

entire record, the proposed decision, Einheber's exceptions, and the UC's response thereto, and finds the ALJ's findings of fact and conclusions of law to be free of prejudicial error and therefore adopts them as the decision of the Board itself.³

The complaint in Case No. SF-CE-258-H is hereby DISMISSED.

Chairperson Hesse and Member Shank joined in this Decision.

It shall be unlawful for the higher education employer to:

(a) Impose 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.

³In regard to Einheber's claim that his letter to the chancellor constituted protected conduct, we would also note the Board's decision in California State University, Long Beach (1987) PERB Decision No. 641-H. The Board held that merely including the name of a union representative among those individuals receiving a copy of the correspondence does not, without more evidence, constitute protected conduct.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD



JACK EINHEBER,)
)
 Charging Party,) Unfair Practice
) Case No. SF-CE-258-H
 v.)
) PROPOSED DECISION
 REGENTS OF THE UNIVERSITY) (10/22/90)
 OF CALIFORNIA,)
)
 Respondent.)
 _____)

Appearances: Winslow & Fassler by Priscilla Winslow, Attorney, for Jack Einheber; Joyce Harlan, Labor Relations Representative, for the Regents of the University of California.

Before Ronald E. Blubaugh, Administrative Law Judge.

PROCEDURAL HISTORY

An unsuccessful applicant for police sergeant contends here that he was passed over for promotion because he filed grievances and wrote a letter to the chancellor at Berkeley. The respondent University of California argues that the Charging Party did not participate in protected conduct and that his failure to be promoted was unrelated to his filing of grievances or letter writing.

Jack Einheber, a police officer at the University's Berkeley campus, timely filed the charge which commenced this action on April 14, 1987. The general counsel of the Public Employment Relations Board (PERB or Board) followed on May 29, 1987, with a complaint against the Regents of the University of California (University or Employer).

The complaint alleges that the University retaliated against Jack Einheber by refusing to promote him to sergeant because he

This proposed decision has been appealed to the Board itself and may not be cited as precedent unless the decision and its rationale have been adopted by the Board.

wrote a letter to the Berkeley campus chancellor, and filed various grievances against the Berkeley campus police department. The complaint alleges that the denial of promotion was a violation of Higher Education Employer-Employee Relations Act section 3571(a).¹ The University filed an answer to the complaint on June 19, 1987, denying that it had engaged in any unfair practice in the treatment of Officer Einheber.

In addition to filing an unfair practice charge, Officer Einheber also filed a grievance under the University's staff personnel policy. The grievance alleged that Officer Einheber was denied promotion in retaliation for filing a grievance.²

Under the University's internal procedures, the grievance went to arbitration commencing April 28, 1987.

¹Unless otherwise indicated, all statutory references are to the Government Code. The Higher Education Employer-Employee Relations Act (HEERA) is found at Government Code section 3560 et seq. In relevant part, section 3571(a) provides as follows:

It shall be unlawful for the Higher Education employer to do any of the following:

(a) Impose 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. . . .

²Section 280.32 of the University's staff personnel policy provides as follows:

Reprisal

No employee shall be subject to reprisal for using or participating in the grievance process.

At the request of the parties, further processing of the unfair practice case was placed in abeyance on July 28, 1987, to await the result of the arbitration. The arbitration was conducted over nine nonconsecutive days, concluding on September 20, 1988. The arbitrator's award, denying the grievance, was issued on June 30, 1989.³

A hearing before the PERB was scheduled to commence in October 1989, but was cancelled at the request of the parties to permit the University to file a motion for dismissal on a theory of collateral estoppel. The motion was filed on October 13, 1989, and was denied by the undersigned on November 1, 1989. On February 20, 1990, the parties agreed to submit the unfair practice case on the basis of the record made in the arbitration with possible supplementary witnesses. The parties agreed that the undersigned should decide the issue of additional witnesses after reading the transcript of the arbitration.⁴

Additional days of hearing were held on May 5, 1990, and June 26, 1990. With the filing of post-hearing briefs, the case was submitted for decision on October 10, 1990.

³As stipulated by the parties, the issue before the arbitrator was as follows:

Was the grievant denied promotion as a reprisal for filing grievances in violation of staff personnel policy section 280.32? If so, what is the appropriate remedy?

The arbitrator held that there had been no reprisal in the denial of the promotion.

⁴The transcript of the arbitration and exhibits were submitted to the undersigned on March 16, 1990.

FINDINGS OF FACT

The Respondent University of California is a higher education employer under HEERA. At all times relevant, Jack Einheber has been employed by the University as a police officer at the Berkeley campus. During the relevant period, there was no exclusive representative for campus police officers at Berkeley. The Statewide University Police Association, the one-time exclusive representative, had been decertified prior to the events at issue.

