STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA STATE UNIVERSITY EMPLOYEES UNION, Charging Party, v. TRUSTEES OF THE CALIFORNIA STATE UNIVERSITY, Respondent.	Case No. LA-CE-1244-H PERB Decision No. 2522-H March 20, 2017

Appearances: Brian Young, Lead Labor Relations Representative, for California State University Employees Union; Leslie V. Freeman, Labor Relations Manager, Trustees of the California State University.

Before Gregersen, Chair; Banks and Winslow, 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 (CSUEU) from the dismissal of its unfair practice charge by PERB's Office of the General Counsel. The charge, as amended, alleged that the Trustees of the California State University (University) violated section 3571, subdivision (a), of the Higher Education Employer-Employee Relations Act (HEERA)[1] by terminating the employment of Erica Chavin (Chavin) in retaliation for her protected activity of serving as a witness in support of a fellow employee's complaint against a supervisor. The amended charge also alleged that the University's termination of Chavin and its disregard of exculpatory evidence presented by Chavin on behalf of a CSUEU steward

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

constituted domination or interference with the formation or administration of an employee organization, in violation of HEERA section 3571, subdivision (d). The Office of the General Counsel determined that CSUEU's charge failed to identify any cognizable protected activity under HEERA and dismissed the charge for failure to state a prima facie case of discrimination or retaliation. It did not address CSUEU's allegation that the University had violated HEERA section 3571, subdivision (d). For the reasons set forth below, we vacate the dismissal and remand to the Office of the General Counsel for further investigation in accordance with this Decision.

DISCUSSION

CSUEU's appeal presents two issues: (1) whether PERB Regulations[2] require an investigating Board agent to provide a separate warning letter for each successive amendment of a charge; and (2) whether providing assistance to a fellow employee in his or her individual dispute with a supervisor constitutes protected activity within the meaning of HEERA section 3565. Insofar as it is necessary to provide context, the factual allegations are discussed below, as they relate to each of these issues and to CSUEU's contentions on appeal.

I. Case Processing Issue: Whether PERB Must Provide a Separate Warning Letter for each Version of an Amended Charge or for each Amendment to a Charge

CSUEU filed its original charge on June 1, 2015 and, following an investigation, PERB's Office of the General Counsel issued a warning letter on November 18, 2015, which advised CSUEU that it had not alleged sufficient facts to demonstrate that Chavin had engaged in protected activity. On November 30, 2015, CSUEU filed a first amended charge and, on March 2, 2016, it filed a second amended charge. On March 23, 2016, the Office of the General

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

Counsel dismissed the charge without providing an additional warning letter in response to either the first or second amended charges.

On appeal, CSUEU first points to the requirements for a Board agent's investigation of an unfair practice under PERB Regulation 32620. The Regulation requires the investigating Board agent to assist the charging party to state in proper form the information required for stating a prima facie case, to answer procedural questions of each party, to facilitate communication and the exchange of information between the parties, and to make inquiries and review the charge and supporting materials before determining whether to issue a complaint, dismiss some or all of the allegations in the charge, or defer the dispute to arbitration. The Regulation also 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." (PERB Reg. 32620, subd. (d).)

CSUEU also notes that PERB Regulation 32621 allows the charging party to amend its charge or to file an amended charge "[b]efore the Board agent issues or refuses to issue a complaint." (PERB Reg. 32621; *Sacramento Municipal Utility District* (2006) PERB Decision No. 1838-M (*SMUD*), pp. 2-3.) According to the Regulation, any amendment of a charge or an amended charge "shall be processed pursuant to [Regulation] 32620." (*Ibid*.) CSUEU argues that, when read together, the Regulations governing the investigation of a charge and any amendments to a charge require the investigating Board agent to provide a separate warning letter responding to *each* successively-filed amendment to a charge or amended charge. We disagree.

