

1 STEPHEN MALLOY
2 2200 Jackson Street
3 San Francisco, CA 94115
4 (310) 428-7005

5 STEPHEN MALLOY, IN PRO PER

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8 IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
9 THE FIRST APPELLATE DISTRICT
10 DIVISION THREE
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14 STEPHEN MALLOY,) Case No.: Pending
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16 Plaintiff,) PETITION FOR REVIEW AND
17) PETITION FOR REHEARING OF
18 vs.) DECEMBER 11, 2024
19)
20) PERB INTERLOCUTORY ORDER OF
21 PERB,) **SUMMARY JUDGEMENT DENIAL IN**
22) COMPLIANCE WITH CRC 8.500
23)
24 Defendant)
25 Hearing Judge: Pending

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1. January 9, 2020, PERB granted a Prima Facie Unfair Practice Charge (UPC) to Charging Party v. his Employer the University of CA Regents with Case SF-CE-1221-H.

See Exhibit 1.

2. December 2, 2024, PERB filed Charging Party's Motion of Summary Judgement.

See Exhibit 2.

1 3. Charging Party's Motion for Summary Judgement was in compliance
2 with PERB Regulation 32190:

3 "Motions. (a) After a complaint has been issued, written motions
4 made before, during or after a formal hearing shall be filed with
5 the Board agent assigned to the proceeding. Service and proof of
6 service pursuant to Section 32140 are required. (1) Motions to
7 strike an allegation, to defer a case to arbitration, or to dismiss
8 or partially dismiss a complaint, including motions styled as
9 motions for summary judgment or for judgment on the pleadings..."

10
11 *See Table of Authority 1.*

12 4. Charging Party's Motion for Summary Judgement was in compliance
13 with PERB Regulation 32602-32606. Processing Violations of HERRA,
14 MMBA and the Trial Court Act.

15 *See Table of Authority 2.*

16
17 5. December 11, 2024 PERB Order by ALJ Cu, denied Charging Party's
18 Motion and right to Summary Judgement.

19 *See Exhibit 3.*

20 6. Per PERB Regulation 32207. Hearings.

21 "The parties may submit stipulated facts where appropriate to the
22 Board agent. No hearing shall be required unless the parties
23 dispute the facts in the case."
24

1 PETITION ARGUMENT STATEMENT

2 1. Charging Party complied with PERB Regulation 32140 Motion for
3 Summary Judgement on December 2, 2024 before PERB.

4 *See Exhibit 2.*

5 2. Charging Party further complied with PERB Regulation 32602-32606
6 for processing UPC violations of HERRA, MMBA and the Trial Court
7 Act in his Motion for Summary Judgement.

8 *See Exhibit 2.*

9
10 3. PERB issued under Regulation 32602 the processing of Prima
11 Facie Unfair Practice Charges against Charging Party's Employer the
12 Univ. of CA Regents on January 9, 2020 Case SF-CE-1221-H.

13 *See Exhibit 1.*

14 4. Charging Party complied with Per PERB Regulation 32207. Hearings.
15 "The parties may submit stipulated facts where appropriate to the
16 Board agent. No hearing shall be required unless the parties
17 dispute the facts in the case."

18
19 * Respondent did not dispute the facts of the case when Charging
20 Party filed his Motion for Summary Judgement on December 2, 2024;
21 or when CALJ Cu issued his denial order on December 11, 2024.

22 Accordingly, here to Respondent's choice to not dispute the
23 Stipulated facts Charging Party filed with his Motion of Summary
24 Judgement calls for CALJ to either grant or dismiss. *

25 *See Table of Authority 3.*

1 PETITION GROUNDS FOR REVIEW

- 2 1. It is important that State of California, that when CA State HERRA
3 Employers like the UC Regents commit Unfair Labor Practices
4 of stipulated facts, that are not contested by the employer,
5 that summary judgement is allowed as cited in the herein
6 statutory authorities.
7
8 2. Therefore, with Charging Party's compliance with applicable PERB
9 Regulations governing the processing of Prima Facie Unfair Labor
10 Practice Charges, as Motion for Summary Judgement.
11
12 3. Charging Party respectfully request the important application of
13 Statutory State Laws by 1DCA Order to PERB granting the
14 Motion for Summary Judgement.

15 EXHIBITS

- 16 1. See *Exhibit 1*: January 9, 2020, PERB granted a Prima Facie Unfair
17 Practice Charge (UPC) to Charging Party v. his Employer the
18 University of CA Regents with Case SF-CE-1221-H.
19 2. See *Exhibit 2*: December 2, 2024, PERB filed Charging Party's Motion
20 of Summary Judgement.
21 3. See *Exhibit 3*: December 11, 2024 PERB Order by ALJ Cu, denied
22 Charging Party's Motion and right to Summary Judgement.

23 Statutory Authorities

- 24 1. PERB Regulation 32190. Summary Judgement Motions.
25 2. PERB Regulation 32602-32606. Processing Violations of HERRA, MMBA
26 and the Trial Court Act.
27 3. PERB Regulation 32207. Hearings. No Hearing. Stipulated facts of
28 Summary Judgement. No Dispute of the Facts.

DATED: December 21, 2024


STEPHEN MALLOY
In Pro Per

1 STEPHEN MALLOY
2 2200 Jackson Street
3 San Francisco, CA 94115
4 (310)428-7005

5
6 STEPHEN MALLOY, IN PRO PER

7 IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
8 THE FIRST APPELLATE DISTRICT
9 DIVISION THREE

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12 STEPHEN MALLOY,
13 Plaintiff,
14 vs.
15 PERB,
16 Defendant

) Case No.: Pending
)
) ORDER FOR PUBLICATION OF
) OPINION IN COMPLIANCE WITH CRC
) 8.500
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19 1DCA Court hereby grants Charging Party's Motion for Summary
20 Judgement in PERB UPC Case SF-CE-1221-H.
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24 DATED:

25 _____
26 1DCA COURT
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EXHIBIT 1

January 9, 2020, PERB granted a Prima Facie Unfair Practice Charge(UPC)to Charging Party v. his Employer the University of CA Regents with Case SF-CE-1221-H.