Jack Einheber was hired as a Berkeley campus police officer in 1977. At the time he was hired he had a masters degree and was working on a doctorate in education. He later received the doctorate in 1985. Over the nine years of his employment, prior to the 1986 sergeant's exam, Officer Einheber developed a reputation of having good "street smarts" and an uncanny ability to be in the right place at the right time.⁵ He had broken up a ring of moped and bicycle thieves and was always one of the top officers in productivity for citations and arrests. He was considered quite good at developing informants. Several witnesses described him as very intense in investigating crimes.

Officer Einheber also had a reputation for establishing a good rapport with students. In addition, he was admired for spending his own time working with juveniles whom he had arrested

⁵One witness described "street smarts" as the ability to quickly determine that a crime may have occurred or be taking place and to place yourself in the right position to apprehend the suspect.

and their parents. He had received commendations for his work with troubled students at the Berkeley campus.

Officer Einheber also developed a reputation for questioning authority and being something of a loner. John Powell, a sergeant who had supervised Einheber and whose testimony was generally favorable toward him, said that all sergeants know that they must be very careful in dealing with him. "If you're going to put something down, you have to document whatever you're going to say," Sergeant Powell testified.

Officer Einheber's reputation for being a loner apparently is rooted in what others perceive as his general disinterest in social activities among members of the department. "He wasn't inclined to go out drinking with the boys after work and things like that," Sergeant Powell testified. "Number one, Jack doesn't drink, to my knowledge anyway . . . I just don't think that was something that really interested him." Another witness described Officer Einheber as one "going to the beat of a different drummer."⁶

In the time prior to the 1986 sergeant's exam, there also was a perception among some department supervisors that Officer Einheber was not a good report writer. At one point early in his career he had been marked down in an evaluation for his report writing. In particular, he was criticized for inserting too much opinion and psychological analysis into his report. Although subsequent evaluations showed improvement in his report writing

⁶Lieutenant William Cooper.

ability, the perception of problems remained among some supervisors.

In the years prior to the October 1986 sergeant's exam, Officer Einheber filed three grievances and a complaint with the Equal Employment Opportunity Commission (EEOC). The first of these grievances was filed on February 19, 1980, and it challenged a performance evaluation for Officer Einheber covering the last four months of 1979. Officer Einheber testified that he filed the grievance because he believed the evaluation placed his job in jeopardy. In addition to challenging the evaluation, the grievance attacked what Officer Einheber viewed as improper practices by certain department members. The grievance document was a lengthy, single-spaced, typewritten exposition by Officer Einheber which became known as "The Einheber Papers." The term "Einheber Papers" ultimately became a kind of departmental shorthand for describing anything lengthy and complicated.⁷ The 1980 grievance was filed with then Chief William P. Beall, Jr.

Officer Einheber filed his next grievance on July 2, 1985. This grievance challenged a low ranking that he received in an evaluation that was completed as part of a University-wide civil service examination for police sergeant. Officer Einheber challenged the evaluation as being unfair and stated a belief that his religion and national origin influenced the outcome. This grievance was the first filed under Chief Derry Bowles.

⁷Sergeant Powell testified that whenever there is something sensitive and of a large volume, people tend to describe it as becoming another "Einheber Papers."

Chief Bowles was in office during the promotional process at issue here.

Officer Einheber's third grievance was filed on January 6, 1986. In it he challenged the department's failure to interview him for a sergeant's position. After the January 1986 grievance, Officer Einheber went to Chief Bowles and told him that the grievance was "nothing personal." Officer Einheber testified that the chief responded, "Okay, you've said what you've had to say, that's it." Officer Einheber said the chief had never before spoken to him in such a manner.

Officer Einheber filed his complaint with the EEOC on July 28, 1985. This complaint challenged the department's failure to promote him and its denial of special assignments to him. In the complaint, he alleged that the failure to promote and the denial of special assignments were due to the University's discrimination against him because of his religion and national origin.

In addition to the filing of grievances, Officer Einheber also contends that he engaged in protected conduct by sending a letter to the Berkeley campus chancellor on August 22, 1986. The letter, addressed to Ira M. Heyman, is a three-page, typewritten, single-spaced document on the letterhead of the Berkeley campus police department. In the letter, Officer Einheber urges the chancellor to reject the creation of a civilian review board for the Berkeley campus police department. The letter recites

various reasons why the creation of a civilian review board would have a negative effect on the campus police department.