In *Trustees of the California State University* (2014) PERB Decision No. 2384-H (*Trustees of CSU*), we noted that our Regulations place no limit on the number of times a charging party may amend its charge before a warning letter issues or before the charge is dismissed. Additionally, we held that the investigating Board agent is not free to dismiss or disregard new information or allegations included in a timely amendment or amended charge merely because they were not found in the original charge. (*Trustees of CSU, supra*, at pp. 19, 21-22; *California State University* (1990) PERB Decision No. 853-H, p. 7.) However, PERB Regulations governing the investigation of unfair practice charges and Board review of dismissals require the charging party to present its allegations and supporting evidence in the first instance, so that the Board agent assigned to the case can fully investigate the charge before deciding whether to issue a complaint or to dismiss or defer the case. (PERB Reg. 32635, subd. (b); *Regents of the University of California* (2006) PERB Decision No. 1851-H, p. 2.) Although the investigating Board agent must advise the charging party of any deficiencies in the charge or amended charge prior to dismissal, our Regulations and decisional law do not contemplate a game of infinite regress by requiring a separate warning letter responding to each subsequent amendment to a charge. If, following a warning letter that adequately identifies the deficiencies in a charge, subsequent amendments do not correct those deficiencies, dismissal is appropriate. Unlike in *Trustees of CSU*, in the present case, the dismissal letter acknowledged and discussed the additional information and new allegations included in CSUEU's first and second amended charges. Under these circumstances, we find no procedural error in the Office of the General Counsel's decision to forego issuing a second (or third) warning letter responding to each amendment to the charge before deciding how to dispose of the charge.

We turn next to CSUEU's second issue on appeal: whether, in dismissing CSUEU's charge for failure to state a prima facie case, the Office of the General Counsel disregarded relevant factual allegations and improperly applied PERB Regulations and decisional law.

II. Whether the Charge States a Prima Facie Case of an Unfair Practice

A. PERB Case Processing Procedures and Board Review of Dismissal

Under PERB's fact pleading standard, the charging party must include the essential facts (often described as the *who, what, when, where and how* of the charge) with sufficient specificity to permit the investigating Board agent to determine whether "the facts as alleged in the charge state a legal cause of action and [whether] the charging party is capable of providing admissible evidence in support of the allegations." (*Eastside Union School District* (1984) PERB Decision No. 466, p. 7.) However, the Board and its agents, and not the parties, determine the legal issues to be considered in unfair practice proceedings. (*Barstow Unified School District* (1996) PERB Decision No. 1138, p. 10; *State Employees Trades Council United (Ventura, et al.)* (2009) PERB Decision No. 2069-H, pp. 6-7; *ABC Unified School District* (1991) PERB Decision No. 831b, p. 4.) Where the charge allegations state a prima facie case of an unfair practice or other violation of a PERB-administered statute, the investigating Board agent may supply the correct legal authority or applicable theory of liability. (*Los Baños Unified School District* (2007) PERB Decision No. 1935, adopting warning letter at p. 2; *SMUD, supra*, PERB Decision No. 1838-M, p. 1, fn. 2; *Los Angeles Community College District* (1994) PERB Decision No. 1060, p. 9; see also *State of California (Department of Corrections & Rehabilitation)* (2012) PERB Decision No. 2282-S, p. 15 ["Where the same employer conduct concurrently violates more than one unfair practice provision, it is the duty of the Board to find more than one violation."].) PERB Regulation 32620 requires an 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." (PERB Reg. 32620, subd. (d); *City of Roseville* (2016) PERB Decision No. 2505-M, pp. 13-14.)

On review of a dismissal without hearing, we treat the charging party's factual allegations as true and consider them in the light most favorable to the charging party. (*San Juan Unified School District* (1977) EERB[3] Decision No. 12, p. 4; *Golden Plains Unified School District* (2002) PERB Decision No. 1489, p. 6; *California School Employees Association & its Chapter 244 (Gutierrez)* (2004) PERB Decision No. 1606, pp. 3-4.) We may also consider information provided by the respondent, when such information is submitted under oath, complements without contradicting the facts alleged in the charge, and is not disputed by the charging party. (PERB Reg. 32620, subd. (c); *Service Employees International Union #790 (Adza)* (2004) PERB Decision No. 1632-M, adopting dismissal letter at p. 1; *Lake Tahoe Unified School District* (1993) PERB Decision No. 994, pp. 12-13; *Riverside Unified School District* (1986) PERB Decision No. 562a, p. 8.) If the Board determines that the investigation of a charge has not adequately addressed all allegations in the charge, the matter must be remanded for further investigation (*County of Alameda* (2006) PERB Decision No. 1824-M (*Alameda*), pp. 2-5) or, if the charge states a prima facie case, the dismissal must be reversed and remanded for issuance of a complaint. (*Trustees of CSU, supra*, PERB Decision No. 2384-H, p. 22, citing *California State University, Hayward* (1987) PERB Decision No. 607-H.)

[3] Before January 1, 1978, PERB was known as the Educational Employment Relations Board or EERB.

The present charge alleges violations of HEERA section 3571, subdivisions (a) and (d), i.e., unlawful discrimination or retaliation against a higher education employee and domination or interference with the formation or administration of an employee organization. We consider first the Office of the General Counsel's investigation of the discrimination allegation and CSUEU's contentions on appeal before turning to the domination/interference allegation.