STATE OF CALIFORNIA

PUBLIC EMPLOYMENT RELATIONS BOARD



STEPHEN MALLOY,

Charging Party,

v.

REGENTS OF THE UNIVERSITY OF
CALIFORNIA,

Respondent.

Case No. SF-CE-1221-H

COMPLAINT

It having been charged by Charging Party that Respondent engaged in unfair practices in violation of Government Code section 3571, the General Counsel of the Public Employment Relations Board (PERB), pursuant to Government Code sections 3563(h) and 3563.2 and California Code of Regulations, title 8, section 32640, issues this COMPLAINT on behalf of PERB and ALLEGES:

1. Charging Party is an employee within the meaning of Government Code section 3562(e).
2. Respondent is an employer within the meaning of Government Code section 3562(g).
3. On or about August 17, 2018, Charging Party exercised rights guaranteed by the Higher Education Employer-Employee Relations Act by reporting the use of abusive and offensive language toward fellow staff of the Medical Respite Sobering Center.
4. On or about September 7, 2018, Charging Party exercised rights guaranteed by the Higher Education Employer-Employee Relations Act by reporting the use of abusive and offensive language toward fellow staff of the Medical Respite Sobering Center.

5. On or about September 27, 2018, Charging Party exercised rights guaranteed by the Higher Education Employer-Employee Relations Act by discussing working conditions with fellow staff of the Medical Respite Sobering Center.

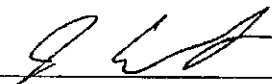
6. On or about October 10, 2018, Respondent, acting through its agent Valerie Gruber, took adverse action against Charging Party by releasing him from his probationary employment.

7. Respondent took the actions described in paragraph 6 because of Charging Party's activities described in paragraphs 3, 4, and 5, and thus violated Government Code section 3571(a).

Any amendment to the complaint shall be processed pursuant to California Code of Regulations, title 8, sections 32647 and 32648.

DATED: January 9, 2020

J. Felix De La Torre
General Counsel

By 

Joseph Eckhart
Senior Regional Attorney

PROOF OF SERVICE

I declare that I am a resident of or employed in the County of Alameda, California. I am over the age of 18 years and not a party to the within entitled cause. The name and address of my residence or business is Public Employment Relations Board, San Francisco Regional Office, 1330 Broadway, Suite 1532, Oakland, CA, 94612.

On January 9, 2020, I served the Complaint Cover Letter regarding Case No. SF-CE-1221-H on the parties listed below by

- Placing a true copy thereof enclosed in a sealed envelope for collection and delivery by the United States Postal Service or private delivery service following ordinary business practices with postage or other costs prepaid.
 Personal delivery.
 Facsimile transmission in accordance with the requirements of PERB regulations 32090 and 32135(d).
 Electronic service (e-mail).

Marcie Isom Fitzsimmons, Attorney
Gordon Rees Scully Mansukhani LLP
275 Battery Street, Suite 2000
San Francisco, CA 94111

Stephen Malloy
2825 Van Ness Ave., #7
San Francisco, CA 94109

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on January 9, 2020, at Oakland, California.

Charisse Diaz
(Type or print name)


(Signature)

EXHIBIT 2

December 2, 2024, PERB filed Charging Party's Motion of
Summary Judgement.

PERB Received
11/30/24 23:46 PM

PERB Filed
12/02/24

DATE:
11-30-2024

FILED FROM:
Stephen Malloy
2200 Jackson Street, #305
San Francisco, CA 94115
(for Charging Party)

TO:
PERB ALJ Eric Cu
Los Angeles Regional Office
425 W. Broadway, Suite 400
Glendale, CA, 91204-1269
Telephone: (818) 551-2822
eric.cu@perb.ca.gov

Susan Garea, Attorney for Teamsters Local 2010 with Beeson, Tayer & Bodine as
Charging Party's Representation Jurisdiction as UC Professional Patient Navigator
II
492 Ninth Street, Suite 350
Oakland, CA 94607
Phone: **510-267-6326**
(for Teamsters Local 2010)
sgarea@beesontayer.com

Marcie Isom Fitzsimmons, Attorney
Gordon Rees Scully Mansukhani LLP
275 Battery Street, Suite 2000
San Francisco, CA 94111
(for Respondent)
misom@grsm.com

CASE:
SF-CE-1221-H, Malloy v. UC Regents

RE: PERB Regulation 32190(a)(1); Motion for Summary Judgement

ALJ Cu,

- 1) Charging Party submits this motion for Summary Judgement; per PERB Regulation 32190(a)(1). Motion. Summary Judgement.
- 2) Charging Party is an employee within the meaning of Government Code section 3562(e).
- 3) Respondent the UC Regents is an employer within the meaning of Government Code section 3562(g).
- 4) On or about August 17, 2018, Respondent Work Product Material Evidence: *See Abuse Email 1, located in Case Docket #5 (UPC 10/25/2019, Pages 153-154 of 274).*

Charging Party exercised rights guaranteed by the Higher Education Employer-Employee Relations Act by reporting the use of abusive conduct and offensive language, in violation of applicable UC Policies cited herein; toward charging party and fellow staff of the Medical Respite Sobering Center.

- 5) On or about August 17, 2018; Charging Party complied with respondent UC Regent's work policy requirements and exercised his guaranteed right to report an abusive work environment for him and his fellow staff.

Respondent Work Product Material Evidence: *See Personnel Record (CIPA 018-119 HR Record, Pages 32-42 of 111)* of Charging Party.

It contains Respondent's guaranteed work policy rights, for charging party to comply & report an abusive work environment.

