be anomalous for the Legislature to enact language specifically designed to ensure that employee organizations remain independent and free from all employer influence, while allowing the employer, by its agent, to exert the same kind of influence over employees in collective bargaining and grievance matters. (*Omnitrans* (2010) PERB Decision No. 2143-M, p. 6; see also §§ 3518.7, 3513, subd. (c) for Dills Act's prohibition against managerial and confidential employees holding elective office in an employee organization, if the organization also represents "state employees," i.e., rank-and-file employees with collective-bargaining rights.)

Given the similar purposes and provisions of HEERA and the other California public-sector labor relations statutes, and NLRA, we conclude that HEERA section 3580.5 serves to protect not only the interests of higher education employers, but also the rights of nonsupervisory employees, by ensuring that supervisory employees cannot "sit on both sides of the table" in collective bargaining and grievance proceedings.

3. CSUEU's Standing to Assert an Alleged Violation of Section 3580.5

While not specifically identified as such, the Office of the General Counsel's warning letter raises, at least implicitly, an issue of standing, i.e., whether CSUEU may assert an alleged violation of Section 3580.5 on behalf of itself and/or employees it represents. To the extent Section 3580.5 or similar language in other labor relations statutes has been litigated, it has apparently only been asserted as an employer's affirmative defense (*California Correctional*

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association, self-organization, and designation of representatives of their own choosing." (HEERA, § 3560, subd. (e).)

Peace Officers Ass'n v. State (2006) 142 Cal.App.4th 198 (*Peace Officers*)) or discussed as a provision designed to protect an employer's interests in unit determination decisions (*Regents, supra,* PERB Decision No. 2217-H). The present case is thus the first time the Board has considered whether the statute's prohibition against supervisory and nonsupervisory employees participating in each other's collective bargaining and grievance proceedings may be alleged as an employer unfair practice or other violation of the statute asserted by employees or employee organizations against an employer.[24] Although neither PERB nor a California court has directly addressed the issue, we find nothing in the language of the statute, nor in the legislative purpose of HEERA, to suggest that this provision was enacted solely as an affirmative defense for higher education employers.

In *Peace Officers*, the Department of Personnel Administration invoked similar language in Dills Act section 3529 as an affirmative defense against a correctional peace officer association's petition to compel arbitration of a contractual dispute over whether supervisory and non-supervisory peace officers could attend and observe the other group's meet-and-confer sessions. In granting the association's petition to compel arbitration, however, the appellate court did not reach the merits of the underlying dispute. (*Peace Officers, supra*, at pp. 210-11.) Thus, the court in *Peace Officers* did not discuss the legislative history or purpose of the statute. Because it was not raised by the facts of that case, neither did the court consider whether the statute's language could *only* serve as an employer's affirmative defense or, whether it might also support an unfair practice allegation against a public employer.

Although not directly on point, more instructive for its reasoning is *Regents, supra,* PERB Decision No. 2217-H, in which the Board adopted an administrative law judge's (ALJ)

[24] In addition to a handful of non-precedential proposed decisions, which were not appealed to the Board, see *California Correctional Peace Officers Ass'n v. State of California* (2006) 142 Cal.App.4th 198.

proposed decision and order to deny a unit modification petition which would have added police sergeants who performed some supervisory duties to an existing unit of rank-and-file police officers. The employer in *Regents* opposed the petition, asserting that HEERA section 3580.5 establishes a "clear and unambiguous statutory determination" that supervisors may not belong to the same bargaining unit as rank-and-file employees. The ALJ relied on PERB's initial unit determination decisions under HEERA, which held that supervisors may be included in the unit with rank-and-file employees, if their performance of supervisory functions is only "sporadic and atypical," if "their exercise of authority does not require the use of independent judgment, but is merely routine or clerical in nature," or if their supervisory functions derive from "greater experience, technical expertise and knowledge of the employer's mission and tasks" rather than from control over personnel policies and practices. (*Regents, supra*, PERB Decision No. 2217-H, proposed dec. at pp. 16-17, citing *Unit Determination (LLNL), supra*, PERB Decision No. 246b-H, p. 8.)

