STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

STEVEN CULWELL, Charging Party, v. TRUSTEES OF THE CALIFORNIA STATE UNIVERSITY, Respondent.	Case No. LA-CE-1174-H PERB Decision No. 2400-H November 24, 2014

Appearances: Steven Culwell, on his own behalf; Office of the Chancellor by Leslie V. Freeman, Labor Relations Manager, 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 exceptions filed by Steven Culwell (Culwell) to the proposed decision (attached) of a PERB administrative law judge (ALJ). Culwell's charge and the complaint in this matter alleged that, by suspending Culwell for 15 days as a result of a heated conversation he had with a fellow employee and union steward about internal union matters, the Trustees of the California State University (University) unlawfully discriminated against Culwell and interfered with his exercise of protected rights, in violation of the Higher Education Employer-Employee Relations Act (HEERA), section 3571, subdivision (a).[1] The University denies any wrongdoing and contends that it disciplined Culwell, not because of any protected conduct or speech that took place during the conversation, but because Culwell made threatening statements and gestures, in violation of the University's "zero-tolerance" policy against

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

violence in the workplace, and because Culwell had previously been disciplined for two similar instances of misconduct.

The Board has reviewed the proposed decision, Culwell's exceptions and the University's responses thereto in light of the record and the relevant law. Based on this review, we find that the ALJ's findings of fact are adequately supported by the record and that the ALJ's conclusions of law are well-reasoned and in accordance with applicable law.

PERB Regulation 32300, subdivision (a),[2] permits an aggrieved party to file exceptions to a proposed decision. Pursuant to the regulation, the statement of exceptions or brief shall, among other things, "[s]tate the specific issues of procedure, fact, law or rationale to which each exception is taken" and "[s]tate the grounds for each exception." Although the Board's review of exceptions to a proposed decision is de novo, it need not address arguments that have already been adequately addressed in the same case or that would not affect the result (*Los Angeles Superior Court* (2010) PERB Decision No. 2112-I, pp. 4-5; *Morgan Hill Unified School District* (1995) PERB Decision No. 1120, p. 3), particularly where the party seeking relief has simply reasserted its claims without identifying a specific error of fact, law or procedure to justify reversal. (*Los Rios College Federation of Teachers (Sander, et al.)* (1995) PERB Decision No. 1111, pp. 6-7; *State of California (Department of Youth Authority)* (1995) PERB Decision No. 1080-S, pp. 2-3; *San Bernardino City Unified School District* (2012) PERB Decision No. 2278, pp. 2-3; *County of San Diego* (2012) PERB Decision No. 2258-M, pp. 2-3.)

Aside from purely conclusory statements (*i.e.*, that the University did retaliate against him and that it did interfere with his protected employee rights), Culwell's exceptions assert that the University failed to conduct a thorough investigation before deciding to discipline Culwell; and, that the disciplinary action chosen (15-day suspension) was unduly harsh. Culwell also

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

disputes various findings of fact from his separate disciplinary hearing before the State Personnel Board, such as a finding that five years had passed between Culwell's involvement in protected activity and the disciplinary action at issue. Culwell's exceptions thus address the various elements necessary for establishing a prima facie case of discrimination, particularly whether there was sufficient evidence of "nexus" or a causal relationship between Culwell's protected activity and the University's decision to take disciplinary action.

PERB has long recognized that an employer's disparate treatment of an employee, or its cursory investigation into alleged misconduct may serve as circumstantial evidence to show "nexus." (*State of California (Department of Transportation)* (1984) PERB Decision No. 459-S; *Trustees of the California State University* (1990) PERB Decision No. 805-H.) However, the issue of "nexus" was not decided against Culwell in the proposed decision. To the contrary, the ALJ concluded, among other things, that Culwell had established a prima facie case of discrimination, including proof of "direct nexus between the adverse action and the protected speech," because Culwell's protected speech "was mentioned specifically in the suspension notice itself." Thus, Culwell's exceptions only address issues that were not adverse to his position, but do not appear to address the *one* issue that *was* decided against him, *i.e.*, whether the University successfully proved its affirmative defenses that it would have imposed the 15-day suspension of Culwell, even in the absence of his involvement in protected activity, and whether its asserted business justification for imposing discipline in this case outweighed any harm to Culwell's protected rights.