Prior to writing his letter to the chief, Officer Einheber consulted with Sergeant John Powell, an executive board member of the University Police Association. The organization is a non-exclusive representative, employee group. Sergeant Powell testified that Officer Einheber asked if it was appropriate for Einheber "to write a letter to the Chancellor. . . discussing his personal views on the subject." [emphasis supplied] Sergeant Powell told Officer Einheber he believed Einheber "had a right to send such a letter since a [police review board] would ultimately impact upon him as an employee."⁸ Officer Einheber later showed a copy of the letter to Powell and Sergeant Brant, both of whom offered suggestions. Although the letter shows the president of the University Police Officers' Association as the recipient of a copy, the letter does not purport to be written on behalf of that group.

Officer Einheber testified that he was told by Sergeant Barbara Buchanan that Chief Bowles was "pretty upset" about the letter. However, Sergeant Buchanan testified that the chief's reaction was not "particularly angry" and that he said he wished Officer Einheber would have "slipped him a copy of the letter" before he sent it to the chancellor. The chief testified that

⁸Sergeant Powell's recollection of this event is set out in Grievant's Exhibit No. 60. Although this document is hearsay, Sergeant Powell was later called as a witness to verify his written comments and to make himself available for cross-examination. See R.T. for June 22, 1988, at p. 957.

his only objection was the use of departmental stationery. He also said that if Officer Einheber had discussed the letter with him and others, they could have provided information to make it stronger. Chief Bowles later told Officer Einheber that any letter on department stationery should have gone through the chief's office first.

In a second letter to Chancellor Heyman, Officer Einheber made it clear that his letter of August 22, 1986, was a purely personal expression of views. In a letter of September 5, 1986, which further outlines his views on a police review board, Officer Einheber wrote:

I also believe it appropriate to inform you that my August 22, 1986 letter to you was written on University of California Police Interdepartmental Letterhead through oversight. I was out of town when the letter was typed and I had failed to provide the typist with adequate instruction before I left. Thus, none of the material in this letter or the August 22, 1986 letter should be construed to represent other than my own personal opinion. [emphasis supplied]

Police sergeants at all nine University of California campuses are promoted from a single eligibility list. Approximately once every three years, a notice of testing is sent to each campus. During the relevant period, the test consisted of a written examination, a service performance rating and an oral interview.⁹ Typically, about 100 police officers take the

Subsequent to the events at issue, the University initiated a new systemwide procedure for selecting candidates for promotion to sergeant. Candidates first are screened through a multiple choice written exam. Those who pass the exam then complete a written simulation exercise. Those who successfully complete the

test. Once a list is established it is usually good for two years but can be extended a third year. Police officers who rank high on the sergeant's list are not always promoted. Sometimes there is no vacancy on their own campus and they are unwilling to transfer to another campus. At other times officers are simply passed over.

The eligibility list which was used in the 1986 promotional process at Berkeley, was first established in 1984. At the time the list initially was published, Officer Einheber ranked 26 out of 93 successful applicants. Following a subsequent audit of the exam, the rankings were shifted and Officer Einheber became number 29 out of 93 applicants.

The University's systemwide policy for promotion of police sergeants and lieutenants permits the campus chief to appoint from among the top five candidates by either of two methods. The chief may immediately appoint any candidate who ranks in the top five and is employed on the campus with the vacancy. Or, the chief may interview in person or by phone as many candidates as required to have five candidates available for consideration and selection. The top five interested in the position are not necessarily the top five on the list because many qualified candidates turn down positions because they do not want to move or are otherwise uninterested.

⁹written exercise are next evaluated in assessment center exercises designed to simulate essential job duties. Interviews have been abandoned as part of the systemwide testing procedure although the Berkeley campus still interviews successful candidates before deciding which to promote.

By March of 1986 Officer Einheber had advanced to number eight on the sergeant's eligibility list. He was the highest ranking Berkeley candidate on the list. Those above him were employed on the San Diego, Davis and Los Angeles campuses of the University. For a number of years, prior even to the enactment of HEERA in July 1979, the prevailing practice at Berkeley was for sergeant's positions to be filled by appointment of the highest eligible Berkeley candidate. Where a Berkeley candidate was within the top five systemwide, that candidate typically would be appointed to the next available sergeant's position at Berkeley. This practice was continued under Chief Bowles and remained in effect until the fall of 1986.¹⁰

In the fall of 1986, Chief Bowles decided to change the process for appointing sergeants at Berkeley. Rather than appoint the highest ranking Berkeley candidate, Officer Einheber, Chief Bowles established a three-tier interview process. The candidates would be interviewed by a panel of lieutenants, the two assistant chiefs, and the chief. The selection would be made

¹⁰There was evidence of three exceptions over a 17-year period, twice under the prior chief, William Beall, and once under Chief Bowles. Some time prior to 1977, Chief Beall promoted an officer to sergeant over a higher ranked candidate named John Powell. In 1979, Chief Beall authorized the transfer of Sergeant William Foley from the Davis campus to fill a sergeant's position at Berkeley, bypassing two Berkeley officers on the promotion list. The single exception under Chief Bowles occurred on December 16, 1985, when two Berkeley police officers were promoted to the rank of sergeant, Theodore Greczyn and Leroy Pereira. Greczyn ranked eighth on the eligibility list and Pereira ranked ninth. Although both promotions were made on the same day, Pereira's was made before Greczyn for seniority purposes.

following the interviews. The system is similar to the system used at Berkeley for selection of lieutenants.