B. Allegation that Chavin was Terminated in Retaliation for Protected Conduct

To demonstrate employer discrimination or retaliation against an employee in violation of HEERA section 3571, subdivision (a), the charging party must allege facts showing 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*), pp. 5-6; *Regents of the University of California* (2012) PERB Decision No. 2302-H, adopting proposed decision at p 14.)

For the purpose of reviewing the dismissal of this allegation, the relevant factual allegations are as follows: Beginning in February 2015, Chavin was employed as an Operations Analyst in the Budget Office at California State University, San Marcos, which is a campus of the University. Chavin's position is part of Bargaining Unit 7, which is exclusively represented by CSUEU. At all times relevant to this appeal, Chavin was a probationary employee.

Chavin worked in the same office as LaShann Wilkerson (Wilkerson), an employee in accounts payable. Because Chavin's and Wilkerson's workspaces were separated only by a partition, on April 3, 2015, Chavin overheard a verbal altercation between Wilkerson and Wilkerson's supervisor, Veronica Roman (Roman), in which Wilkerson repeatedly asked Roman to put her hands down. After Roman left, Wilkerson informed Chavin of her plans to file a

complaint against Roman and asked Chavin to appear as a witness. Chavin agreed. Wilkerson filed with the University a written complaint alleging improper governmental activity/coercion to work unpaid hours, denial of the right to union representation in an investigative meeting and retaliation.[4] Wilkerson's complaint identified Chavin as a witness to Wilkerson's dispute with Roman. Although Wilkerson's complaint was presented through a non-collectively bargained complaint procedure, the charge alleges that CSUEU represented Wilkerson in this complaint.[5]

On or about April 8, 2015, Melinda Swearingen (Swearingen), a manager of employee relations, contacted and interviewed Chavin about the Wilkerson-Roman dispute. Swearingen

---

[4] CSUEU's appeal argues that the Office of the General Counsel improperly ignored its separate allegation that Wilkerson, in her capacity as a CSUEU steward, was also involved in a grievance regarding unpaid overtime compensation, which was brought under the collective bargaining agreement. While this allegation was included in the charge and, unquestionably, establishes Wilkerson's participation in protected activity, we agree with Office of the General Counsel that it fails to establish either *Chavin's* involvement in the overtime grievance or the University's knowledge thereof. As explained below, Chavin engaged in protected activity by providing mutual aid or protection as a witness in support of Wilkerson's dispute with her supervisor. The charge fails to allege specific facts demonstrating how Wilkerson's status as a steward, or her involvement in representing employees in the overtime grievance, has any bearing on the analysis of whether Chavin engaged in protected conduct.

[5] The second amended charge also alleges that Chavin was a witness in PERB Unfair Practice Case No. LA-CE-1242-H, which CSUEU filed on April 16, 2015 on Wilkerson's behalf. One could infer that, if Chavin had just provided testimony in support of Wilkerson's University complaint one week earlier, she might also serve as a witness in an unfair practice charge challenging Wilkerson's dismissal. However, we agree with the Office of the General Counsel that CSUEU's charge does not allege specific facts demonstrating either that CSUEU identified Chavin as a witness in advance of the hearing, or how the University otherwise was made aware of Chavin's willingness to serve as a witness in the separate unfair practice charge at any time before Chavin's termination. Pursuant to PERB decisional law, the Board and its agents may take official notice of documents in PERB's files and records, and we do so here to correct a minor, nonprejudicial error. (*Antelope Valley Community College District* (1979) PERB Decision No. 97, pp. 23-24; *Santa Clara County Superior Court* (2014) PERB Decision No. 2394-C, p. 16.) Although the dismissal letter incorrectly identifies Wilkerson, rather than CSUEU, as the charging party in Case No. LA-CE-1242-H, this error does not affect the Office of the General Counsel's determination that, because Case No. LA-CE-1242-H was withdrawn before going to hearing, there was insufficient information to explain how the University would have known that Chavin was prepared to testify as a witness in the separate charge.

asked Chavin questions about her knowledge of the event and also instructed her not to talk to anyone about the investigation.

In the course of her duties for the University, Chavin later learned that Wilkerson had been dismissed, and Chavin herself was then summoned to a meeting with her supervisor who allegedly told Chavin that she was "not collaborative" and that she would need to meet with a Human Resources (HR) official. HR Director Ellen Cardoso met with Chavin and informed her of her probationary release on or about May 1, 2015. Chavin also learned from CSUEU representatives that her testimony about the Wilkerson-Roman dispute had not been included in the University's response to Wilkerson's complaint and, more specifically, that the University's response stated that no one had corroborated Wilkerson's claim that Roman had put her hands in Wilkerson's face or that Wilkerson had asked Roman to put her hands down.