Although the ALJ rejected the categorical separation of supervisory and non-supervisory employees urged by the employer in *Regents*, on the facts of that case, the ALJ and the Board agreed with the employer that, "there are multiple areas in which [the police] sergeants exercise independent judgment in matters defined as supervisorial work under the statute," and that such responsibilities created "a significant potential for a conflict of interest ... between line officers and management." Because higher education employers are entitled to a "cadre of [supervisory] employees whose loyalty will not be compromised by concurrent obligations to the interests of those employees who are entitled to negotiate wages, hours, and terms and conditions of employment" (*Unit Determination (LLNL), supra,* PERB Decision No. 246b-H, pp. 7-8), and because the supervisory functions performed by the police sergeants went beyond "the point at which the employees' supervisory obligation to the employer

outweighs their entitlement to the rights afforded rank-and-file employees," the ALJ concluded that the police sergeants "should be excluded from the rank-and-file unit in order to allow the [employer] to effectively achieve its mission without undue conflict of interest." (*Regents, supra*, PERB Decision No. 2217-H, proposed dec. at p. 24.)

While *Regents* was thus concerned with unit determination and placement issues rather than the participation of supervisors in the collective bargaining or grievance meetings of nonsupervisory employees, its reasoning touches on the same "underlying concern," which is to prevent or limit "the potential for divided loyalties" that necessarily arises when the same individuals both carry out the employer's personnel policies and practices and purport to represent employees aggrieved by the implementation or enforcement of those policies and practices. As one appellate court observed in a similar context involving the MMBA, "It takes no vivid imagination to see that, due to its closeness to management, ... supervisory personnel might (and in many instances do) possess divided loyalty, rendering them ill-equipped to conduct labor negotiations and settle sensitive labor disputes *from the standpoint of both the employer and the union.*" (*United Clerical Employees v. County of Contra Costa* (1977) 76 Cal.App.3d 119, 127, emphasis added.)

And, while *Regents* discussed only the interest of the higher education employer in preventing divided loyalties among its supervisors, its logic applies equally to protecting the statutorily-guaranteed rights of rank-and-file employees. The Legislature sought to promote "harmonious" and "cooperative" labor relations between the State's public institutions of higher education and their employees, not by demanding that public employees abandon their demands for improved wages, hours and working conditions and identify with the interests of their employer, but by providing a system of collective bargaining through which employees could attempt to resolve their differences with the employer. (HEERA, § 3560, subd. (a).)

In the absence of a clear statutory directive or legislative history to the contrary, we conclude that Section 3580.5 is also designed to protect the rights of nonsupervisory employees to "full freedom of association, self-organization, and designation of representatives of their own choosing." (HEERA, § 3560, sub. (e).) We note, in particular, that the plain language of the statute's prohibition points equally *in both directions*. Not only are supervisors prohibited from participating in the handling of grievances on behalf of nonsupervisory employees, but nonsupervisory employees are likewise prohibited from performing these same functions on behalf of supervisors. (HEERA, § 3580.5, subd. (a).) Whatever protections against potential or actual conflicts of interest are afforded by the statute to higher education employers were thus intended by the Legislature to extend equally to nonsupervisory employees.

Thus, we do not read Section 3580's exclusion of supervisory employees from PERB's jurisdiction as preventing the agency from considering an allegation that, by a supervisor's conduct, an employer has violated HEERA section 3580, either by itself or in conjunction with one of the employer unfair practice provisions in the statute. Because, unlike *State of California, Department of Health, supra,* PERB Decision No. 86-S, which asserted a putative right of supervisors to serve as officers in employee organizations representing nonsupervisory employees, the present charge seeks to enforce the rights of nonsupervisory employees, and therefore does not run afoul of the jurisdictional or standing issues discussed in that decision or raised, at least implicitly, during the Office of the General Counsel's investigation of the charge.

While we take no position at this stage of the proceedings on the merits of CSUEU's allegation that Bergmann's attendance at or conduct in the University's EO 928 complaint process violated HEERA section 3580.5, we reject not only the jurisdictional concerns cited by the Office of the General Counsel as grounds for dismissing this allegation but any implicit concerns about CSUEU's standing to bring that allegation in the present case.