This material fact and evidence is documented with charging party's personnel record See Pages 32-42 of 111 for the job period in question; the key ones are:

- A) Mandated Reporter UC Policy
- B) Zero Tolerance of Hostile Workplace UC Policy
- C) Workplace Violence and Bullying UC Policy
- D) Abusive Conduct
- E) Harassment UC Policy
- F) Affirmative Action UC Policy
- G) Affiliation Agreement UC Policy
- H) Probation Policy PPSM-22

I) Job Termination UC Policy

- 6) On or about September 7, 2018, Respondent Work Product Material Evidence: *See Abuse Email 2, located in Case Docket #5 (UPC 10/25/2019, Page 171 of 274).*

Charging Party exercised rights guaranteed by the Higher Education Employer-Employee Relations Act by reporting the use of abusive conduct and offensive language, in violation of applicable UC Policies cited herein; toward charging party and fellow staff of the Medical Respite Sobering Center.

- 7) On or about September 7, 2018, Charging Party complied with respondent UC Regent's work policy requirements and exercised his guaranteed right to report an abusive work environment for him and his fellow staff.

Respondent Work Product Material Evidence: *See Personnel Record (CIPA 018-119 HR Record, Pages 32-42 of 111).*

- 8) On or about September 27, 2018, Charging Party exercised rights guaranteed by the Higher Education Employer-Employee Relations Act by discussing unsafe, abusive, working conditions that were occurring as outlined, *See Docket 5, UPC Abuse Emails 1 & 2;* toward charging party and fellow staff at his worksite the Medical Respite Sobering Center

Charging Party complied with respondent UC Regent's work policy requirements cited herein; and exercised his guaranteed right to report an abusive work environment for him and his fellow staff.

- 9) On or about September 28, 2018, State HERRA Respondent's UC Managers Supervisor Valerie Gruber, Dir. Fumi Mitsuishi and HR Admin. Connie Revore; in violation of: *PERB Regulation 32604(a)(b)(e); and Govt. Code 3571(a)(b)(c)(d) & (f).*

Acted through its MMBA Agent, City Dept. of Public Health (DPH), Dir. of Operations Darryl Gault to do a unfair practice and coerce, investigate & expel as an adverse action against HERRA Charging Party; from his worksite at Medical Respite Sobering Center.

Respondent admits this material fact. *See Case Docket #9, 11/27/2019, Respondent Position Statement.*

- 10) On or about October 02, 2018, Respondent's UC Managers Supervisor Valerie Gruber, Dir. Fumi Mitsuishi and HR Admin. Connie Revore - in Temporal Proximity - to Charging Party's August 17, 2024, September 17, 2024 and September 27, 2024 exercise of guaranteed rights to report an abusive work environment; departed from HERRA Probation Policy PPSM-22 in extending charging party's original permanent job award date of October 2, 2024.

By taking adverse action of not providing Charging Party the required 7 day written notice and reason for.

October 10, 2018, took adverse action against Charging Party by releasing him from probationary employment.

Respondent admits this material fact. *See Case Docket #9, 11/27/2019, Respondent Position Statement Exhibits of Charging Party Oct, 2 & Oct. 10, 2018 Probation Letters.*

- 11) On or about October 03, 2018, State HERRA Respondent's UC Managers Supervisor Valerie Gruber, Dir. Fumi Mitsuishi and HR Admin. Connie Revore; in violation of: *PERB Regulation 32604(a)(b)(e); and Govt. Code 3571(a)(b)(c)(d) & (f).*

Acted through its MMBA Agent, DPH EEO Manager Hallie B. Albert to do a unfair practice and coerce, transfer UC Regent personnel administration via Albert's business card, coercion by MMBA City EEO Policy and unlawful conduct of investigation as an adverse action against HERRA Charging Party.

Respondent admits this material fact. *See Case Docket #9, 11/27/2019, Respondent Position Statement.*

- 12) On or about October 11, 2018, State HERRA Respondent's UC Managers Supervisor Valerie Gruber, Dir. Fumi Mitsuishi and HR Admin. Connie Revore; then failed to exercise their duty and responsibility as UC Regent Agents to conduct the required HR Investigation under afore mentioned personnel record UC Policy with and on behalf of Charging Party – at time of each incident of abusive conduct in the workplace.

The UC HR failure was negliable and caused the unfair practice.

- 13) Respondent took the actions described in paragraph 6 because of Charging Party's activities described in paragraphs 3, 4, and 5, and thus *violated Government Code section 3571(a)(b)(c)(d) & (f)*.

s/[SGM]
Stephen Malloy
Charging Party

EXHIBIT 3

December 11, 2024 PERB Order by ALJ Cu, denied Charging
Party's Motion and right to Summary Judgement



STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

STEPHEN MALLOY,

Charging Party,

v.

REGENTS OF THE UNIVERSITY OF
CALIFORNIA (SAN FRANCISCO),

Respondent.

UNFAIR PRACTICE
CASE NO. SF-CE-1221-H

ORDER DENYING CHARGING
PARTY'S MOTION FOR
DEFERRAL TO ARBITRATION
AND MOTION FOR SUMMARY
JUDGMENT

INTRODUCTION

This Order addresses both Charging Party Stephen Malloy's "Motion; to defer case arbitration" and his "Motion for Summary Judgment," which were both considered filed as of December 2, 2024. Both motions are opposed by Respondent Regents of the University of California (San Francisco) (University). For the reasons specified below, both motions are DENIED.

RELEVANT PROCEDURAL HISTORY

On April 9, 2019, Malloy filed the instant unfair practice charge (UPC) with the Public Employment Relations Board (PERB or Board) against the University. On January 9, 2020, the OGC issued a Complaint on Malloy's behalf alleging that the University, acting through its agent Valerie Gruber, released Malloy from probation because Malloy engaged in activities protected under the Higher Education Employer-Employee Relations Act (HEERA).¹ On January 28, 2020, the University filed an Answer to the PERB Complaint, denying all allegations except that the University is a

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

higher education employer, that it once employed Malloy, and that it released him from probation. The Answer also asserted 16 affirmative defenses, including that releasing Malloy from probation was justified by legitimate, non-retaliatory, reasons.

On November 25, 2025, PERB issued a First Amended Complaint, adding the allegations that Hallie B. Albert and Alice Moughamian were agents of the University who played some role in the decision to release Malloy from probation.