The Office of the General Counsel dismissed CSUEU's retaliation allegation for failure to state a prima facie case and, in particular, for failure to allege facts demonstrating Chavin's participation in protected activity. Citing *Regents of the University of California* (1991) PERB Decision No. 872-H (*Einheber*), the Office of the General Counsel noted that PERB has afforded protection to employee grievances and complaints in at least two situations: where they constitute participation in the activities of an employee organization, and where the employee represents himself or herself pursuant to a specific statutory right. (*Id*. adopting proposed decision at p. 24; see also *Berkeley Unified School District* (2015) PERB Decision No. 2411 (*Berkeley*), p. 17, and *Walnut Valley Unified School District* (2016) PERB Decision No. 2495 (*Walnut Valley*), pp. 13-20.) The warning and dismissal letters correctly note that filing a grievance or appearing as a witness in a collectively-bargained grievance procedure necessarily involves participation in the activities of an employee organization and is therefore protected.

Additionally, as the Board explained in *North Sacramento School District* (1982) PERB Decision No. 264 (*North Sacramento*), "it would be anomalous to guarantee employee organizations the right to represent employees in the grievance process while failing to guarantee employees the concomitant right to participate in the very same grievance process free from fear of discrimination or reprisal." (*Id*. at p. 7, underlining and fn. omitted.)

However, the Office of the General Counsel reasoned that Wilkerson's complaint against her supervisor was not protected because it was presented in an "internal" or non-collectively bargained complaint procedure, and that Chavin's participation as a witness in support of Wilkerson's complaint was likewise unprotected. The Office of the General Counsel also reasoned that, because Wilkerson's complaint against Roman was filed solely on Wilkerson's own behalf, that Chavin's willingness to serve as a witness in support of that complaint was not group activity and was therefore unprotected. We disagree on both points.

In language that is virtually identical to that found in the other PERB-administered statutes, HEERA expressly guarantees 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." (HEERA, § 3565, emphasis added.) Unlike most of the other PERB-administered statutes, HEERA provides no independent right of employee organizations to represent employees. (*Regents of the University of California v. Public Employment Relations Board* (1985) 168 Cal.App.3d 937, 944.) However, it does guarantee the employee organization selected by a majority of employees in an appropriate unit as the exclusive representative the right to meet and confer on behalf of unit employees "on all matters within the scope of representation," including employee grievances. (HEERA, § 3570; *Trustees of*

CSU, supra, PERB Decision No. 2384-H, p. 23, fn. 19.) Even where employees choose to represent themselves in grievances, the higher education employer cannot "adjust[]" or fully resolve the matter without providing the exclusive representative with notice and opportunity for comment. (HEERA, § 3567; *Trustees of The California State University (East Bay)* (2015) PERB Decision No. 2408-H, adopting proposed decision at pp. 41-42; see also *Van Can Co. & United Steelworkers of Am., Local No. 5632, AFL-CIO-CLC* (1991) 304 NLRB 1085, fn. 5.)

While an individual employee's complaint that is "entirely personal in nature and not an extension of concerted action" is unprotected (*Regents of the University of California* (2010) PERB Decision No. 2153-H, adopting warning letter at p. 9), employee activity directed against a supervisor's performance is protected when its purpose is to further a legitimate interest in the employees' working conditions or when the supervisor's conduct affects collective working conditions. (*Barstow Unified School District* (1996) PERB Decision No. 1164 (*Barstow*), proposed decision at pp. 22-23; *State of California (Department of Transportation)* (1982) PERB Decision No. 257-S, pp. 6-7.) Wilkerson's complaint of abusive treatment by her supervisor falls squarely within the ambit of "employer-employee relation[s]" because it affects workplace safety and freedom from a hostile work environment. (*State of California (Department of Veterans Affairs)* (2006) PERB Decision No. 1686-S, pp. 2-3.)[6] By alleging that CSUEU represented Wilkerson in her complaint of abusive treatment by her supervisor, the charge includes sufficient facts to demonstrate that Wilkerson, and by extension Chavin, "participate[d]

[6] Because CSUEU's representation of Wilkerson's complaint establishes its protected status as an employee organizational activity, we find it unnecessary to consider whether Wilkerson's complaint was also a protected health and safety complaint, for the purpose of establishing a prima facie case. (*Los Angeles Unified School District* (1995) PERB Decision No. 1129, pp. 3-5, 8.)

in the activities of [an] employee organization[] of their own choosing for the purpose of representation" on a matter of employer-employee relations.