Alternatively, assuming that the alleged incompleteness of the University's investigation or the severity of the discipline it imposed also bear on issues pertaining to the University's affirmative defense, Culwell has not explained *how* this evidence, even if given the additional weight urged by Culwell, would cause the Board to disturb the ALJ's findings. After

considering evidence regarding the University's zero tolerance policy against violence in the workplace, the ALJ found that the University had a legitimate, non-discriminatory reason for imposing a 15-day suspension, and that, pursuant to that policy, it would have suspended Culwell for 15 days for his alleged misconduct, regardless of his concurrent involvement in protected activity. (*Palo Verde Unified School District* (2013) PERB Decision No. 2337, pp. 12-13.) The ALJ also found that, under the circumstances, including Culwell's history of discipline for similar misconduct, the University's business justification for enforcing its policy against workplace violence outweighed any harm caused to Culwell's protected rights. (*State of California (Department of Personnel Administration)* (2011) PERB Decision No. 2106a-S, pp. 10-11.)[3]

Because Culwell's exceptions fail to identify any error of fact, law or procedure with respect to the determinative issue decided against Culwell, he has provided the Board with no basis for reversing the proposed decision. We therefore adopt the proposed decision as the decision of the Board itself.

ORDER

The complaint and underlying unfair practice charge in Case No. LA-CE-1174-H are hereby DISMISSED.

Chair Martinez and Member Hugeunin joined in this Decision.

[3] The ALJ analyzed Culwell's interference allegation solely under the "slight harm" test, which Culwell does not challenge. Exceptions not specifically raised are deemed waived. (PERB Reg. 32300, subd. (c); *Santa Clara Valley Water District* (2013) PERB Decision No. 2349-M, pp. 31-32.)

16STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

STEVEN CULWELL, Charging Party, v. TRUSTEES OF THE CALIFORNIA STATE UNIVERSITY, Respondent.	UNFAIR PRACTICE CASE NO. LA-CE-1174-H PROPOSED DECISION (November 6, 2013)

Appearances: Steven Culwell, in propria persona; Leslie V. Freeman, Labor Relations Manager, for Trustees of the California State University.

Before Shawn P. Cloughesy, Chief Administrative Law Judge.

PROCEDURAL HISTORY

This case alleges that a higher education employer suspended an employee for engaging in a discussion with a union steward. The employer denied committing any unfair practices, and, as an affirmative defense, contended that the complaint should be deferred to arbitration pursuant to PERB Regulation 32620(b)(6).[1] The employer also contended that res judicata/collateral estoppel effect be given to prohibit claims/issues already determined in a California State Personnel Board (SPB) decision.

On November 13, 2012, Steven Culwell (Culwell) filed an unfair practice charge (charge) against San Diego State University (SDSU). On March 4, 2013, the Office of the General Counsel of the Public Employment Relations Board (PERB) issued a complaint alleging that SDSU interfered with and retaliated against Steven Culwell by suspending him for engaging in a discussion with his union steward regarding changes within the "hierarchy"

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

of the State Employees Trade Council (SETC) and therefore violated the Higher Education Employer-Employee Relations Act (HEERA) section 3571(a).[2]

On March 29, 2013, SDSU answered the complaint, denying any violation of HEERA and including affirmative defenses. Specifically, SDSU contended that the charge and complaint should be deferred to the grievance procedure of the applicable SETC and California State University (CSU) Collective Bargaining Agreement (CBA). An informal conference was held on May 31, 2013, but the matter was not resolved.

Prehearing

A prehearing conference was set for August 15, 2013, to discuss the motion to defer and a possible motion requesting collateral estoppel effect be given to the May 16, 2013 SPB decision. The parties agreed that the testimony in the transcripts of the SPB hearing would be considered testimony in the PERB matter in lieu of having the same witnesses testify again. The same exhibits in the SPB record would also be used in the PERB proceeding. Additionally, for purposes of the deferral motion, Culwell agreed to inquire into whether SETC would represent him in an arbitration over whether SDSU retaliated against him for his January 10, 2012 conversation with Chris Sprofera (Sprofera).