The procedure for filing vacancies for sergeant was changed after Chief Bowles raised the issue at a meeting of lieutenants in October 1986. A resignation had created an opening for a sergeant and the chief inquired of the others how the next appointment should be made. Lieutenant Howard Hickman mentioned the past practice and suggested the appointment of Officer Einheber. Others suggested that they should take a look at "what's out there" before making a decision.

Assistant Chief Victoria Harrison then recommended conversion to the three-tier interview process. Both Chief Bowles and Assistant Chief Harrison had formerly worked together at the University's Santa Barbara campus where a three-tier interview process is employed. Assistant Chief Harrison said she recommended the change to bring Berkeley into conformity with what had become a practice on other campuses.

A notice was posted on all nine campuses about the vacancy for a sergeant at Berkeley. Letters were sent to all candidates at the top of the eligibility list to inquire about their interest. As a result of the posting and letters, a pool of seven candidates was established, two from Davis, one from San Diego, two from Berkeley, and two sergeants from other campuses who indicated an interest in transferring to Berkeley.

Collectively, the various interviewers testified that they wanted a sergeant who was articulate, a leader and a team player.

They also wanted a candidate who demonstrated command presence, self-confidence, interpersonal skills, good judgment, job knowledge, and credibility. Finally, they wanted someone who understood the role of the sergeant and understood the difficulties they perceived in making the transition from officer to supervisor.

It is clear from the testimony that there were opponents to the promotion of Officer Einheber, prior even to the interviews. Lieutenant William Cooper testified that he had a negative perception of Einheber's potential as a sergeant before the interview, and nothing changed after it. He testified that he did not believe Officer Einheber had demonstrated the skills and qualifications expected in a sergeant. Assistant Chief Harrison testified that she had heard anti-Einheber comments before the interviews from several sergeants. Sergeant Sarah Ferrandini, a friend of Assistant Chief Harrison, was quoted as saying prior to the interviews that "Jack was not going to be selected sergeant."

By the time of the interviews, Officer Einheber had moved to first on the list. All seven officers ranked above him had waived interest in the Berkeley sergeant's position. By removing themselves from consideration, the higher-ranking candidates allowed Officer Einheber to move to first place.

Various witnesses testified about Officer Einheber's performance in the October 23, 1986, interviews. Witnesses who attended his interview with the lieutenants criticized his appearance, his answers and his preparation. Several of his

answers in particular were received negatively. Asked if he had any hobbies, Officer Einheber replied, "I like to watch women."¹¹ Lieutenant Ellen Stetson described his response as lacking in good judgment.

Following his comment about watching women, a panel member asked Officer Einheber about his view of women in law enforcement. He replied that if a woman has an adequate upper body strength to perform the job then he has no criticism. However, he expressed a belief that some women in the department were inadequate for the arrest team because they did not have sufficient upper body strength. He made a comparison to his girlfriend whom he described as capable of doing 60 push-ups and 10 pull-ups. He said that she was strong enough for the position. Lieutenant Stetson described the comments as "shocking" and said that they showed a lack of sensitivity since there was a woman sitting right in front of him.¹²

Several of the lieutenants also were unimpressed by Officer Einheber's answer to a question about how he might improve patrolling of the campus. He suggested surveillance from some high structure like the campanile from which an officer

¹¹There are various versions in the record of his exact remark. One version is that he said, "I like to watch girls." Officer Einheber testified he recalls saying "I like women." He described his response as a joke.

¹²Regardless of his comments about women in the interview, none of the witnesses testified that they had ever seen any evidence that Officer Einheber treats female co-workers in a sexist manner or that he had any on-the-job problems with female officers.

could report on any criminal activity below. Two lieutenants testified that random surveillance from high structures on the campus about activity below would be very negatively received by the campus community. Lieutenant William Cooper said the answer showed a lack of understanding about campus realities.

The two assistant chiefs also were highly critical of Officer Einheber's appearance and answers at their interview with him. Assistant Chief Foley described Einheber's attire as inappropriate for an interview. He said Officer Einheber wore a parka jacket with a clip-on tie and a shirt that did not seem to fit.¹³ Lieutenant Foley said that Officer Einheber slouched in his chair and looked at the floor and never made good eye contact. Assistant Chief Harrison said that Officer Einheber's failure to make good eye contact during the interview did not instill confidence that he was in control.