The fact that Wilkerson's complaint was presented in an "internal," rather than collectively-bargained, grievance procedure does not, in our view, make her complaint unprotected. Our precedents hold that securing union representation about a matter of employment relations, including representation in a grievance arising under the employer's staff personnel policies, falls within the protection afforded by section 3565. (*Regents of the University of California* (1984) PERB Decision No. 449-H (*Regents of UC*), adopting proposed decision at pp. 71, 135, 154; see also *City of Monterey* (2005) PERB Decision No. 1766-M, adopting proposed decision at p. 8 [protected right to representation in non-collectively-bargained termination hearing].) The reasoning of *North Sacramento* is no less applicable when an employee organization represents an employee in an employer's "internal" or other non-collectively bargained grievance or complaint procedure. In *Mount Diablo Unified School District, et al.* (1977) EERB Decision No. 44, the Board determined that the statutory right of the exclusive representative to represent unit employees "in their employment relations" applies to both contractual and non-contractual grievance procedures. (*Id.* at p. 10.)[7] In reaching this conclusion, the Board observed that the term "employment relations" was broad enough to

[7] *Mt. Diablo* held that section 3543.1, subdivision (a), of EERA "confers on an employee organization the right to represent its members in a grievance proceeding even if that employee organization is not the exclusive representative, but only so long as there is no exclusive representative of the grieving employees." (*Id.* at p. 9; the Educational Employment Relations Act (EERA) is codified at section 3540 et seq.) Thus, under *Mt. Diablo* and similar cases, representation by an employee organization in an internal or non-collectively bargained grievance procedure constitutes protected participation in the activities of an employee organization, so long as the unit where the dispute arose is not exclusively represented by another employer organization. (*Ibid.*; see also *Chaffey Joint Union High School District* (1982) PERB Decision No. 202, pp. 6-7, and *Hartnell Community College District* (2015) PERB Decision No. 2452, p. 35, fn. 14, 37-38.)

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), 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. (*Ibid*.; see also *Circuit-Wise, Inc.* (1992) 306 NLRB 766, 766–767.)

In several subsequent cases, PERB has affirmed that the term "employment relations" includes an employer's administrative remedies, and that the statutory rights of an exclusive representative to represent employees extends to an employer's non-collectively bargained complaint resolution procedures. (*Rio Hondo Community College District* (1982) PERB Decision No. 272, pp. 2-3, 6-11; *Eastern Sierra Unified School District* (1983) PERB Decision No. 312, pp. 5-6; *City of Monterey, supra*, PERB Decision No. 1766-M, proposed decision at p. 8.) These and other cases have likewise affirmed the reasoning of *North Sacramento*, that, where the exclusive representative has a right to represent employees in their employment relations, employees have a corresponding right to be represented by their designated representative. (*Rio Hondo, supra*, at p. 9; *City of Monterey*; see also *Trustees of CSU, supra*, PERB Decision No. 2384-H, pp. 36-37.) Even under HEERA, where employee organizations have no independent right to represent employees, PERB has held that higher education employees nonetheless have a protected right to representation by their designated employee organization. (*Regents of UC, supra*, PERB Decision No. 449-H, adopting proposed decision at pp. 71, 135, 154; *Regents of the University of California v. PERB, supra,* 168 Cal.App.3d 937, 945.)

Regents (Einheber) is distinguishable from the allegations in the present charge. In *Regents (Einheber)*, the charging party was *not* part of an exclusively represented unit, and he presented his complaint through a non-collectively bargained grievance procedure without representation by any employee organization. (*Regents (Einheber), supra*, PERB Decision No. 872, p. 24.) The proposed decision in *Regents (Einheber)* explains the significance of this distinction, by specifically noting that, "HEERA protects employees *who seek union representation in the University's grievance procedure*," but that HEERA provides no separate right of employees to represent themselves individually in workplace disputes with a higher education employer. (*Id*. at pp. 27-29, emphasis added.)

Unlike the facts in *Regents (Einheber)*, CSUEU's second amended charge alleges that Wilkerson was exclusively represented by CSUEU and that CSUEU represented Wilkerson in her complaint against her supervisor. As discussed above, the fact that Wilkerson's complaint was not presented in a collectively--bargained grievance procedure is not determinative, because, by virtue of CSUEU's involvement, Wilkerson participated in the activities of an employee organization, which is *expressly* protected by HEERA section 3565. Chavin's appearance as a witness on Wilkerson's behalf in that same process was likewise protected participation in an employee organization's activity, regardless of the nature of the proceedings in which CSUEU presented Wilkerson's complaint.