Motion to Defer to Arbitration

On April 20, 2013, SDSU filed a motion to defer the allegations in the complaint to the arbitration procedures set forth in the CBA. Specifically, CBA sections 7.20 and 9.10, for the period of September 22, 2009 to September 30, 2011,[3] provide:

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

[3] The suspension action was issued on April 13, 2012. The successor CBA governing the time period of September 19, 2012 to June 30, 2015 contains the same or similar provisions as the previous CBA where employees would not suffer reprisals for participating in union activities. Additionally, only SETC could request that the matter to be arbitrated.

> 7.20 An employee shall not suffer reprisals for participating in union activities.
>
> 9.10 If the grievance is not resolved at level II or III, whichever is applicable, the Office of the Chancellor shall have up to ninety (90) days to resolve or issue a Level IV response. If the grievance has not been resolved within this period, then the parties may mutually agree to schedule a "Med-Arb" as per provisions 9.9.d. above and 9.17 – 9.19 below or the Union alone may, no later than fifteen (15) days after receipt of the Level IV response, file a request for arbitration by giving notice to that effect by certified mail, return receipt requested, directed to the Office of the Chancellor.

(Emphasis added.)

On August 19, 2013, Culwell notified the Administrative Law Judge (ALJ) and CSU that SETC was not interested in pursuing his reprisal matter to arbitration.

PERB Regulation 32620(b)(6) requires the Board agent to:

> Place the charge in abeyance if the dispute arises under MMBA, HEERA, TEERA, Trial Court Act or Court Interpreter Act and is subject to deferral to final and binding arbitration pursuant to a collective bargaining agreement, and dismiss the charge at the conclusion of the arbitration process unless the charging party demonstrates that the settlement or arbitration award is repugnant to the purposes of MMBA, HEERA, TEERA, Trial Court Act or Court Interpreter Act, as provided in section 32661.

(Emphasis added.)

In *Trustees of the California State University* (1997) PERB Decision No. 1231-H (*Trustees*), PERB explicitly found that an arbitration clause in a grievance process does not continue in effect after the expiration of the contract, except for disputes that:

> (1) involve facts and occurrences that arose before expiration; (2) involve post-expiration conduct that infringes on rights accrued or vested under the agreement; or (3) under normal principles of contract interpretation, survive expiration of the agreement.

The suspension concerns an incident which occurred on January 10, 2012, which was investigated between January 10 and 25, 2012. A notice of suspension was issued on April 13,

2012. All of the incidents took place when a CBA had expired and a successor CBA had not yet been effected. Therefore, the case cannot be arbitrated. Additionally, SETC, who had the sole right to request arbitration, decided not to represent Culwell on these matters. For these reasons, the motion to defer to arbitration is denied.

Formal Hearing

A formal hearing was held on September 3, 2013. The matter was submitted upon the receipt of the last closing argument on October 11, 2013.

FINDINGS OF FACT

The Trustees of the CSU are a higher education employer under section 3562(g). SDSU is a university within the CSU system. SETC is the exclusive representative of an appropriate bargaining unit of employees under HEERA section 3562(i). Culwell was a higher education employee under HEERA section 3562(e) represented by SETC.

John Ferris (Ferris) is the SDSU Director of the Facility Services and Glenn Vorraro (Vorraro) is the Assistant Director of Facility Services. Herb Dickerson (Dickerson) was the SETC Business Agent and Larry Tilton (Tilton) and Sprofera were SETC co-chief job stewards at the SDSU campus appointed by Dickerson. Culwell has been employed with SDSU since 1997.

Violence-Free Workplace Policy

The SDSU Violence-Free Workplace Policy provides in pertinent part:

> The safety and security of San Diego State University faculty, staff, and students are very important. Threats, threatening behavior, acts of violence, or any related conduct which disrupts another's work performance or the organization's ability to execute its mission will not be tolerated.
>
> [¶ . . .¶]
>
> Violations of this zero-tolerance policy by employees will lead to disciplinary action up to and including dismissal. . . .

> Employees are responsible for immediately notifying their appropriate administrator and University Police of violence on University owned or leased property.

Prior Disciplinary Record

On June 19, 2007, Vorraro issued Culwell a Letter of Reprimand for speaking in a loud, disruptive, and confrontational manner to another employee. Culwell was warned that the matter should not be repeated or further disciplinary action would be taken against him, up to and including dismissal.