4. Section 3580.5 and Allegations of Employer Interference with Employee Rights

Because we conclude that Section 3580.5's prohibition against supervisory employees' participation in grievances on behalf of nonsupervisory employees may serve to protect employee rights, we reject the implicit determination of the warning and dismissal letters that Section 3580.5 cannot support an allegation of employer interference with employee rights, in violation of HEERA section 3571, subdivision (a).[25]

HEERA section 3571, subdivision (a), expressly authorizes PERB to investigate, adjudicate and remedy allegations that a higher education employer has engaged in unfair practices by "impose[ing] or threaten[ing] to impose reprisals on employees, ... discriminat[ing] or threaten[ing] to discriminate against employees, or otherwise [by] interfere[ing] with, restrain[ing], or coerc[ing] employees because of their exercise of rights guaranteed by this chapter," where "this chapter" refers to the *entire* Act. (HEERA, § 3560.) Although the protected employee rights most frequently litigated in PERB's unfair practice proceedings are those set forth in HEERA section 3565,[26] nothing in the language of section 3571, subdivision (a), suggests that this provision is limited to enforcing only those rights set forth in Section 3565. Moreover, there is Board precedent suggesting that Section 3565 is not the sole source of enforceable employee rights under HEERA. For example, in *Regents of the University of California* (1984) PERB Decision No. 403-H, the Board held that a higher education

[25] We consider it unnecessary at this stage of the proceedings to determine whether an alleged violation of Section 3580.5 is more appropriately plead as a "stand-alone" violation of HEERA, or in conjunction with one or more of the employer unfair practice provisions set forth in section 3571. Such matters can be more appropriately decided on the basis of a fully-developed evidentiary record and briefing by the parties.

[26] HEERA section 3565 grants higher education employees the right "to form, join and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations and for the purpose of meeting and conferring," as well as the right to refrain from such activity.

employee's right to representation in a meeting with management "derives directly from HEERA Section 3565 *and* subsection 3560(d)."[27] (*Id.* at p. 10, emphasis added; see also *Compton, supra,* PERB Order No. IR-50; and *El Dorado County Office of Education* (1989) PERB Decision No. 759 [recognizing "general violations" based on similar language in EERA].)

We presume that, if the Legislature had intended to limit the scope of "interference" violations under HEERA to only those employee rights protected by Section 3565, it would have said so. Because it chose instead to prohibit employer interference with *all* employee rights "guaranteed by this chapter," and because the statutory language must be read broadly to effectuate its "primary" and "fundamental," remedial purpose of ensuring full participation by employees in the determination of their employment conditions by recognizing the right to "full freedom of association, self-organization, and designation of representatives" (HEERA, § 3560, subd. (e)), we must reject any interpretation that arbitrarily restricts section 3571, subdivision (a) to enforcing only *some* employee rights guaranteed by HEERA. (*Jefferson School District* (1979) PERB Order No. Ad-66 (*Jefferson*); *Barstow Unified School District* (1997) PERB Decision No. 1138b (*Barstow*), p. 23; and *International Brotherhood of Electrical Workers v. City of Gridley* (1983) 34 Cal.3d 191, 198-201.)

In interference cases, the question is whether there exists a mingling of supervisory and employee representative functions, such that nonsupervisory employees would reasonably tend to be restrained in the exercise of statutory rights. (*Ditzler Mech. Contractors*

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[27] HEERA, section 3560, subdivision (d), provides:

> The people and the aforementioned higher education employers each have a fundamental interest in the preservation and promotion of the responsibilities granted by the people of the State of California. Harmonious relations between each higher education employer and its employees are necessary to that endeavor.

(1981) 259 NLRB 610, 612.) Where an individual appears to, or effectively does "sit on both sides of the table" as *both* a representative of employees *and* an agent of the employer with influence over personnel policies or practices, the interference violation may be "obvious." (*Ibid.*) In other cases, there may be difficult legal and factual issues, such as whether mere attendance as "a support person," "on behalf of" a bargaining-unit employee, and "pursuant to her right to representation" constitutes "participation" in the "handling of grievances" within the meaning of the statute. As with other allegations of interference with employee rights, the well-meaning intent of the employer or the individual supervisor in question is irrelevant (*Carlsbad Unified School District* (1979) PERB Decision No. 89).

One such issue that will need to be decided at hearing is whether the Williams' EO 928 complaint constitutes a "grievance" within the meaning of section 3580.5. As noted above, the parties apparently dispute whether the EO 928 complaint process is "contractual," i.e., whether it is incorporated into the CBA, and whether it is therefore a "grievance" or some other form of dispute not covered by the statute, or whether, as the University contends, the parties have separately agreed to exclude discrimination allegations from the contract, except under special circumstances.[28] We do not resolve this issue at this stage of the proceedings, nor presume what, if any significance, it may ultimately have in deciding the merits of this case. HEERA includes no definition of the term "grievance" and that, while not directly on point, insofar as it affects the exclusive representative's right to represent employees, PERB has previously disregarded any distinctions between negotiated and non-negotiated grievance procedures.