On the evening of Saturday, November 30, 2024, Malloy submitted through the ePERB filing system a "Motion; to defer case arbitration" (Deferral Motion), claiming that "Charging Party's employment with respondent includes alternative dispute/arbitration provisions" and arguing that the retaliation claim in this case should be deferred to "final and binding arbitration." Later that evening, Malloy also submitted through ePERB a "Motion for Summary Judgment" (Summary Judgment Motion) arguing that Malloy should prevail in this case based on undisputed facts. Since both documents were submitted over the weekend, PERB considered the motions to be filed on Monday, December 2, 2024. (See PERB Reg. 32110, subs. (f).)²

On December 4, 2024, the University filed a single response to both motions, disputing both that the claims in this case are subject to any binding arbitration process or that the material facts in this case are undisputed.

On December 5, 2024, the University filed an Amended Answer to the First Amended Complaint, repeating all its previous denials and affirmative defenses. The Amended Answer also denied all of the newly added allegations.

² PERB Regulation 32110, subsection (f) states, in relevant part: "[A]ll documents electronically filed after 11:59 p.m. on a business day, or at any time on a non-business day, will be deemed filed the next regular PERB business day."

DISCUSSION

1. The Deferral Motion

Before addressing the merits of Malloy's Deferral Motion, I find it necessary to briefly discuss the timing of that motion. After the OGC issues a complaint in a UPC case, PERB Regulation 32190, subsection (a) permits parties to file written motions "before, during or after a formal hearing[.]" Subsection (a)(1) includes specific timelines for filing certain motions. That subsection states:

"Motions to strike an allegation, *to defer a case to arbitration*, or to dismiss or partially dismiss a complaint, including motions styled as motions for summary judgment or for judgment on the pleadings, must be filed with the Board agent assigned to the proceeding no later than forty-five (45) days prior to the first day of the scheduled formal hearing, unless otherwise ordered by the Board. Service and proof of service pursuant to Section 32140 are required."

(Emphasis supplied.)

The first day of the formal hearing in this case is set to commence on January 14, 2025. Forty-five days before January 14, 2025 is Saturday, November 30, 2024. Since the filing deadline fell on a weekend, the last day to file a motion to defer this case to arbitration is automatically extended to December 2, 2024. (See PERB Reg. 32130, subs. (b).)³ Since Malloy's Deferral Motion was considered filed on December 2, 2024, it is timely.

PERB has exclusive initial jurisdiction to investigate and determine whether

³ PERB Regulation 32130, subsection (b), states in relevant part: "Whenever the last date to file a document falls on Saturday, Sunday, or a holiday, as defined in Government Code Sections 6700 and 6701, or PERB offices are closed, the time period for filing shall be extended to and include the next regular PERB business day."

allegations of unfair practices under HEERA are justified, and, if so, to exercise its broad authority to determine what remedies are appropriate to effectuate the purposes of HEERA. (HEERA, §§ 3563, subd. (h); 3563.2; 3563.3.) Unlike with other collective bargaining statutes that PERB enforces, HEERA has no specific terms addressing the Board's discretionary authority to defer unfair practice allegations to collectively bargained grievance and arbitration procedures. (See, e.g., Gov. Code, §§ 3505.8 [Meyers-Milias-Brown Act]; 3514.5, subd. (a)(2) [Ralph C. Dills Act]; 3541.5, subd. (a)(2) [Educational Employment Relations Act or EERA].) Nevertheless, through decisional law, PERB has applied its pre-arbitral deferral policy under HEERA using standards developed in the private sector and codified in EERA and other PERB-administered statutes. (*Trustees of the California State University (Stanislaus)* (2004) PERB Decision No. 1659-H, pp. 7, 9 [applying private-sector standards under *Collyer Insulated Wire* (1971) 192 NLRB 837]; *Regents of the University of California (San Francisco)* (1984) PERB Order No. Ad-139-H, pp. 2-3.)

PERB Regulation 32620, subsection (b)(6), requires that a UPC alleging HEERA violations should be placed in abeyance if it is "subject to deferral to final and binding arbitration pursuant to a collective bargaining agreement," and that it be dismissed "at the conclusion of the arbitration process unless the charging party demonstrates that the settlement or arbitration award is repugnant to the purposes of ... HEERA."

The moving party has the burden of proving that a case is subject to deferral to a negotiated arbitration procedure. (*Santa Ana Unified School District* (2013) PERB Decision No. 2332, p. 27; *City of Burbank, supra*, PERB Decision No. 1988-M, pp. 19-20.) To meet its burden for pre-arbitral deferral, the moving party must establish that:

(1) the dispute arises within a stable collective bargaining relationship; (2) the parties are willing to waive all procedural defenses and proceed to arbitration on the merits of the dispute; (3) the contract and its meaning lie at the center of the dispute; and (4) no recognized exception to deferral applies. (*Oxnard Union High School District* (2022) PERB Decision No. 2803, p. 53; *Department of Corrections, supra*, PERB Decision No. 1967-S, pp. 31-32, citing *Dry Creek Joint Elementary School District* (1980) PERB Order No. 81a.)

In this case, Malloy contends that the University has an “alternative dispute/arbitration” process, but Malloy has not either provided a copy of that procedure or described it in his Deferral Motion. The University disputes that such a process exists. There is accordingly insufficient evidence to conclude that any of these four required elements have been satisfied. First, without knowing anything about the terms of the claimed arbitration process, it remains unclear whether that process was the product of negotiations with the University, and if so, by whom. Thus, I cannot determine whether the University has a stable bargaining relationship with the entity that negotiated the alleged arbitration process.

Second, Malloy has not established that the University is willing to arbitrate the merits of the claims alleged in the PERB Complaint. On the contrary, the University has stated in its response to Malloy’s motions that opposes arbitrating this matter.

Third, without information about the terms or the scope of the claimed “alternative dispute/arbitration” process, Malloy has not established that the claims in the PERB complaint are subject to arbitration.