Both assistant chiefs were critical of Officer Einheber's response to a question about whether he could be a team player. Lieutenant Foley interpreted Officer Einheber's answer as an indication that he considered himself "standoffish" and to an extent a loner. Lieutenant Foley said this would run counter to the department's goals of building a team. Lieutenant Harrison interpreted Officer Einheber's answer as a statement that he "tended to do his own thing." She said that teamwork is important because police officers have to back each other up.

¹³Officer Einheber said he dressed casually because in a previous interview he was criticized for being too formal while wearing a three-piece suit.

She interpreted his answer as an indication that he would not become involved in internal discussions among sergeants but would keep to himself.

Both assistant chiefs described Officer Einheber as not prepared. Lieutenant Harrison said that he rambled in his responses and did not seem in touch with real issues facing the Berkeley campus police department. Assistant Chief Foley described Officer Einheber's answers as shallow.¹⁴

Chief Bowles testified that he similarly was unimpressed with Officer Einheber's performance in the interview. He also faulted Officer Einheber's appearance and eye contact, which he said did not indicate strength in leadership. He described Officer Einheber's answers to questions about dealing with youth gangs and mid-campus crime problems as unworkable and lacking in judgment. He said that when he asked Officer Einheber what he would do with an order that he disagreed with, Einheber responded that he would be quiet. The chief testified that he felt this indicated Officer Einheber would not support him strongly.

Neither the lieutenants nor the assistant chiefs ranked the candidates following the interviews. They did discuss the candidates following the completion of the interviews but they did not record their views in any formalized manner. Ultimately, a joint post-interview discussion was held among all who

¹⁴Assistant Chief Foley's testimony is consistent with what he told Officer Einheber in a recorded meeting after Officer Einheber failed to get the promotion. See Grievant's Exhibit 13.

participated in the interviews. During the meeting each participant discussed each candidate and gave an opinion about the candidate. The participants to the discussion testified that there was not much difference in views. They all placed Officer Einheber either last or next to last. Several expressed surprise that he did not do better in the interviews. No one recommended that Officer Einheber be selected for the sergeant's position.¹⁵

The promotion to sergeant was given to Shaun Donelson, an officer from the University's San Diego campus. Various witnesses described him as articulate and well prepared. He had acted as a corporal in San Diego which gave him some time as an acting supervisor. There was a general perception that he presented himself far more professionally than the other candidates. The witnesses testified that Officer Donelson displayed more openness and ability to communicate. Witnesses described Donelson as maintaining good eye contact, projecting a sense of humor and making a good overall impression.¹⁶

¹⁵ Officer Einheber testified that his showing in the interviews was affected by a rigorous training program that he had completed the week before the interview and a 14-hour day he had worked immediately prior to it.

¹⁶ The Charging Party submitted testimony about problems in the work performance of Sergeant Donelson after he received the position. Several witnesses testified about particular situations in which he performed in a manner they viewed as improper. On October 12, 1987, Sergeant Donelson resigned his position as sergeant at Berkeley and returned to San Diego as an officer.

I find information regarding Sergeant Donelson's performance irrelevant to the question of why Officer Einheber was passed over for the sergeant's position. Any problems which later occurred in Sergeant Donelson's work performance could not have

Donelson's appointment was announced sometime in the week between the October 23 interviews and Officer Einheber's October 31 meeting with Assistant Chief Foley to find out why he was passed over.

In an effort to show retaliatory intent by the University, the Charging Party presented evidence of what he considered retaliatory actions taken against other officers. Officer John Edmands testified that his relationship with the chief became strained after he opposed the chief's plan to ban pain compliance techniques.

The practice at Berkeley for removing recalcitrant demonstrators had been to apply pain to their arms. The chief proposed a system whereby officers would drag demonstrators, roll them onto blankets and carry them away. Officer Edmands opposed this because he believed it would cause back injuries to the officers. He arranged for a meeting between the chief and approximately 25 or 26 officers on campus at Alumni House. The officers as a group were absolutely opposed to the use of blankets and carrying the demonstrators away. Most of the officers who attended the meeting were highly critical of the chief, including Officer Edmands.¹⁷ After the meeting, Officer

been known by the persons who evaluated the candidates in October 1986. In this regard I share the views of the arbitrator, Bonnie Bogue, which are set out at page 107 of the transcript for the seventh day of the arbitration.

¹⁷Chief Bowles testified that he was so depressed by the meeting that he was thinking of quitting until the chancellor talked him out of it.