In *Mount Diablo, supra*, EERB Decision No. 44, the Board determined that the statutory right of the exclusive representative to represent unit employees "in their employment relations"

[28] According to the University's Level I response to Belcher's grievance, "The parties have agreed to exclude discrimination allegations from the contract, unless there has been a violation or misinterpretation of the application of [the EO] 928 [complaint process]."

applies to both contractual and non-contractual grievance procedures. In reaching this conclusion, the Board observed that the term "employment relations" was broad enough to encompass employee grievances, regardless of whether they arose in collectively-bargained or non-negotiated grievance procedures. It also reasoned that the policy considerations underlying EERA section 3543.1, subdivision (a),[29] including the rights of employees to select a representative and to be represented, are no less applicable when the bargaining agent carries out its function in a non-contractual grievance procedure. (*Id.* at p. 10; see also *Eastern Sierra Unified School District* (1983) PERB Decision No. 312.)

Although both *Mount Diablo* and *Eastern Sierra* arose under EERA, HEERA contains similarly broad language regarding the respective rights of employees and their designated representative. Section 3560 identifies the statute's purpose as "providing a uniform basis for recognizing the right of [higher education] employees ... to full freedom of association, self-organization, and designation of representatives of their own choosing for the purpose of representation in their employment relationships with their employers and to select one of these organizations as their exclusive representative for the purpose of meeting and conferring." (HEERA, § 3560, sub. (e).) Additionally, in language that is identical or nearly identical to that of EERA, HEERA section 3565 recognizes the rights of higher education employees "to form, join and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations and for the purpose of

[29] EERA section 3543.1, subdivision (a), provides, in pertinent part, that:

> Employee organizations shall have the right to represent their members in their employment relations with public school employers, except that once an employee organization is recognized or certified as the exclusive representative of an appropriate unit pursuant to Section 3544.1 or 3544.7, respectively, only that employee organization may represent that unit in their employment relations with the public school employer.

meeting and conferring," while Section 3570 directs higher education employers, or such representatives as they may designate, to meet and confer with the employee organization selected as the exclusive representative of an appropriate unit "on all matters within the scope of representation." The similar language of EERA and HEERA apparently reflects the Legislature's view, that employees may only exercise their guaranteed rights to "full freedom of association, self-organization, and designation of representatives of their own choosing" in an atmosphere that is free of employer influence, domination or interference. (HEERA, § 3571, subds. (a) and (d); *Oak Grove, supra*, PERB Decision No. 582; see also *NLRB v. Cabot Carbon Co.* (1959) 360 U.S. 203, 210-12.)

We conclude that the charge states a viable legal theory and alleges sufficient facts to state a prima facie case. As in other interference cases, such questions are to be resolved through an examination of all the circumstances present. (*State of California (Department of Personnel Administration)* (2011) PERB Decision No. 2106a-S; *Carlsbad, supra,* PERB Decision No. 89.) However, in the absence of guiding authority, we can see no reason to rule out, as a matter of law, an allegation that a supervisor's involvement in grievance proceedings on behalf of a nonsupervisory employee would reasonably tend to interfere with, restrain or coerce employees in the exercise of their statutory rights, in violation of HEERA section 3571, subdivision (a).

5. Agency Status of Bergmann

We next address the alternative reason cited by the Office of General Counsel for dismissing CSUEU's allegation that the University violated Section 3580.5. The warning letter states that CSUEU has not alleged sufficient facts to demonstrate that Bergmann, the admitted supervisor of both Williams and Belcher, "was an agent of [the University] or acted with actual or apparent authority of [the University] when he attended the meeting with Seigle on behalf of

Williams." Again, we disagree not only with the conclusion but also with the analysis in the warning and dismissal letters.

CSUEU has alleged that Bergmann's attendance at the EO 928 complaint meeting constituted "participation" in "the handling of grievances" on behalf of a nonsupervisory employee. Because Bergmann cannot be held individually liable for unfair practices or other alleged violations of HEERA, the issue is whether his conduct may be imputed to the University, i.e., whether he is acting as an agent of the University, by virtue of actual or apparent authority, at the complaint proceeding.