We likewise reject the Office of the General Counsel's determination that, because Wilkerson's complaint against Roman was made solely by and on behalf of Wilkerson herself, Chavin was not engaged in protected group activity. Here, we think *Regents (Einheber)* actually provides persuasive support for concluding that Chavin's participation as a witness on Wilkerson's behalf *was* protected, even without the involvement of CSUEU, and even assuming

the Office of the General Counsel appropriately characterized Wilkerson's complaint as "solely by and on behalf" of Wilkerson herself. We explain.

PERB and California courts have long recognized that, in drafting the California public-sector labor relations statutes, the Legislature drew much of its inspiration from section 7 of the National Labor Relations Act (NLRA).[8] (*Modesto City Schools* (1983) PERB Decision No. 291 (*Modesto*), pp. 60-61; *Redwoods Community College Dist. v. Public Employment Relations Bd.* (1984) 159 Cal.App.3d 617, 622; *McPherson v. Public Employment Relations Bd.* (1987) 189 Cal.App.3d 293, 311 (*McPherson*); see also *Capistrano Unified School District* (2015) PERB Decision No. 2440, p. 35.) Under section 7 of the NLRA, employees in the private sector "have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection," as well as the right to refrain from any or all of such activities. (29 U.S.C., § 157.) In *Modesto,* the Board explained that, "[t]he only difference" between the right of California's public-sector employees to participate in employee organizational activities and the right of private-sector employees to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection is that the California statutes "use[] plainer and more universally understood language to clearly and directly authorize employee participation in collective actions traditionally related to the bargaining process." (*Id.* at p. 62.)

In various contexts, Board decisions have affirmed that the *Modesto* Board's interpretation as consistent with the policies and purposes of the California labor relations statutes. (*Fresno County In-Home Supportive Services Public Authority* (2015) PERB

[8] The NLRA is codified at 29 U.S.C. section 151 et seq.

Decision No. 2418-M, pp. 32-34, overruling *Compton Unified School District* (1987) PERB Order No. IR-50; *Los Angeles Community College District* (2014) PERB Decision No. 2404, pp. 6-8; *Walnut Valley, supra,* PERB Decision No. 2495, p. 9; see also *County of Trinity (United Public Employees of California, Local 792)* (2016) PERB Decision No. 2480-M, adopting warning letter at p. 3.) PERB has also held that an individual employee's criticism of management or working conditions is protected when its purpose is to advance other employees' interests or when it is a logical extension of group activity. (*Regents (Einheber), supra,* PERB Decision No. 949, pp. 6-7; *Barstow, supra,* PERB Decision No. 1164, adopting proposed decision at pp. 22-23; *Berkeley, supra,* PERB Decision No. 2411, pp. 19-20.)

The underlying rationale for these Board decisions and for similar private-sector authorities is that, if individual employees are not free to act together informally and spontaneously to provide mutual aid or protection to one another, then it is unlikely that they may ever exercise their right to form or join, much less to participate in the activities of, an employee organization. Thus, under both California and federal law, an individual employee's attempt to enlist the support of fellow employees for mutual aid or protection concerning employer-employee relations is as much protected activity as is his or her participation in employee organizational activities, since the one seldom exists without the other. (*Owens-Corning Fiberglas Corp. v. NLRB* (4th Cir. 1969) 407 F.2d 1357, 1365; *Franklin Iron & Metal Corp*. (1994) 315 NLRB 819, 820.)

By logical extension, it would make little sense to treat an individual employee's request for assistance to other employees or an individual's appeal to group activity as protected, but then to hold that another employee's *response* to that request or appeal is not protected. Even if the original request or appeal was solely by and on behalf of the complaining employee, the

appeal for assistance and the fellow employee's response make the activity both *concerted* and *for the purpose of providing mutual aid or protection* to a coworker in the purest sense of those words. Absent some explanation of how the statutory language or the peculiar circumstances of public-sector employment justify a different result, we can discern no reason for departing from the array of sound private-sector precedents holding that individual employee-to-employee activity aimed at providing mutual aid or protection is statutorily protected, notwithstanding its informal and spontaneous nature. (*McPherson, supra,* 189 Cal.App.3d 293, 311; *Modesto, supra,* PERB Decision No. 291, p. 62.) By alleging that Wilkerson approached Chavin to serve as a witness in support of Wilkerson's complaint against a supervisor's allegedly abusive conduct, and by alleging that Chavin responded to Wilkerson's request for assistance, CSUEU has alleged sufficient facts to demonstrate that Wilkerson *and Chavin* engaged in statutorily-protected concerted activity.