On October 7, 2010, Vorraro issued Culwell a Memorandum of Reprimand for kicking chairs, using profanity toward his supervisor, and telling him to "grow some balls." Vorraro was referred to the Employee Assistance Program and warned that he was expected to treat all employees with dignity and respect, and to refrain from using profanity or offensive language and displaying hostility or aggression. Culwell was warned that failure to meet these expectations may result in further disciplinary action up to and including dismissal.

January 10, 2012 Comments to Sprofera

After Dickerson appointed Sprofera and Tilton as SETC co-chief stewards, Culwell became concerned as to the manner in which co-chief stewards were being placed into their positions (appointment versus election) and that the appointment of Tilton would pave the way for SDSU Facilities Services management to further contract out bargaining unit work.

On January 10, 2012, at approximately 10:00 a.m. in the SDSU Facilities Services parking lot, Culwell saw Sprofera and wanted to discuss Sprofera's and Tilton's appointments as co-chief stewards. Culwell approached within a couple of feet of Sprofera and expressed his dismay over the direction of the union in appointing Sprofera and Tilton as co-chief stewards, instead of them being voted in by the membership. Culwell protested that he did not want to support the union with his dues and that the last person who put his hand in his "pocket" to steal money from him pulled out "a bloody stump." Culwell was loud and used

profanity. Sprofera felt threatened and tried to deescalate the situation, but eventually ended up walking away. Sprofera later told Tilton and another steward of the incident and Tilton told Vorraro. Vorraro then discussed the matter in his office with Sprofera and three other witnesses of the event: Jamie Baro (Baro), Scott Guymon (Guymon), and Robert Lastinger (Lastinger).[4]

SDSU Investigations of the Incident

After speaking with the witnesses that day, Vorraro immediately reported the incident to the University Police Department (UPD) and later to Thomas Harpole (Harpole), SDSU Director of the Office of Employee Relations and Compliance.

1. University Police Investigation

UPD assigned Police Corporal Jennifer Hart to investigate the matter; she arrived at the Facilities Services building at 10:50 a.m. and interviewed both Sprofera and Culwell. Corporal Hart recorded the following statement from Sprofera in pertinent part:

> Culwell was complaining to Sprofera about union matters, specifically stating he did not agree with the way the stewards had recently been selected to represent the local union. Culwell told Sprofera he wanted his $65.00 union dues back because he did not think the money was being spent wisely. Culwell was not happy with his union representation and demanded Sprofera give him his dues back, telling him, "If I have to take it out of you, I will take it out of you!" Culwell was very heated and got within one foot [of] Sprofera's face. He was raising his voice and yelling at him. Culwell told Sprofera they had "unfinished business" he intended to take care of "after work." He told Sprofera the last person who stole from him they "pulled back a bloody stump." Sprofera told Culwell to stop and stated it was not going to work out well for either of them if they continued their banter.

[4] At the administrative hearing, only Culwell, Sprofera, Guymon and Baro testified. Lastinger did not testify and was no longer working for CSU. None of the witnesses testified to Culwell stating to Sprofera that he would "take it [the union dues] out of" Sprofera or take the money "out of [Sprofera's] ass." Sprofera did not remember Culwell stating to Sprofera that Culwell had "unfinished business" with Sprofera "after work," unless he had stated it before to an investigator.

> Sprofera stated he felt threatened by Culwell and believed he had the ability to carry out his threats. He stated Culwell never raised a hand to him or made any motion as if he was going to hurt him physically.

(Emphasis added.)

Corporal Hart also interviewed Culwell that day. The interview stated in part:

> He thought he was not raising his voice and believed he was "well under control." Culwell stated the was yelling at Sprofera because he felt there was a "hostile takeover" with the union. He feels like he should have a say in what happens within [the] union because he pays $65.00 each month. I asked Culwell if he had stated he would "take it out" on Sprofera as he had stated. Culwell told me he did not say that, instead stating he would "fight him every step of the way." Culwell stated he did not threaten Sprofera and just wanted him to know that he was not done arguing his point and still had issues he wanted addressed. Culwell admitted he made a comment about a "bloody stump" and stated he did not mean it in a threatening manner. He stated he wanted to tell Sprofera to not steal from him. . . .
>
> I advised Culwell the statements he made were perceived as threats by Sprofera and three other people who were present during the altercation. He explained that was not his intent and stated he would not have any contact with Sprofera. . . . Just as I was about to leave Vorraro's office, Culwell looked at Vorraro and stated, "My schedule's about once a year, right?", insinuating he gets into trouble that often.