As discussed in *Santa Ana Unified School District* (2013) PERB Decision No. 2332 (*Santa Ana*), PERB has previously articulated different tests for agency. For example, in *Compton Unified School District* (2003) PERB Decision No. 1518, the Board described the test as "whether the perception of agency is reasonable under the circumstances" and cited with approval National Labor Relations Board (NLRB) case law: "whether under all circumstances, employees 'would reasonably believe that the employee in question [the alleged agent] was reflecting company policy and speaking and acting for management.'" (Citations omitted.) In *West Contra Costa County Healthcare District* (2011) PERB Decision No. 2164-M, p. 7, the Board reiterated this test:

> Both PERB and the courts have held that apparent authority to act on behalf of the employer may be found where the manifestations of the employer create a reasonable basis for employees to believe that the employer has authorized the alleged agent to perform the act in question.

In the present matter, CSUEU alleges, and the University admits, Bergmann's supervisory status over both Williams and Belcher. Additionally, the University's own correspondence indicates that Bergmann has supervisory authority and performs supervisory duties on more than a sporadic or atypical basis and exercises independent judgment over matters

affecting Williams' and Belcher's wages, hours and working conditions, including performance evaluations, corrective actions, and other workplace policies and procedures. Although the University may raise additional factual or legal arguments in its answer to the complaint, CSUEU has alleged sufficient facts to demonstrate Bergmann's status as a statutory supervisor.

While not dispositive, such allegations are also sufficient to satisfy the separate agency issue identified in the warning and dismissal letters, i.e., whether Bergmann was acting as an agent of the University when he attended the EO 928 complaint meeting with Belcher. Because HEERA borrows *verbatim* its definition of "supervisory employees" from section 2(11) of the NLRA, we consider the NLRB's decisional law regarding the agency status of statutory supervisors highly persuasive. Under the broad principles of agency used in federal labor law and adopted by PERB (see *Santa Ana, supra,* PERB Decision No. 2332, p. 9), there exists a presumption that, "[i]f they are supervisors, the [employer] is responsible for their conduct." (*Big Three Indus. Gas & Equip. Co.* (5th Cir. 1978) 579 F.2d 304, 310, enforcing *Big Three Indus. Gas & Equip. Co.* (1977) 230 NLRB 392, 395; see also *Circuit-Wise, Inc.* (1992) 309 NLRB 905, 908.) Whether characterized as a "presumption" or as a public policy objective, the private-sector decisional law is clear that an employer's responsibility for the coercive acts of thers is not limited by technical rules of agency or strict principles of *respondeat superior*, but rather must be determined with reference to the broad, remedial purposes of the statute. (*International Assn. of Machinists, Tool and Die Makers Lodge No. 35 v. NLRB* (1940) 311 U.S. 72, 80; *H. J. Heinz Co. v. NLRB* (1941) 311 U.S. 514, 520-521.) [30] Given their similar

[30] For federal court decisions interpreting the NLRA, see *NLRB v. Hart Cotton Mills* (4th Cir. 1951) 190 F.2d 964, 974; *NLRB v. Main Street Terrace Care Center* (6th Cir. 2000) 218 F.3d 531, 537-539; *Wilson Trophy Co. v. NLRB* (8th Cir. 1993) 989 F.2d 1502, 1511; *NLRB v. Int'l Medication Sys. Ltd.* (9th Cir. 1981) 640 F.2d 1110, 1112, fn. 1; and, *Local 636 of United Assn. of Journeymen and Apprentices of Plumbing and Pipe Fitting Industry of U.S. and Canada, AFL-CIO v. NLRB* (D.C. Cir. 1961) 287 F.2d 354, 359-360. For California judicial

language and purposes, we see no reason to follow a different approach for enforcing the rights guaranteed by California's public-sector collective bargaining statutes. (*Vallejo, supra*, 12 Cal.3d 608, 615-617; *McPherson v. Public Employment Relations Bd.* (1987) 189 Cal.App.3d 293, 310-311.)

In addition to the presumptive agency status of a supervisor, CSUEU's charge and its attachments include additional factual allegations to demonstrate that, under common law principles of agency, Bergmann was acting in an agency capacity when he attended the EO 928 complaint meeting at Belcher's request. CSUEU alleges, and the University admits, that the EO 928 complaint meeting was convened and conducted by Seigle, a high-ranking official in the University's human resources department. By virtue of Seigle's position and responsibilities, employees may reasonably presume that he is familiar with the University's policies and that he speaks and acts on behalf of the University in grievance and complaint proceedings. (See, e.g., *Regents of the University of California* (1998) PERB Decision No. 1263-H, proposed dec. at p. 45.) CSUEU further alleges, and again, the University admits, that Seigle neither objected to Bergmann's attendance at the meeting "on behalf of" Williams, nor repudiated Bergmann's conduct after the fact.