Fourth, due to the total lack of details regarding the alleged agreement at issue

or the alleged “alternative dispute/arbitration” process, I cannot determine whether any exception to deferral applies here.

All four of these elements are required to demonstrate that a dispute is subject to deferral to arbitration and Malloy has not established any of them in this case. Therefore, Malloy’s Deferral Motion is DENIED.

2. Summary Judgment Motion

PERB Regulations do not preclude parties from filing motions for summary judgment. (See PERB Reg. 32190, subs. (a); see generally *Eastern Municipal Water District* (2020) PERB Decision No. 2715-M, p. 11; *San Diego Unified School District* (1987) PERB Decision No. 610 (*San Diego USD*), pp. 1-2.) Although PERB Regulation 32190, subsection (a)(1) governs the timing of motions “to dismiss or partially dismiss a complaint, including motions styled as motions for summary judgment or for judgment on the pleadings,” it does not include any specific timeline for a *charging party’s motion* for summary judgment, which does not seek dismissal of any claims in the complaint. In the absence of such restrictions, PERB Regulation 32190, subsection (a) generally permits Malloy to bring motions “before, during or after a formal hearing[.]”

PERB has not either adopted its own formal summary judgment procedures or formally adopted the filing process from the Code of Civil Procedure. (*Santa Ana Unified School District* (2017) PERB Decision No. 2514 (*Santa Ana USD*), pp. 26-27, citing *San Diego USD, supra*, PERB Decision No. 610, pp. 2-5.) In general, PERB considers summary judgment to be available on a pre-hearing basis, where there are no material facts in dispute and where the uncontroverted facts demonstrate that the

moving party should prevail as a matter of law. (*Santa Ana USD*, pp. 26-27; *San Diego USD*, pp. 3-5.)

In this case, Malloy contends that summary judgment should be granted in his favor based on what he claims to be undisputed facts contained in his amended UPC, filed on October 25, 2019, something Malloy refers to as “Personnel Record (CIPA 018-119 HR Record,”⁴ and the University’s amended position statement filed on November 27, 2019. However, other than the allegations that the University is a higher education employer, that Malloy was once employed by the University, and that the University released Malloy from probationary employment, I find that all of the remaining factual claims asserted in the Summary Judgment Motion are either disputed by the University or too conclusory or unclear to support Malloy’s Summary Judgment Motion.

For example, citing to his UPC, Malloy contends that it is undisputed that he engaged in activity protected under HEERA by reporting unsafe and abusive working conditions to the University. Even if it were true that the University did not dispute that Malloy sent e-mails and spoke during meetings about topics that are traditionally protected under HEERA, it would not necessarily mean that those actions constitute protected speech. Employees and union representatives have the protected right to speak about labor and employment issues. (*Sunline Transit Agency* (2024) PERB Decision No. 2928-M, p. 18, citing *Mt. San Jacinto Community College District* (2023) PERB Decision No. 2865 (*Mt. San Jacinto CCD*), p. 18.) Such speech activity retains

⁴ It is unclear what document this is. Malloy did not attach it to his Summary Judgment Motion and none of the more than 200 (sealed and unsealed) documents filed or issued in this case bare that name. Malloy does not specify whether this document is attached to any of the documents filed thus far.

its protected status, even if it is “intemperate, disparaging, or inaccurate, or engenders ill feelings and strong responses,” unless the employer can prove that the speech was “maliciously dishonest or so insubordinate or flagrant as to create a substantial disruption or the serious risk thereof.” (*Sunline Transit Agency*, p. 18, citing *Mt. San Jacinto CCD*, pp. 21-22.) Resolving claims where the employer contends that an employee’s speech activity was flagrant or insubordinate requires a “fact-intensive inquiry” that considers many factors including, but not limited to:

“(1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of what occurred; and (4) the extent to which the speech or conduct at issue can fairly be said to have been provoked by the employer.”

(*Sunline Transit Agency*, p. 19, citing *Mt. San Jacinto CCD*, p. 22.)

In this case, the facts asserted in the Summary Judgment Motion do not provide enough information to perform the “fact-intensive inquiry” needed to resolve whether Malloy’s various communications with the University were protected under HEERA or whether any statements on protected subjects lost their protection because of manner in which they were communicated. Therefore, I reject Malloy’s claim that there is no factual dispute over whether he engaged in protected activity.

The Summary Judgment Motion also asserts that Daryl Gault, alleged to be a University agent, improperly expelled Malloy from his worksite on September 28, 2018. I find no support for the conclusion that the University admits that Gault, who Malloy acknowledges is an employee of the City and County of San Francisco, is an agent of the University. Nor do I have any basis for concluding that the University admits that Malloy was “expelled” from his workplace. Since Malloy has not shown that these factual assertions are undisputed, I do not conclude that these allegations

support Malloy's Summary Judgment Motion.

The Summary Judgment Motion also contends that, on October 2, 2018, that the University violated its PPSM-22 policy by extending his probationary period without providing adequate notice. During the investigation of Malloy's UPC, the University disputed that it violated PPSM-22. The Summary Judgment Motion provides no basis for rejecting the University's position. Accordingly, since this factual assertion is disputed, I do not conclude that it supports Malloy's Summary Judgment Motion.

Malloy also contends that on October 3, 2018, the University, through "DPH EEO Manager Hallie B. Albert to do a[n] unfair practice and coerce, transfer UC Regent personnel administration via Albert's business card, coercion by MMBA City EEO Policy and unlawful conduct of investigation[.]" It is unclear what this allegation is asserting, but in any event, the University disputes in its Amended Answer to the First Amended Complaint that Albert is an agent of the University. Since this factual assertion is disputed, I do not conclude that it supports Malloy's Summary Judgment Motion.

Malloy also contends that on October 11, 2018, University representatives "failed to exercise their duty and responsibility as UC Regent Agents to conduct the required HR Investigation under afore[.]mentioned personnel record UC Policy with and on behalf of Charging Party[.]" This allegation is too conclusory to support Malloy's Summary Judgment Motion. During the investigation of Malloy's UPC, the University denied any violation of its policies. Malloy has not alleged what terms from the "personnel record UC Policy" applied here and how the University failed to adhere

to those terms. I accordingly do not find that this assertion supports Malloy's Summary Judgment Motion.