Because the Office of the General Counsel determined that CSUEU had not alleged sufficient facts to demonstrate protected activity, it did not analyze the other elements of PERB's *Novato, supra,* PERB Decision No. 210, test for unlawful discrimination or retaliation, including whether the charge contains sufficient facts to demonstrate that Chavin's probationary release was undertaken because of her participation in protected conduct. We therefore reverse the dismissal of this allegation and remand to the Office of the General Counsel for further investigation of this allegation.

C. Domination or Interference with Administration of an Employee Organization

HEERA 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." (HEERA, § 3571, subd. (d); *Ventura Community College District* (1994) PERB Decision No. 1073, p. 8; *Clovis Unified School District* (1984) PERB Decision No. 389, pp. 8-9; see also *Oak Grove School District* (1986) PERB Decision No. 582, p. 18.) Proof that the employer intended to unlawfully dominate or assist an employee organization or to influence employee choice is not required. (*Azusa Unified School District* (1977) EERB Decision No. 38, pp. 6-10.) Nor is it necessary to prove that employees actually changed their organizational affiliation as a result of the employer's conduct. (*Santa Monica Community College District* (1979) PERB Decision No. 103, p. 22; *Redwoods Community College District* (1987) PERB Decision No. 650, pp. 2-4.)

Although an allegation that an employer has dominated or interfered with the internal affairs of an employee organization may overlap with an allegation of other employer unfair practices, such as by-passing the representative and dealing directly with employees (see, e.g., *Omnitrans* (2010) PERB Decision No. 2143-M, pp. 5-6), a prima facie case of employer domination or assistance does not necessarily involve employer interference with union activities or discrimination based on protected conduct. (See, e.g., *State of California (Department of Corrections)* (1999) PERB Decision No. 1308-S, adopting warning letter at p. 4.) Allegations of employer interference with or discrimination because of protected rights are properly analyzed as separate unfair practices proscribed by other provisions of the statute. (HEERA, § 3571, subds. (a), (b), (c); *Trustees of CSU, supra*, PERB Decision No. 2384-H, p. 23, fn. 19.) Although CSUEU's original charge and each of the amendments filed with PERB alleged that the University had violated HEERA section 3571, subdivision (d), it does not appear that the charge includes sufficient allegations to state a prima facie violation of this

provision of HEERA. Nevertheless, we are unable to dismiss the allegation in the current posture of the case.

PERB Regulation 32620 requires an 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." (PERB Reg. 32620, subd. (d).) The purpose of the regulation is to provide the charging party with notice and an opportunity to correct any deficiencies before any allegation in the charge is dismissed. (*Hartnell, supra,* PERB Decision No. 2452, p. 31; *County of San Joaquin* (2003) PERB Decision No. 1570-M, p. 8; *County of Alameda* (2006) PERB Decision No. 1824-M, pp. 4-5.)

There is no indication in the file that any theory of a subdivision (d) violation was ever investigated, as the warning and dismissal letters do not reference the allegation, nor discuss the elements for stating a prima facie case. Because our Regulations prohibit dismissal of any allegation without prior notice to the charging party, we vacate the dismissal of this allegation and remand the matter to the Office of the General Counsel for further investigation in accordance with PERB Regulations. (PERB Reg. 32620, subd. (d); *Hartnell, supra,* PERB Decision No. 2452, p. 31; *County of Alameda, supra,* PERB Decision No. 1824-M, p. 5.)

D. Interference with Protected Rights

Under PERB's *Carlsbad* standard, a prima facie interference violation is established if the employer's conduct, including its promulgation or maintenance of a rule, reasonably tends to or does in fact result in harm to employee rights. (*Carlsbad Unified School District* (1979) PERB Decision No. 89 (*Carlsbad*), pp. 10-11; *County of Riverside* (2010) PERB Decision No. 2119-M, pp. 16-23; *Jurupa Unified School District* (2012) PERB Decision No. 2283

(*Jurupa*), p. 29.) Even absent enforcement, the promulgation or maintenance of an employer rule may interfere with protected rights because its ambiguity creates the reasonable possibility of a broad interpretation in the future that would potentially chill protected activity. (*Santee Elementary School District* (2006) PERB Decision No. 1822, p. 11; *Los Angeles County Federation of Labor v. County of Los Angeles* (1984) 160 Cal.App.3d 905, 908-909.) Generally, an employer rule or directive that bans a general category of conduct, which includes both protected and unprotected activity, is presumptively unlawful because its very ambiguity is likely to chill protected conduct. (*Petaluma City Elementary School District/Joint Union High School District* (2016) PERB Decision No. 2485, pp. 46-47; *Los Angeles Community College District* (2014) PERB Decision No. 2404 (*LACCD*), p. 6-7; *County of Sacramento* (2014) PERB Decision No. 2393-M, p. 20.)