To the contrary, in its correspondence with CSUEU and Belcher, its position statements filed in response to the present charge, and its opposition to CSUEU's appeal, the University repeatedly insists that Bergmann's attendance at the meeting was permitted by University policies and by Williams' statutory and contractual rights to representation. The University also contends that Bergmann's mere attendance "on behalf of" Williams and "pursuant to [her] right of representation" does not constitute "participation in the handling of grievances on behalf of" a

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decisions interpreting the Agricultural Labor Relations Act (codified at Lab. Code, § 1140 et seq.), see *Vista Verde Farms v. Agricultural Labor Relations Bd.* (1981) 29 Cal.3d 307, 322; and, *Superior Farming Co. v. Agricultural Labor Relations Bd.* (1984) 151 Cal.App.3d 100, 118.

nonsupervisory employee within the meaning of HEERA section 3580.5, subdivision (a). While the University disputes the legal significance of CSUEU's factual allegations, it essentially admits those factual allegations that support CSUEU's prima facie case for agency. Its own correspondence suggests that the University's Vice President of Human Resources knew about and did not repudiate Bergmann's attendance in the complaint proceedings "on behalf of" a bargaining unit employee. In our view, CSUEU has stated a viable theory of a violation of section 3580.5 of HEERA and alleged sufficient facts that Bergmann had apparent authority to act as an agent of the University at the meeting.

The University may have authorities or additional facts to rebut the presumption that Bergmann was acting as its agent when he attended the EO 928 complaint meeting "on behalf of" Belcher and/or that Bergmann's conduct does not rise to the level of "participation," or otherwise contravene the language of Section 3580.5. However, such factual and legal disputes cannot be resolved at this stage of the proceedings. Because an investigating Board agent is not empowered to rule on the ultimate merits of a charge (see PERB Regs. 32630 and 32640), "where the investigation results in receipt of conflicting allegations of fact or contrary theories of law, fair proceedings, if not due process, demand that a complaint be issued and the matter be sent to formal hearing." (*Eastside, supra*, PERB Decision No. 466, p. 7.)

On the facts, as alleged by CSUEU and admitted by the University, there is sufficient information to state a prima facie case of either a stand-alone violation of HEERA section 3580.5, subdivision (a), an interference violation of section 3571, subdivision (a), and/or a violation of the two provisions operating in tandem. We therefore remand for issuance of a complaint as to this allegation.

6. Whether Section 3580.5 is Subject to Waiver

Although not considered by the Office of the General Counsel, we briefly discuss the issue of waiver. HEERA section 3567, which is modeled closely after section 9(a) of the NLRA, provides that, "[a]ny 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*," subject to certain provisos, which are not at issue here. (Emphasis added.) Although it is a cardinal rule of statutory interpretation that one provision of a statute should not be read to conflict with another, a literal reading of Section 3567, or similar language included in the parties' CBA and/or the EO 928 complaint procedure, could be construed as authorizing employees to designate a statutory supervisory employee as "a representative of their own choosing" for the purpose of presenting grievances to the employer.

PERB and federal authorities have previously considered language that is identical or nearly identical to Section 3567 and determined that it does not "waive" the right of exclusive representative. In *Chaffey, supra,* PERB Decision No. 202, PERB adopted federal precedent which holds that parallel language in the NLRA does not establish an absolute right of exclusively-represented employees in the selection of a grievance representative. If exclusively-represented employees are not "free" to disregard the system of majority rule and exclusive representation by selecting an agent of a rival employee organization as their grievance representative, then certainly they are not "free" either to choose the employer's statutory supervisor as their grievance representative.

While the exclusive representative has broad discretion to reach an agreement covering wages, hours and working conditions in return for various concessions, such agreements "rest on the premise of fair representation and presuppose that the selection of the bargaining

representative remains free." (*NLRB v. Magnavox Co. of Tennessee* (1974) 415 U.S. 322, 325 [internal quotations omitted].) A policy or rule that interferes with the very preconditions of employee choice is therefore invalid, even if it was adopted through otherwise lawful meeting and conferring with the representative (*County of Imperial* (2007) PERB Decision No. 1916-M), or if the representative knowingly acquiesced to its restrictions. (*International Brotherhood of Electrical Workers v. City of Gridley* (1983) 34 Cal.3d 191, 195, 198-201.) Where, as here, the primary purpose of the statute is "to provide a uniform basis for recognizing the right of public [] employees to join organizations of their own choice" (*Jefferson, supra,* PERB Order No. Ad-66; *Barstow, supra,* PERB Decision No. 1138b, p. 23), statutory language aimed at preserving the very conditions necessary for employees to freely exercise that choice cannot be waived or abridged by the exclusive representative.