2. Harpole Investigation

Harpole conducted interviews on January 10 (Vorraro), 11 (Corporal Hart), 12 (Guymon, Baro, and Lastinger), 18 (Corporal Hart again), 24 (Sprofera), and 25 (Culwell). Harpole interviewed Sprofera who reiterated the "bloody stump" comment and how Culwell stated he would take the money out of Sprofera's "ass" and they had "unfinished business" to attend to "after work." When Lastinger was interviewed he stated that he heard Culwell talking about $65 in union dues and "kicking" Sprofera's "ass" and that Culwell and Sprofera were not done and would address the matter "after work." In Culwell's interview, he admitted

to making a comment about a "bloody stump," but it was only in reference to raising union dues.

On February 28, 2012, Harpole issued his investigation findings to SDSU Associate Vice President of Administration Jessica Rentto (Rentto), which concluded that Culwell "engaged in unprofessional and threatening behavior that included a veiled threat of physical violence targeted at a colleague." Harpole recommended that Culwell be issued a three-day suspension. Rentto, as the appointing authority of SDSU staff, is the individual vested with the authority to issue disciplinary actions.

After Rentto reviewed the investigation report and recommendation, she discussed with Harpole the level of penalty to be issued to Culwell. Rentto was aware of a previous disciplinary action taken against another SETC member for similar conduct for which SDSU issued the employee a 15-working day suspension and another employee who was terminated. Harpole was unaware of these other disciplinary actions.[5] Rentto believed that Culwell's conduct was more inappropriate than the other SETC member who received a 15-working day suspension. Rentto was also concerned that Culwell had two prior reprimands previous to the January 10, 2012 incident. Rentto stated that the topic of conversation between Culwell and Sprofera (SETC appointment of co-chief stewards) played no role in the decision to take the suspension action against Culwell.

Advance Notice of Suspension

On April 13, 2012, Rentto issued Culwell an advance notice of suspension (suspension notice) stating that SDSU proposed to suspend him for 15 working days for violating Education Code section 89535(b) [u]nprofessional conduct and (d) [f]ailure and refusal to

[5] Rentto held Harpole's position before she was promoted to Associate Vice-President of Administration.

perform the normal and reasonable duties of the position. Specifically, the suspension notice provided:

> The events upon which the foregoing causes for discipline are based occurred on January 10 and 25, 2012.
>
> 1. On January 10, 2012[,] at approximately 11:00 a.m., you engaged in hostile interpersonal behavior with Department of Physical Plant coworker, Christopher Sprofera. You were upset that the State Employee Trades Council had designated Mr. Sprofera as a Chief Steward. You requested to speak with Mr. Sprofera and raised your voice, yelled and used profanity with him while in close physical proximity. During this confrontation with Mr. Sprofera, you made a veiled threat of physical violence that included a statement regarding a "bloody stump." Specifically, you told him that you wanted your $65 in union dues back and that if Mr. Sprofera attempted to stick his hand in your "pocket," he would come back with "a bloody stump" and that you would "take the money out of his ass." Additionally, you stated that you and Mr. Sprofera had unfinished business to attend to "after work," which was deemed to be a threat of violence that would occur at a later date.
>
> 2. On January 10, 2012, during a meeting with Mr. [Vorraro] and SDSU Police Corporal Jennifer Hart, in which your behavior with Mr. Sprofera was discussed, you said something to the effect that you do this once a year, so "give me my piece of paper." You made this statement in connection with a prior reprimand for similar interpersonal misconduct. It demonstrates a knowing and willful disregard for the prior direction University management provided you.

The notice of suspension attached the Harpole investigation report and the Memorandum of Reprimand. Culwell served his suspension from June 25 through July 13, 2012.

SPB Appeal and Decision

Culwell appealed his suspension to the SPB pursuant to Education Code section 89539 and it was assigned as SPB Case No. 12-0657. A hearing was held on November 8 and December 18, 2012 before SPB ALJ James M. Sobolewski. On April 16, 2013, the SPB ALJ issued his decision sustaining the 15 working days suspension. The proposed decision was

adopted by the SPB on May 16, 2013. Culwell never filed a further appeal from the adopted decision and it became final on May 16, 2013 pursuant to California Code of Regulations, title 2, section 51.2.