Edmands testified, the chief stopped talking to him in the hallway and would not initiate any conversations with him.

Officer David Braunecker, a Berkeley campus sergeant until he resigned from the position in July 1987, described a confrontation he had with the chief in December 1983. The chief had directed all sergeants to attend a meeting at a Half Moon Bay retreat. They were to be there 24 hours a day, although they would be paid for only 8 hours. Braunecker demanded full pay and testified that he got into a heated discussion with the chief about the issue. When attendance at the retreat was made voluntary, Braunecker refused to attend. Officer Braunecker testified that thereafter he was removed from participation on an oral panel for interviewing police officers. He said that he found out that the chief took his name off the panel because the chief said he did not have experience to serve on the panel.

Officer Braunecker testified that he had another confrontation with the chief over an incident in which a trainee was incorrectly reprimanded and warned of dismissal. Sergeant Braunecker was the platoon sergeant for two trainees, one of whom was "breezing through" the program and the other who looked like he was not going to make it. Chief Bowles decided that the one who was not doing well should be spoken to very forcefully and advised that if he did not improve he would be terminated. However, Braunecker testified, Chief Bowles confused the two names. As a result the wrong trainee was chastised. Braunecker said when he learned of this mix-up he was very angry and

complained to all who were involved in the incident. Thereafter he was reassigned for two weeks to another platoon because the chief said he did not know how to get along with people.

In November 1987, a new statewide list for sergeants was developed. Officer Einheber ranked first, statewide, on the list. As of the last day of the hearing, Officer Einheber had not been promoted to the position of sergeant.

LEGAL ISSUE

Did the University of California refuse to promote Jack Einheber to the position of police sergeant in retaliation for protected activities, and thereby violate section 3571(a)?

CONCLUSIONS OF LAW

Higher education employees have the protected "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" ¹⁸ Under section 3571(a), it is unlawful for a

¹⁸HEERA section 3565 provides in its entirety as follows:

Higher education employees shall have 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. Higher education employees shall also have the right to refuse to join employee organizations or to participate in the activities of these organizations subject to the organizational security provision permissible under this chapter.

higher education employer to "[i]mpose . . . reprisals on employees, to discriminate . . . or otherwise to interfere with, restrain, or coerce employees because of their exercise of [protected] rights"

In order to prove an allegation of discrimination, the charging party must first demonstrate that the aggrieved employee engaged in protected conduct. The charging party must then show that the employer knew of the employee's protected act¹⁹ and that the employer took an adverse action against the employee. The adverse action cannot be speculative but must be an actual harm. Palo Verde Unified School District (1988) PERB Decision No. 689.

Upon a showing of protected conduct and adverse action, the party alleging discrimination must then make a prima facie showing of unlawful motivation. Under Novato Unified School District (1982) PERB Decision No. 210, unlawful motivation within the meaning of section 3543.5(a) occurs where the employer's action against the employee was motivated by the employee's participation in protected conduct.²⁰

¹⁹Moreland Elementary School District (1982) PERB Decision No. 227.

²⁰Indications of unlawful motivation have been found in many aspects of an employer's conduct. Words indicating retaliatory intent can be persuasive evidence of unlawful motivation. Santa Clara Unified School District (1979) PERB Decision No. 104. Other indications of unlawful motivation have been found in an employer's: failure to follow usual procedures, Santa Clara Unified School District (1979) PERB Decision No. 104; shifting justifications and cursory investigation, State of California (Department of Parks and Recreation) (1983) PERB Decision No. 328-S; disparate treatment of a union adherent, State of California (Department of Transportation) (1984) PERB Decision No. 459-S; timing of the action, North Sacramento School District

The test adopted by the Board is consistent with other California and federal precedent. Under this precedent, the trier of fact is required to weigh both direct and circumstantial evidence to determine whether an action would not have been taken against an employee but for the exercise of protected rights. See Martori Brothers Distributors v. Agricultural Labor Relations Board (1981) 29 Cal.3d 721, 727-730 [175 Cal.Rptr. 626]; Wright Line, Inc. (1980) 251 NLRB 1083 [105 LRRM 1169] enf., in relevant part, (1st Cir. 1981) 662 F.2d 899 [108 LRRM 2513]. This test was adopted for higher education employees in California State University (1982) PERB Decision No. 211-H.

After the charging party has made a prima facie showing sufficient to support an inference of unlawful motive, the burden shifts to the respondent to produce evidence that the action "would have occurred in any event." Martori Brothers Distributors v. Agricultural Labor Relations Bd., supra. 29 Cal.3d at 730. Once employer misconduct is demonstrated, the employer's action,

. . . should not be deemed an unfair labor practice unless the board determines that the employee would have been retained "but for" his union membership or his performance of other protected activities. (Ibid.)