Any notion that, CSUEU waived any rights it may have under section 3580.5 by incorporating general language from HEERA section 3567 is also at odds with the language of Article 8, sections 8.7 and 8.9 of which specify that the complainant and one representative, if any, may initiate the informal complaint process by "discuss[ing] the complaint with the [complainant's] immediate non-bargaining unit supervisor… ." It is self-evident that the parties did not contemplate that an immediate, non-bargaining unit supervisor, such as Bergmann, could act as the complainant's representative, if the same individual were to be sitting across the table as University's representative responsible for adjusting the complaint.

We thus reject the assertion that section 3567 of HEERA, or similarly-worded language in a contractual or non-negotiated grievance procedure, can be used to "waive" or otherwise subvert the fundamental policies the Legislature sought to promote when it enacted HEERA and California's other labor relations statutes.

C. CSUEU's Allegation that the University Unilaterally Altered Its Records Retention Policy.

On remand, the Office of the General Counsel must consider CSUEU's second amended charge, or any subsequent amendments thereto, to determine whether CSUEU has alleged sufficient facts to state a prima facie case that the University unilaterally altered its records retention policy, and whether it has alleged sufficient facts to dispute the University's factual allegations that would constitute a waiver of the right to bargain or any other affirmative defense to CSUEU's unilateral change allegation.

D. CSUEU's Allegation that the University Failed and Refused to Provide Information

CSUEU's appeal asserts that its allegation that the University withheld and destroyed records that were necessary and relevant for representing Belcher in her complaint constituted a viable theory of law, for which a PERB complaint should have issued. It contends that, in dismissing this allegation, the investigating Board agent improperly considered the merits of factual or legal disputes. The appeal includes no reference to, or explanation of, the following sentence, which appeared as the first bullet point in CSUEU's second amended charge: "The union withdraws its reference in paragraph one of the first amended charge regarding right to information for the grievance or complaint process."

Although the second amended charge, including the above-quoted language, was not considered by the Office of the General Counsel, we do not regard this omission as providing any grounds for relief from the dismissal of this allegation. When considering an appeal from a dismissal, the Board examines the entire case file and conducts a *de novo* review of the factual allegations included the charge. (*Jurupa, supra*, PERB Decision No. 2283, pp. 3, 31.) Thus, regardless of how the charge was handled during its initial investigation, nothing requires the Board to ignore material in the operative version of the charge which indicates the charging party's desire to withdraw certain allegations or legal theories.

The reasonable inference to be drawn from the above-quoted sentence and its surrounding context is that CSUEU's second amended UPC *withdrew* the factual allegations included in the previous first amended UPC as support for CSUEU's contention that the University had failed and refused to provide information that was necessary and relevant for investigating Belcher's complaint. We consider this allegation to have been withdrawn before the charge was dismissed and therefore disregard CSUEU's belated attempt to resurrect this contention in its appeal.[31]

ORDER

It is hereby ORDERED that the dismissal of the unfair practice charge, as amended, in Case No. LA-CE-1166-H is REVERSED and the matter REMANDED to the Office of the General Counsel for further investigation of the California State University Employees Union, Service Employees International Union Local 2579's (CSUEU) allegation that the Trustees of the California State University (University) unilaterally changed its policies affecting employee complaints, and for issuance of a complaint as to CSUEU's allegations that the University has violated the Higher Education Employer-Employee Relations Act, Government Code sections 3580.5 and 3571, subdivision (a), in accordance with this decision.

Chair Martinez and Member Huguenin joined in this Decision.

[31] We also disregard CSUEU's attempt to amend or supplement its previous factual allegations by asserting, for the first time, in its appeal, that "*CSUEU and* Ms. Belcher requested" the documents that were allegedly withheld and destroyed by the University, whereas every version of CSUEU's charge, and all of the supporting documentation, had alleged that Belcher, *acting alone*, had requested the documents at issue.