In *LACCD, supra*, PERB Decision No. 2404, we explained that, "[i]n the area of employer rules and directives, PERB does not look favorably on broad, vague directives that might chill lawful speech or other protected conduct." (*Id*. at p. 6, citing *State of California (Employment Development Department)* (2001) PERB Decision No. 1365a-S, p. 10.) We held that an employer directive that could reasonably be construed to prohibit protected activity, including contacting union representatives or members for the purpose of initiating a grievance or enlisting the support of other employees, constitutes a prima facie case of interference with protected rights. (*LACCD, supra*, at pp. 6-7.)

Similarly, in the private sector, when an employer instructs an employee not to speak with others about wages, hours or working conditions, including grievances and past or prospective disciplinary actions, it is a prima facie case of interference with employees' rights to engage in concerted activity for mutual aid or protection. (*Rogers Environmental*

Contracting, Inc. (1997) 325 NLRB 144 [wages]; *Kinder-Care Learning Centers* (1990) 299 NLRB 1171, 1172 [working conditions]; *Medeco Sec. Locks, Inc. v. NLRB* (4th Cir. 1998) 142 F.3d 733, 748 [working conditions and involuntary transfer]; *Tracer Protection Services, Inc.* (1999) 328 NLRB 734 [discipline or discharge].) The rationale for these decisions is that, if employees are not free to discuss their wages, hours and working conditions, then they can never get to the more difficult concerted activities of forming, joining or participating in the activities of employee organizations (or refraining from doing so). (See *Beth Israel Hosp. v. NLRB* (1978) 437 U.S. 483, 491 ["[T]he right of employees to self-organize and bargain collectively established by § 7 ..., necessarily encompasses the right effectively to communicate with one another regarding self-organization at the jobsite.]; *Central Hardware Co. v. NLRB* (1972) 407 U.S. 539, 543 ["[O]rganization rights are not viable in a vacuum; their effectiveness depends in some measure on the ability of employees to learn the advantages and disadvantages of organization from others."].)

To the extent that an employer's directive or policy of maintaining "confidentiality" of investigations into employee grievances "muzzles" employees who seek to engage in concerted activity for mutual aid or protection by denying them the very information needed to discuss their wages, hours or working conditions, it necessarily harms employee rights. (*Int'l Bus. Machines Corp.* (1982) 265 NLRB 638.) To overcome a presumption of invalidity stemming from a vague or overinclusive rule, the employer must make it clear to employees that the thrust of an inexplicitly-worded confidentiality rule is not to prohibit discussion of their terms and conditions of employment. (*Longs Drug Stores California, Inc*. (2006) 347 NLRB 500; *Vanguard Tours* (1990) 300 NLRB 250, 264.) Once it is established that the employer's prohibition on discussing wages, hours or working conditions adversely affects employees'

protected rights, the burden falls on the employer to demonstrate "legitimate and substantial business justifications" for its conduct. (*Jeannette Corp. v. NLRB* (3d Cir. 1976) 532 F.2d 916, 918; *In Desert Palace, Inc.* (2001) 336 NLRB 271.)

Although not identified by CSUEU as an independent unfair practice, the second amended charge alleges that, on or about April 8, 2015, and as part of the University's investigation into Wilkerson's complaint against Roman, "Swearingen told Chavin she should not talk to anyone about the investigation and that she would probably not hear any results." On its face, this directive not to talk to "anyone" could reasonably be construed to prohibit protected activity, including contacting union representatives or members, or enlisting the support of other employees. However, the warning and dismissal letters do not identify or discuss this allegation. Because the allegation was apparently not investigated as an independent theory of liability, we do not presume to say, at this point in the proceedings, whether this allegation states a viable theory of liability of interference with protected rights or whether there are additional factual allegations that would overcome a presumption of invalidity, for example, by indicating that the University also made clear to employees that Swearingen's directive would not prohibit discussion of their terms and conditions of employment. Instead, we remand the matter for investigation in accordance with this Decision.

ORDER

It is hereby ORDERED that the dismissal of the unfair practice charge, as amended, in Case No. LA-CE-1244-H is VACATED and the matter REMANDED to the Office of the General Counsel for further investigation in accordance with this Decision.

Chair Gregersen and Member Winslow joined in this Decision.