The University bases its primary defense on a contention that Officer Einheber did not participate in protected conduct as

(1982) PERB Decision No. 264; and pattern of antagonism toward the union, Cupertino Union Elementary School District (1986) PERB Decision No. 572.

defined in HEERA. The University argues that the filing of an individual grievance under the University's internal personnel policies is not protected conduct. Such an individual grievance, the University argues, does not meet the statutory requirement of participation in the activities of an employee organization. The University argues that the PERB has not directly ruled on the question and that the Board has specifically declared the issue to be unresolved. University of California (1987) PERB Decision No. 615-H.

Officer Einheber finds protected conduct in various grievances which he has filed under the University's internal grievance procedures. He argues that previous PERB decisions strongly imply the filing of grievances under the University's internal grievance procedure is protected activity.²¹ He finds this consistent with HEERA statutory language in which he finds specific protection for the filing of grievances. As an additional theory, he also finds protected conduct in a letter he wrote to the Berkeley campus chancellor regarding the police

²¹In support of this proposition, Officer Einheber quotes from Regents of the University of California, supra, PERB Decision No. 615-H. But his quotation of the Board's words is selective. He ignores the following comment:

. . . UC's failure in this case to except on appeal to the ALJ's finding of protected activity, and the consequent lack of briefing on this significant issue, make us unwilling to reverse those findings sua sponte. Therefore, we will assume without deciding for purposes of this case that [the Charging Party's] filing of the UC appeal pursuant to a nonnegotiated grievance procedure was protected conduct under HEERA.

review board. The letter, he argues, was written on behalf of others and was thus a form of concerted activity.

PERB decisions have afforded protection to employee grievances and complaints in two situations: 1) Where the grievance constituted participation in the activities of an employee organization, and 2) where the employee was representing himself individually in accord with a specific statutory right.

Thus, the Board has held the filing of a grievance under a collective bargaining contract to be protected. This is because the assertion of a right contained in a collective bargaining agreement "is an extension of the concerted action that produced the agreement" and its assertion "affects the rights of all employees covered by . . . the agreement." NLRB v. City Disposal Systems (1984) 465 U.S. 822, 829 [115 LRRM 3193]. See also, North Sacramento School District (1982) PERB Decision No. 264.

Here, however, there was no exclusive representative for campus police and no collective bargaining agreement at any time relevant. Officer Einheber's various grievances were filed under a University policy, not a collective agreement. Accordingly, all Board decisions affording protected status to grievances filed under contractual provisions are inapplicable to Officer Einheber's grievances.

Aside from a contractual grievance, an employee's action still might qualify as organizational activity if "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." Meyers Industries, Inc.

(1986) 281 NLRB 882 [123 LRRM 1137, 1141].²² This rationale was adopted by the PERB in Regents of the University of California (1984) PERB Decision No. 449-H. (See pp. 95-97 of the Board-adopted Administrative Law Judge's opinion.)

However, an examination of Officer Einheber's grievances shows that they were entirely personal in nature. The grievance of February 19, 1980, challenged a performance evaluation given to Officer Einheber for the last four months of 1979. The grievance of July 2, 1985, challenged the low ranking Officer Einheber received in an evaluation completed as part of a civil service examination for sergeant. The grievance of January 6, 1986, challenged the department's failure to interview Officer Einheber for a sergeant's position. Each of these grievances was filed solely by, and for, Officer Einheber himself.

In support of his assertion of protected conduct, Officer Einheber relies primarily on his August 22, 1986, letter to the Berkeley campus chancellor. This letter, he contends, was written in protest of a policy that would have affected working conditions of all police officers in the department. He argues that he showed the letter to others and wrote it with their tacit approval and overwhelmingly positive feedback.

²²The National Labor Relations Board first set out this rule in Meyers Industries, Inc. (1984) 268 NLRB 493 [115 LRRM 1025]. However, this decision was remanded to the NLRB for further consideration, Prill v. NLRB (D.C. Cir., 1985) 775 F.2d 933 [118 LRRM 2649], in light of the Supreme Court's decision in NLRB v. City Disposal Systems, supra, 465 U.S. 822 [115 LRRM 3193]. On remand, the NLRB adhered to its original conclusion about the concerted activity requirement.

