

CLIENT NEWS BRIEF

PERB Determines That an Employer's Broad "No-Contact" Admonition During Administrative Leave May Violate Labor Laws

The Public Employment Relations Board (PERB) recently held that a public school employer violated the Educational Employment Relations Act (EERA) when it issued a notice of paid administrative leave to an employee which directed him not to contact faculty, staff, or students during the employer's workplace investigation. (*Los Angeles Community College District (2014) PERB Decision No. 2404-E.*) In this case, Carlos Perez, an adjunct electronics instructor, was placed on paid administrative leave while the Los Angeles Community College District (District) initiated a fitness-for-duty examination. The administrative leave letter was stamped "confidential" and contained standard language directing Mr. Perez "not to contact any members of the faculty, staff or students." Mr. Perez initiated an unfair practice charge with PERB, including allegations that the District's no-contact directive interfered with his protected rights.

The EERA, codified in the Government Code, was enacted to protect certain rights of employees and their representative organizations. More specifically, Government Code section 3543 of the EERA protects a public school employee's right to "form, join, and participate in the activities of employee organizations," and section 3543.5, subdivision (a) prohibits an employer from interfering with, restraining, or coercing employees because of their exercise of rights. When analyzing an interference claim, PERB balances the degree of harm to protected rights against any legitimate business interest asserted by the employer. If the harm to protected rights is slight, PERB balances this against the employer's defense of operational necessity. On the other hand, if the harm is inherently destructive of protected rights, the employer must show that the interference was caused by circumstances beyond its control.

PERB applied the balancing test to Mr. Perez's claim after finding that the District's no-contact directive caused slight harm to Mr. Perez's rights. Even if Mr. Perez was not deterred from engaging in protected activity, the directive was harmful because "it could have reasonably been construed to prohibit a variety of protected activities, such as contacting members of the union, initiating grievance or otherwise enlisting the support of fellow employees." After finding harm to protected rights, PERB then weighed the degree of harm against the District's asserted business necessity for issuing the no-contact directive.

Generally, PERB does not look favorably on broad, vague directives by an employer that might chill lawful speech or other protected conduct. A narrowly-tailored no-contact directive could be justified, however, if the circumstances show that an employee might taint evidence or that the integrity of an investigation would be jeopardized without such a directive. Interestingly, the record showed that Mr. Perez engaged in types of conduct that disrupted the educational opportunities for students and that was annoying, and potentially harassing, to other staff members. In spite of this, PERB found that the no-contact directive was not justified in the absence of the District's evaluation of the actual need for the directive based on the individualized facts of Mr. Perez's situation.

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PERB's decision in this case is consistent with the 2012 National Labor Relations Board (NLRB) decision in *Banner Health System* (2012) 358 N.L.R.B. No. 93, where the NLRB held an employer's ban on employee communication throughout workplace investigations violated section 7 of the National Labor Relations Act. NLRB decisions are not binding on PERB, but this case exemplifies another instance where PERB followed NLRB precedent. In *Banner Health System*, the NLRB implied that a "no-contact" directive could be allowed if an employer finds certain circumstances to exist, such as when: (1) witnesses need protection, (2) evidence is in danger of being destroyed, (3) testimony is in danger of being fabricated, or (4) there is a need to prevent a cover up. Even in such situations, an employer should eliminate ambiguities in the directive by clearly stating what is not allowed and affirming what protected activity remains permissible.

As this decision illustrates, employers should be very cautious when issuing confidentiality directives during ongoing employee investigations. While employers are not absolutely barred from requiring confidentiality during workplace investigations, they must be able to justify why such a broad directive is required. Thus, employers should consult with counsel, carefully review administrative leave notices, and amend any overbroad directives prohibiting employee discussion during workplace investigations.

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