The SPB decision found that Culwell yelled at Sprofera, used profanity and made a hostile remark about a bloody stump. However, it found that the evidence did not establish that Culwell threatened to take the money out of his [Sprofera's] ass or that Culwell had unfinished business with Sprofera after work. Culwell was found to have violated Education Code section 89535(b) [u]nprofessional conduct and (d) [f]ailure and refusal to perform the normal and reasonable duties of the position. The penalty of a 15 working days suspension was upheld as "just and proper" (§ 19582(a)) as Culwell's conduct could have quickly escalated into a physical altercation, he had two prior reprimands for aggressive and disrespectful behavior, he refused to acknowledge his misconduct and sought to excuse his actions.

During the SPB administrative hearing, Culwell raised the affirmative defense that he was retaliated against because of his protected activities against Facilities Services manager(s) and because of his protected speech on January 10, 2012. The SPB found that Culwell failed to demonstrate that he was retaliated against because of his protected activities against Facilities Services manager(s), but did not make a finding on the issue of protected speech.

ISSUES

1) Does the SPB Decision have res judicata and/or collateral estoppel effect over the instant proceeding.

2) Did SDSU retaliate against Culwell by suspending him because of protected speech?

3) Did SDSU interfere with Culwell's protected speech by suspending him?

CONCLUSIONS OF LAW

Res Judicata and Collateral Estoppel

In the instant case, CSU alleges that PERB is bound by the prior adjudication of Culwell's SPB proceeding as to the claims and issues finally adjudicated in those proceedings. As summarized recently by the California Supreme Court:

> As generally understood, '[t]he doctrine of *res judicata* gives certain *conclusive effect* to a *former judgment* in subsequent litigation involving the same controversy.' [Citation.] The doctrine 'has a double aspect.' [Citation.] 'In its primary aspect,' commonly known as claim preclusion, it 'operates as a bar to the maintenance of a second suit between the same parties on the same cause of action. [Citation.]' [Citation.] 'In its secondary aspect,' commonly known as collateral estoppel, '[t]he prior judgment ... "operates" ' in 'a second suit ... based on a different cause of action ... "as an estoppel or conclusive adjudication as to such issues in the second action as were actually litigated and determined in the first action." [Citation.]' [Citation.] 'The prerequisite elements for applying the doctrine to either an entire cause of action or one or more issues are the same: (1) A claim or issue raised in the present action is identical to a claim or issue litigated in a prior proceeding; (2) the prior proceeding resulted in a final judgment on the merits; and (3) the party against whom the doctrine is being asserted was a party or in privity with a party to the prior proceeding. [Citations.]'

(*Boeken v. Philip Morris USA, Inc.* (2010) 48 Cal.4th 788, 797, italics in original.)

1. Res Judicata—Claim Preclusion

In the instant case, CSU contends that the "primary right"[6] of both the SPB and PERB proceedings are identical: specifically the wrongful suspension of Culwell. However, in *George v. California Unemployment Insurance Appeals Board* (2009) 179 Cal.App.4th 1475, the Court of Appeal decided that the adjudication of a disciplinary appeal before the SPB and

[6] To determine whether two proceedings involve identical claims or causes of actions for applying claim preclusion, California courts have applied the "primary rights" theory. The most salient characteristic of a primary right is that it is indivisible or that the violation of a single primary right gives right to a single cause of action or the right to redress for a harm suffered. (*Boeken v. Philip Morris USA, Inc.*, *supra*, 48 Cal.4th 788, 797-798; *Mycogen Corporation, et al. v. Monsanto Corporation* (2002) 28 Cal.4th 888, 904.)

the statutory claim of retaliation in the Fair Employment and Housing Act[7] (FEHA) did not involve the same primary right. The SPB's responsibilities were to ensure state employment was based upon merit while FEHA was enacted to eliminate discrimination and to vindicate civil rights. (*Id.* at p. 1483.) Similarly, SPB and PERB proceedings do not involve the same primary right(s). SPB adjudicates the violation of Education Code section 89535 and determines whether the disciplinary action was based upon merit (Ed. Code, § 89539(a)(2)(A through E), where HEERA was enacted to eliminate unfair practices including retaliation and interference (§ 3571(a)) and to:

> provide the means by which relations between each higher education employer and its employees may assure that the responsibilities and authorities granted to the separate institutions . . . are carried out in an atmosphere which permits the fullest participation by employees in the determination of conditions of employment which affect them.