Although the establishment of a review board would affect all officers, the evidence simply does not support Officer Einheber's assertion that his letter was written on behalf of others. Sergeant Powell, upon whom Officer Einheber relies, specifically testified that Officer Einheber wrote the letter to set out his "personal" views. Moreover, Officer Einheber's contemporaneous statements contradict his present contention that he was acting on behalf of others. In Officer Einheber's own words, nothing in the letter "should be construed to represent other than my own personal opinion." I conclude that the letter was nothing other than an expression of views by a single individual. Like the safety protest of an individual employee in Meyers Industries, supra, Officer Einheber's letter to the Berkeley campus chancellor was not protected conduct.²³

Where employee acts do not qualify as protected organizational activities, they sometimes are held to be protected self-representation. For example, an individual employee's complaints about job safety were held to be protected in Pleasant Valley School District (1988) PERB Decision No. 708. But Pleasant Valley, the Board's primary decision in this area, relies entirely on statutory construction. Under the wording of the protected rights clause of the Educational Employment

²³It is clear, also, that Officer Einheber's 1985 complaint to the EEOC was not protected conduct under the HEERA. See University of California, supra, PERB Decision No. 615-H where a complaint to the State Department of Fair Employment and Housing was held to be unprotected under the HEERA.

Relations Act,²⁴ the Board held that the employee had a protected right to self-representation. A similar right is set out in the Dills Act, the collective bargaining law for state employees.²⁵

Because of the unique wording of the protected rights section of HEERA, Officer Einheber can find no protection under a theory of self-representation. Although HEERA protects employees who seek union representation in the University's grievance

²⁴Educational Employment Relations Act section 3543 provides in relevant part:

Public school employees shall have 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. Public school employees shall also have the right to . . . represent themselves individually in their employment relations with the public school employer, except that once the employees in an appropriate unit have selected an exclusive representative and it has been recognized pursuant to Section 3544.1 or certified pursuant to Section 3544.7, no employee in that unit may meet and negotiate with the public school employer. [Emphasis supplied.]

²⁵Section 3515 of the Dills Act provides in relevant part as follows:

Except as otherwise provided by the Legislature, state employees shall have 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. . . . In any event, state employees shall have the right to represent themselves individually in their employment relations with the state. [Emphasis supplied.]

procedure,²⁶ section 3565 sets out no separate right for employees to represent themselves, individually.²⁷ A related provision, section 3567,²⁸ upon which Officer Einheber relies, assures individual employees of a right to file grievances without the interference of the exclusive representative. Apparently modeled after a proviso in National Labor Relations Act section 9(a),²⁹ section 3567 is very limited in purpose. Its

²⁶ Regents of the University of California (Berkeley) (1983) PERB Decision No. 308-H.

²⁷ See footnote no. 18, supra.

²⁸ HEERA section 3567 provides 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.

²⁹ National Labor Relations Act (NLRA) section 9(a) provides in relevant part as follows:

. . . Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment.

sole purpose is to define the right of an individual to act separately from the union. It cannot be read, as Officer Einheber argues, to set out a specific protected right separate from those identified in HEERA section 3565.³⁰

The omission from HEERA of provisions found in the EERA and the Dills Act is not to be treated lightly. Such omissions are "strong evidence of a contrary legislative intent." Regents of the University of California v. Public Employment Relations Board (1985) 168 Cal.App.3d 937, 945 [214 Cal.Rptr. 698]. The omission of a right of self-representation from HEERA means that the statute affords no protection against reprisal to employees who engage in self-representation.

For these reasons I find that Officer Einheber has failed to sustain the burden of showing that he engaged in conduct protected by the HEERA. Accordingly, his charge and companion complaint must be dismissed for failure to establish a prima facie case. It is unnecessary, therefore, to consider the issue of employer motivation or other University defenses.

PROPOSED ORDER

Based upon the foregoing findings of fact and conclusions of law and the entire record in this matter, unfair practice charge

³⁰The Supreme Court has limited the application of the Section 9(a) provision, by reading its intent narrowly. The Court finds the provision an authorization for an employer to entertain grievances from individual-employees without liability for bypassing the exclusive representative. "The Act nowhere protects this 'right' by making it an unfair labor practice for an employer to refuse to entertain such a presentation" Emporium Capwell Co. v. Western Addition Community Organization (1975) 420 U.S. 50, 61 [88 LRRM 2660].

SF-CE-258-H, Jack Einheber v. Regents of the University of California, and the companion PERB complaint are hereby DISMISSED.

Pursuant to California Administrative Code, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the Board itself at the headquarters office in Sacramento within 20 days of service of this Decision. 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. See California Administrative Code, title 8, section 32300. A document is considered "filed" when actually received before the close of business (5:00 p.m.) on the last day set for filing ". . . or when sent by telegraph or certified or Express United States mail, postmarked not later than the last day set for filing" See California Administrative Code, title 8, section 32135. Code of Civil Procedure section 1013 shall apply. 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 California Administrative Code, title 8, sections 32300, 32305 and 32140.

Dated: October 22, 1990

RONALD E. BLUBAUGH
Administrative Law Judge