Finally, even assuming that all of the factual assertions in Malloy's Summary Judgment Motion were undisputed, and further assuming that those assertions suggest retaliation under HEERA, this would, at most, tend to show that Malloy has stated a prima facie case for a violation under HEERA section 3571, subdivision (a). Malloy's Summary Judgment Motion makes no effort to address any of the numerous affirmative defenses asserted by the University in its Answer to the PERB Complaint.⁵

If a charging party establishes all the elements of a prima facie case for unlawful retaliation, then one available affirmative defense that employer may attempt to prove is that it acted for non-retaliatory reasons. (*Regents of the University of California* (2020) PERB Decision No. 2704-H (*UC Regents*), pp. 41-42, citing *NLRB v. Transportation Management Corp.* (1983) 462 U.S. 393, pp. 395-402; *Martori Brothers Distributors v. Agricultural Labor Relations Bd.* (1981) 29 Cal.3d 721, pp. 729-730; *Wright Line* (1980) 251 NLRB 1083, 1089.) This defense may be available even if the charging party puts forward direct evidence that the employer's actions were motivated by the employee's protected activity. (*Regents of the University of California* (2012) PERB Decision No. 2302-H, p. 4.) The employer has the burden of both pleading and proving this affirmative defense. (*Los Angeles Unified School District* (2014) PERB Decision No. 2359, p. 3.) To satisfy its burden of proof, the employer must show both that it had a legitimate, non-retaliatory reason for taking the

⁵ Malloy filed his Summary Judgment Motion on December 2, 2024, before the University filed its Amended Answer to the First Amended Complaint on December 5, 2024. However, the Amended Answer does not contain any affirmative defenses that were not already asserted its initial Answer, filed on January 28, 2020.

adverse action and that proffered reason was the actual motivation for the adverse action. (*UC Regents*, p. 42, citing *Cabrillo Community College District (2015) PERB Decision No. 2453*, p. 12.)

In this case, the eleventh affirmative defense alleged in the University's Answer states that:

"Charging Party is not entitled to relief because Respondent's actions were reasonable in response to a legitimate business necessity, and were taken for legitimate, non-discriminatory and non-retaliatory reasons and/or as a result of business necessity."

Thus, even assuming that Malloy established a prima facie case for unlawful retaliation under HEERA, the University would still have the opportunity to put forward evidence and argument concerning its affirmative defense that it acted for non-retaliatory reasons. Nothing in the Summary Judgment Motion demonstrates either that undisputed facts disprove this affirmative defense or that the University's defenses cannot be established as a matter of law. For this additional reason, I conclude that summary judgment in Malloy's favor is not warranted here.

For all of these reasons, Malloy's Summary Judgment Motion is DENIED.

DATE: December 11, 2024



Eric J. Cu
Chief Administrative Law Judge

Document received by the CA 1st District Court of Appeal.

PROOF OF SERVICE

I declare that I am a resident of or employed in the County of Los Angeles, California. I am over the age of 18 years and not a party to the within entitled cause. The name and address of my residence or business is Public Employment Relations Board, Los Angeles Regional Office, 425 W. Broadway, Suite 400, Glendale, CA, 91204-1269.

On December 11, 2024, I served the Order regarding Case No. SF-CE-1221-H on the parties listed below by

 I am personally and readily familiar with the business practice of the Public Employment Relations Board for collection and processing of correspondence for mailing with the United States Postal Service, and I caused such envelope(s) with postage thereon fully prepaid to be placed in the United States Postal Service at Los Angeles, California.

 Personal delivery.

 X Electronic service (e-mail).

Stephen Malloy
2200 Jackson Street, #305
San Francisco, CA 94115
Email:
POCdisabledveteranadvocate@gmail.com

Annette L. Rose, Attorney
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Gordon Rees Scully Mansukhani LLP
275 Battery Street, Suite 2000
San Francisco, CA 94111
Email: misom@grsm.com

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on December 11, 2024, at Glendale, California.

Eric J. Cu

(Type or print name)



(Signature)

Document received by the CA 1st District Court of Appeal.

STATUTORY AUTHORITIES

AUTHORITY 1

PERB Regulation 32190. Summary Judgement Motions

testimonial evidence and to call, examine, and cross-examine witnesses and introduce documentary and other evidence on the issues.

(c) The Board agent conducting a hearing shall determine the location of the hearing and whether parties, representatives, and witnesses shall participate in a hearing in person, telephonically, by video, or a combination thereof.

32185. Ex Parte Communications.

(a) No party to a formal hearing before the Board on an unfair practice complaint shall, outside the hearing of the other parties, orally communicate about the merits of the matter at issue with the Board agent presiding. Nor shall any party to a formal hearing communicate in writing with the Board agent presiding without providing a copy of the writing to the other parties.

(b) A Board agent who receives such an ex parte communication shall state on the record that the communication was made, identify the person who made it and either summarize the contents of the communication, or provide all parties with a copy of such communication. The Board agent shall then afford the other parties to the hearing the opportunity to rebut the communication on the record.

32190. Motions.

(a) After a complaint has been issued, written motions made before, during or after a formal hearing shall be filed with the Board agent assigned to the proceeding. Service and proof of service pursuant to Section 32140 are required.

(1) Motions to strike an allegation, to defer a case to arbitration, or to dismiss or partially dismiss a complaint, including motions styled as motions for summary judgment or for judgment on the pleadings, must be filed with the Board agent assigned to the proceeding no later than forty-five (45) days prior to the first day of the scheduled formal hearing, unless otherwise ordered by the Board. Service and proof of service pursuant to Section 32140 are required.

(2) A response to a motion filed pursuant to subsection (a)(1) shall be filed with the Board agent within twenty (20) days of service of the motion, or within such time as is directed by the Board agent. Service and proof of service pursuant to Section 32140 are required. There shall be no reply briefs unless requested by the Board agent.