(§ 3571(a).)

Because these two proceedings do not involve the same primary right(s), CSU has not satisfied the first element to establish res judicata.

The second element that CSU must demonstrate to establish res judicata is that SPB's decision resulted in a final judgment on the merits. The SPB decision was issued on May 16, 2013. As of the date of formal hearing on September 3, 2013, Culwell had not appealed the SPB decision on a writ of administrative mandamus. (Code Civ. Proc., 1094.5.) CSU did not provide any citation as to when the statute of limitations expired for Culwell to advance such an appeal.[8] As it has not been established that the time for appealing to Superior Court has expired, CSU has not established that there is a final judgment on the merits.

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[7] Section 12900, et seq.

[8] Section 19630 provides the statute of limitations for a state civil servant to appeal a SPB decision as being one year from a final SPB decision. No similar statute of limitations section could be found regarding a CSU employee appealing a SPB decision.

As two of the three elements to establish res judicata has not been demonstrated, it will not be applied to the PERB proceeding.

2. Collateral Estoppel—Issue Preclusion

Collateral estoppel requires an "identity of issues" to exist between the two proceedings. While the SPB decision decided whether Culwell was issued the suspension because of his past protected activities against Facilities Services manager(s), it did not decide whether his January 10, 2012 speech was protected and whether SDSU interfered with Culwell's speech or took the suspension action against him because of his speech. Collateral estoppel is not applicable in this case because SPB did not consider the identical issue (protected speech) now before PERB. (*State of California (Department of Developmental Services)* (1987) PERB Decision No. 619-S.) Additionally, CSU did not establish that the SPB's decision resulted in a final judgment on the merits. Thus, collateral estoppel effect cannot be attributed to the SPB decision.

Retaliation

Higher education employees have the right to "form, join and participate in the activities of employee organizations of their own choosing." (§ 3565.) A higher education employer violates this right when it imposes reprisals on employees because of their participation in protected activities. (§ 3571(a).) To demonstrate that an employer discriminated or retaliated against an employee in violation of HEERA section 3571(a), the charging party must show that: (1) the employee exercised rights under HEERA; (2) the employer had knowledge of the exercise of those rights; (3) the employer took adverse action against the employee; and (4) the employer took the action because of the exercise of those rights. (*Novato Unified School District* (1982) PERB Decision No. 210 (*Novato*).)

1. Protected Activity and Knowledge of Protected Activity

In *Rancho Santiago Community College District* (1986) PERB Decision No. 602, pp. 12-13, PERB applied Educational Employment Relations Act (EERA)[9] section 3543(a)[10] to employee speech, and determined:

> In considering the limits of employee speech protected by EERA, PERB has adopted the standard applied by the National Labor Relations Board, consistent with that articulated by both the California and United States Supreme Courts in First Amendment cases. [Footnote omitted.] Preliminarily, the speech must be related to matters of legitimate concern to the employees as employees so as to come within the right to participate in the activities of an employee organization for the purpose of representation on matters of employer-employee relations. (Section 3543.) [Citations omitted.]
>
> Here, McKim's writings are related to matters of legitimate concern to employees as employees, including such subjects as teacher safety, negotiations, leaves, the autonomy and effectiveness of the exclusive representative and other employee organizations, educational policy and academic freedom.
>
> Speech which is related to employer-employee relations may nonetheless lose its statutory protection where it is found to be so "opprobrious, flagrant, insulting, defamatory, insubordinate, or fraught with malice" [citations omitted] as to cause "substantial disruption of or material interference with school activities" [Citations omitted].

(Emphasis added.)

Additionally, an employee's speech may lose its protected status if it "is so disrespectful of the employer as seriously to impair the maintenance of discipline." (*Rio Hondo Community College District* (1982) PERB Decision No. 260, p. 12, citing *NLRB v. Blue Bell, Inc.* (1955) 219 F.2d 796, 797.)

The focus of Culwell's comments were his protest over the recent appointments of the new co-chief stewards and that he did not want to support SETC because of it. He was concerned that SETC was not going to effectively represent the SETC SDSU membership in

[9] EERA is codified at section 3540 et seq.

[10] EERA section 3543 is similar to HEERA section 3565.

the contracting out of bargaining unit work. The comments that Culwell was going to "take the money out of [Spofera's] ass" and that he had "unfinished business" with him "after work" infers the threat of violent acts which constitute speech which is so opprobrious, flagrant and fraught with malice as to fall outside the ambit of statutory protections. However, those comments were only supported by hearsay evidence based upon the witnesses' testimony. Culwell's January 10, 2012 speech therefore is protected by HEERA. It also became readily known to SDSU managers. As such, Culwell has established the first two elements of a prima facie case of retaliation.

2. Adverse Action

It is uncontested that a 15 working days suspension constitutes an adverse action. (*Los Angeles County Superior Court* (2008) PERB Decision No. 1979-C, p. 18.)

3. Nexus

In this case, there is a direct nexus between the adverse action and the protected speech. The speech is mentioned specifically in the suspension notice itself. Culwell has established all of the elements of a prima facie case for retaliation.

4. SDSU's Burden

Once the charging party establishes a prima facie case of retaliation, the burden shifts to the employer to show it would have imposed the adverse action even if the employee had not engaged in protected activity. (*Novato, supra*, PERB Decision No. 210; *Martori Brothers Distributors v. Agricultural Labor Relations Bd.* (1981) 29 Cal.3d 721, 729-730; *Wright Line* (1980) 251 NLRB 1083.) Thus, "the question becomes whether the [adverse action] would not have occurred 'but for' the protected activity." (*Martori Brothers.*) The "but for" test is "an affirmative defense which the employer must establish by a preponderance of the evidence." (*McPherson v. Public Employment Relations Bd.* (1987) 189 Cal.App.3d 293, 304.)

At the time that Rentto issued the suspension notice, two investigators who were independent from Culwell's chain of command, Corporal Hart and Harpole, obtained interviews from Sprofera which stated that Culwell would be taking money out of Sprofera or out of Sprofera's "ass." Additionally, Lastinger's interview supported Sprofera when Lastinger recalled that Culwell spoke of "kicking" Sprofera's "ass" and that Culwell would address the matter "after work." Based upon these two witnesses interview statements, Rentto would have no choice but to proceed with disciplinary action based upon the Violence-Free Workplace Policy and the prior 15-working days suspension issued to another SETC employee.[11] SDSU has met its burden that it would have issued the suspension action even if the contents of the conversation was connected to an internal union issue. As a result, the allegation of retaliation because of protected speech must be dismissed.

Interference

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

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

If the harm to employee rights is slight and the employer offers justification based on operational necessity, the competing interests are balanced. (*Carlsbad, supra*, PERB Decision

[11] Although witness testimony at the hearing, which occurred many months after the investigation, did not establish the most flagrant and opprobrious statements, Rentto only needed to rely on the statements in the investigative report(s), which were supported by two of the witnesses, to decide to issue the suspension notice.

No. 89; *State of California (Department of Personnel Administration)* (2011) PERB Decision No. 2106a-S.) Only when the interference with employee rights outweighs the business justification for the respondent's conduct will a violation be found. (*Carlsbad.*)

As explained earlier in this proposed decision, Rentto's decision to issue a disciplinary action was based upon the interviews in which Culwell stated he would take the union dues out of Sprofera's "ass" or address it after work, and a similar disciplinary action taken against another SETC employee. Additionally, SDSU has a zero tolerance policy for threats and violence. These reasons create a sufficient business justification to overcome any interference to employee's protected rights. As such, the interference allegation is also dismissed.

PROPOSED ORDER

Based upon the foregoing findings of fact and conclusions of law and the entire record in this matter, the complaint and underlying unfair practice charge in Case No. LA-CE-1174-H, *Steven Culwell v. Trustees of the California State University*, are hereby DISMISSED.

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

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95811-4124
(916) 322-8231
FAX: (916) 327-7960
E-FILE: PERBe-file.Appeals@perb.ca.gov

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

A document is considered "filed" when actually received during a regular PERB business day. (Cal. Code Regs., tit. 8, §§ 32135, subd. (a) and 32130; see also Gov. Code, § 11020, subd. (a).) A document is also considered "filed" when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet or received by electronic mail before the close of business, which meets the requirements of PERB Regulation 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code Regs., tit. 8, § 32135, subds. (b), (c) and (d); see also Cal. Code Regs., tit. 8, §§ 32090, 32091 and 32130.)

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