(3) The above filing deadlines shall not apply in any proceeding designated for expedited treatment pursuant to Section 32147. In expedited hearings, the Board agent shall have the authority and discretion to set timelines for the filing of motions and responses.

(4) Once the scheduled formal hearing has commenced, no motion specified in subsection (a)(1) above may be filed or orally presented until the charging party has fully presented evidence in its case, exclusive of rebuttal evidence.

AUTHORITY 2

PERB Regulation 32602-32606. Processing Violations of
HERRA, MMBA and the Trial Court Act.

stoppage or lockout, in which case the General Counsel shall make a recommendation to the Board within 24 hours after the request is received.

32465. Decision of the Board Itself.

Upon receipt of the General Counsel's report, the Board itself shall determine whether to seek injunctive relief.

32470. Lack of Board Quorum.

In the event that a quorum of the Board itself is unavailable to act upon the request for injunctive relief within 24 hours after the time the General Counsel's recommendation is filed, the Board authorizes the General Counsel to seek injunctive relief in every case in which the General Counsel has reasonable cause to believe that such action is in accordance with Board policy and that legal grounds for injunctive relief are present.

Article 6. Request for Judicial Review

32500. Review of Representation Case.

(a) Any party to a decision in a representation case by the Board itself, except for decisions rendered pursuant to Chapter 5, Subchapter 3 of Chapter 6, Chapter 7 or Chapter 8 of these Regulations, may file a request to seek judicial review within 20 days following the date of service of the decision. The request shall be filed with the Board itself in the headquarters office and shall include statements setting forth those factors upon which the party asserts that the case is one of special importance. Service and proof of service of the request pursuant to Section 32140 are required.

(b) Any party shall have 20 days following the date of service of the request to file a response. The response shall be filed with the Board itself in the headquarters office. Service and proof of service of the request pursuant to Section 32140 are required.

(c) The Board may join in a request for judicial review or may decline to join, at its discretion.

SUBCHAPTER 5. UNFAIR PRACTICE PROCEEDINGS

32602. Processing Violations.

(a) Alleged violations of the EERA, Ralph C. Dills Act, HEERA, MMBA, TEERA, JCEERA, Article 3 of the Trial Court Act, the Court Interpreter Act, the PECC, the PEDD, the OCTDA, the SFBART Act, the Sacramento RTD Act, and alleged violations of local rules adopted pursuant to the MMBA, Trial Court Act, Court Interpreter Act, or the OCTDA, and alleged violations of rules or regulations adopted by the Statewide Authority pursuant to IHSSEERA, shall be processed as unfair practice charges.

(b) Except as provided in subsections (c) and (d), unfair practice charges may be filed by an employee, employee organization, or employer against an employee organization or employer.

(c) A charge alleging that an employer or an exclusive representative has failed to comply with Government Code section 3523, 3547, 3547.5, or 3595, or Public Utilities Code section 99569, may be filed by any affected member of the public.

(d) A charge alleging that an exclusive representative has failed to comply with Government Code section 3515.7(e), 3546.5, 3584(b), or 3587, or Public Utilities Code Section 99566.3 may only be filed by an affected employee.

32603. Employer Unfair Practices under MMBA.

It shall be an unfair practice for a public agency to do any of the following:

(a) Interfere with, intimidate, restrain, coerce or discriminate against public employees because of their exercise of rights guaranteed by Government Code section 3502 or by any local rule adopted pursuant to Government Code section 3507.

(b) Deny to employee organizations rights guaranteed to them by Government Code section 3503, 3504.5, 3505.1, 3505.3, 3507.1, 3508(d) or 3508.5 or by any local rule adopted pursuant to Government Code section 3507.

(c) Refuse or fail to meet and confer in good faith with an exclusive representative as required by Government Code section 3505 or any local rule adopted pursuant to Government Code section 3507.

(d) Dominate 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 in violation of rights guaranteed by Government Code section 3502 or 3508(d) or any local rule adopted pursuant to Government Code section 3507.

(e) Fail to exercise good faith while participating in any impasse procedure mutually agreed to pursuant to Government Code section 3505 or 3505.2, or required by the MMBA or any local rule adopted pursuant to Government Code section 3507.

(f) Adopt or enforce a local rule that is not in conformance with MMBA.

(g) In any other way violate MMBA or any local rule adopted pursuant to Government Code section 3507.

32604. Employee Organization Unfair Practices under MMBA.

It shall be an unfair practice for an employee organization to do any of the following:

(a) Cause or attempt to cause a public agency to engage in conduct prohibited by the MMBA or by any local rule adopted pursuant to Government Code section 3507.

(b) Interfere with, intimidate, restrain, coerce or discriminate against public employees because of their exercise of rights guaranteed by Government Code section 3502 or by any local rule adopted pursuant to Government Code section 3507.

(c) Refuse or fail to meet and confer in good faith as required by Government Code section 3505 or by any local rule adopted pursuant to Government Code section 3507.

(d) Fail to exercise good faith while participating in any impasse procedure mutually agreed to pursuant to Government Code section 3505 or 3505.2, or required by the MMBA or any local rule adopted pursuant to Government Code section 3507.

(e) In any other way violate MMBA or any local rule adopted pursuant to Government Code section 3507.

32606. Employer Unfair Practices under Trial Court Act.

It shall be an unfair practice for a trial court to do any of the following:

(a) Interfere with, intimidate, restrain, coerce or discriminate against trial court employees because of their exercise of rights guaranteed by Government Code section 71631 or by any local rule adopted pursuant to Government Code section 71636.

(b) Deny to employee organizations rights guaranteed to them by the Trial Court Act or by any local rule adopted pursuant to Government Code section 71636.

(c) Refuse or fail to meet and confer in good faith with an exclusive representative as required by Government Code section 71634.2 or any local rule adopted pursuant to Government Code section 71636.

(d) Dominate 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 in violation of rights guaranteed by Government Code section 71631 or any local rule adopted pursuant to Government Code section 71636.

(e) Fail to exercise good faith while participating in any impasse procedure mutually agreed to pursuant to Government Code section 71634.4 or required by any local rule adopted pursuant to Government Code section 71636.

(f) Adopt or enforce a local rule that is not in conformance with the Trial Court Act.

(g) In any other way violate the Trial Court Act or any local rule adopted pursuant to Government Code section 71636.

32607. Employee Organization Unfair Practices under Trial Court Act.

It shall be an unfair practice for an employee organization to do any of the following:

(a) Cause or attempt to cause a trial court to engage in conduct prohibited by the Trial Court Act or by any local rule adopted pursuant to Government Code section 71636.

(b) Interfere with, intimidate, restrain, coerce or discriminate against trial court employees because of their exercise of rights guaranteed by Government Code section 71631 or by any local rule adopted pursuant to Government Code section 71636.

(c) Refuse or fail to meet and confer in good faith as required by Government Code section 71634.2 or by any local rule adopted pursuant to Government Code section 71636.

(d) Fail to exercise good faith while participating in any impasse procedure mutually agreed to pursuant to Government Code section 71634.4 or required by any local rule adopted pursuant to Government Code section 71636.

(e) In any other way violate the Trial Court Act or any local rule adopted pursuant to Government Code section 71636.

32608. Employer Unfair Practices under Court Interpreter Act.

It shall be an unfair practice for a trial court or regional committee to do any of the following:

(a) Interfere with, intimidate, restrain, coerce or discriminate against court interpreters because of their exercise of rights guaranteed by Government Code section 71813 or by any local rule adopted pursuant to Government Code section 71823.

(b) Deny to employee organizations rights guaranteed to them by the Court Interpreter Act or by any local rule adopted pursuant to Government Code section 71823.

(c) Refuse or fail to meet and confer in good faith with an exclusive representative as required by Government Code section 71818 or any local rule, adopted pursuant to Government Code section 71823.

(d) Dominate 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 in violation of rights guaranteed by Government Code section 71813 or any local rule adopted pursuant to Government Code section 71823.

(e) Fail to exercise good faith while participating in any impasse procedure mutually agreed to pursuant to Government Code section 71820 or required by any local rule adopted pursuant to Government Code section 71823.

(f) Adopt or enforce a local rule that is not in conformance with the Court Interpreter Act.

(g) In any other way violate the Court Interpreter Act or any local rule adopted pursuant to Government Code section 71823.

AUTHORITY 3

PERB Regulation 32207. Hearings. No Hearing. Stipulated
Facts of Summary Judgement. No Dispute of the Facts.

party must attempt to contact representatives from all other parties to ascertain their positions on the request. The request must be in writing or, if made orally, explain why it cannot be reduced to writing. It must explain the grounds for the request, any reasons the request was not made earlier, and, to the extent the requesting party has been able to ascertain, the other parties' positions regarding the request. The request shall be granted only if the requesting party demonstrates extraordinary circumstances justifying the continuance that outweigh any prejudice to other parties.

32206. Production of Statements of Witnesses After Direct Testimony.

(a) After direct examination of a witness, and upon motion of any party, the hearing officer shall order the production of any statement made by the witness to a Board agent that relates to the subject matter of the testimony.

(b) A statement includes a written declaration by the witness, signed or otherwise approved by the witness, or a recording or a transcription of a recording which is a verbatim recital of something said by the witness.

(c) If the party sponsoring the testimony claims that a statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony, the party shall deliver the statement to the hearing officer for their private inspection. The hearing officer may excise those portions of the statements which do not relate to the subject matter of the testimony. The remainder of the statement shall be delivered to the moving party.

32207. Hearings.

The parties may submit stipulated facts where appropriate to the Board agent. No hearing shall be required unless the parties dispute the facts in the case.

32209. Correction of Transcript.

A motion to correct alleged errors in the transcript of a proceeding before a Board agent must be filed with the Board agent presiding at the proceeding within 20 days of the date of service of the transcript. The motion shall specify the alleged errors and provide a proposed corrected version. Within 10 days following the date of service of such a motion, any party may file with the Board agent a response to the motion. Service and proof of service of the motion and of any response to a motion pursuant to Section 32140 are required. Failure to file a timely motion to correct will be deemed a waiver of any objection to the accuracy of the transcript.

32210. Informational Briefs and Arguments.

(a) Any person may file a petition to submit an informational brief or to argue orally in any case at a hearing or before the Board itself.

(b) The petition shall include the following information:

PROOF OF SERVICE

I declare that I am a resident of or employed in the County of SF,
State of CA. I am over the age of 18 years. The name and address of my
Residence or business is 2200 Jackson St., SF, CA 94115

On 12-21-2024, I served the PETITION PERB Summary
(Date) (Description of document(s))

Judgement Denial in Case No. SF-CE-1221-H
(Description of document(s) continued) PERB Case No., if known)

on the parties listed below by (check the applicable method(s)):

- placing a true copy thereof enclosed in a sealed envelope for collection and delivery by the United States Postal Service or private delivery service following ordinary business practices with postage or other costs prepaid;
- personal delivery;
- electronic service - I served a copy of the above-listed document(s) by transmitting via electronic mail (e-mail) or via e-PERB to the electronic service address(es) listed below on the date indicated. (May be used only if the party being served has filed and served a notice consenting to electronic service or has electronically filed a document with the Board. See PERB Regulation 32140(b).)

(Include here the name, address and/or e-mail address of the Respondent and/or any other parties served.)

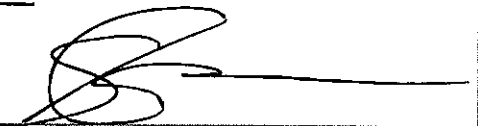
PERB felix.delatorre@perb.ca.gov

Respondent: UC Regents at misomegrsm.com

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on 12-21-2024,
(Date)

at SF, CA
(City) (State)

Stephen Malloy



(Type or print name)

(Signature)