STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

REGENTS OF THE UNIVERSITY OF CALIFORNIA, Charging Party, v. AMERICAN FEDERATION OF STATE, COUNTY & MUNICIPAL EMPLOYEES, LOCAL 3299 and UNIVERSITY PROFESSIONAL & TECHNICAL EMPLOYEES COMMUNICATION WORKERS OF AMERICA LOCAL 9119, Respondent.	Case Nos. SF-CO-233-H SF-CO-234-H SF-CO-235-H PERB Order No. IR-62-H November 7, 2019

Appearances: Sloan Sakai Yeung & Wong, by Timothy Yeung, Attorney, and Allison Woodall and Andrew Huntington, Attorneys, for Regents of the University of California; Leonard Carder, by, Kate Hallward, Arthur Liou, and Julia Lum, Attorneys, for American Federation of State, County & Municipal Employees, Local 3299, and University Professional & Technical Employees-Communication Workers of America, Local 9119.

Before Banks and Paulson, Members.

DECISION[1]

BANKS, Member: This case came before the Public Employment Relations Board (PERB or Board) on three requests for injunctive relief that the Regents of the University of California (the University) filed in response to strike notices from three bargaining units represented by American Federation of State County & Municipal Employees, Local 3299

[1] Pursuant to the Higher Education Employer-Employee Relations Act (HEERA), section 3563, subdivision (j), the Board has delegated this case for decision to a two-member panel of the Board. (HEERA is codified at Government Code section 3560 et seq.) Unless otherwise specified, all further statutory references are to the Government Code.

(AFSCME), and one unit represented by University Professional and Technical Employees-Communication Workers of America, Local 9119 (UPTE) (collectively "Unions"). In its requests, the University alleged that the Unions' one-day strike on May 16, 2019, constituted an unlawful intermittent strike because it was the fifth strike of short duration since May 2018.

It is well settled that "PERB cannot seek an injunction unless it finds (1) 'reasonable cause' to believe an unfair practice has been or will be committed; and (2) that injunctive relief is 'just and proper.'" (*San Mateo County Superior Court* (2019) PERB Order No. IR-60-C, p. 2 (*San Mateo Superior Court*), citing *Public Employment Relations Bd. v. Modesto City Schools Dist.* (1982) 136 Cal.App.3d 881, 895-896 (*Modesto*).) Here, after reviewing the parties' submissions, we denied[2] the University's request because, regardless of whether the charges themselves stated a prima facie case, it failed to "satisfy the higher 'reasonable cause' standard upon which a decision to seek injunctive relief must be based." (*Fremont Unified School District* (1990) PERB Order No. IR-54, p. 8 (*Fremont USD*).) That is, the record in this case gave us insufficient cause to believe that the Unions were engaged in unlawful intermittent strike activities. Without such evidence, the University's underlying unfair practice theory is fairly characterized as "insubstantial or frivolous." (*County of San Joaquin (Health Care Services)* (2001) PERB Order No. IR-55-M, p. 7, citing *Modesto, supra*, 136 Cal.App.3d at p. 897.) Additionally, because the University complains only of economic harm, it would be neither just nor proper to enjoin these presumptively protected activities.

We publish this decision because the University's request presents a matter of ongoing concern, especially between the parties, and for the purpose of clarifying the relevant standards

[2] Significantly, the University's request does not center on allegations that the strike imminently and substantially threatened public health or safety. (See *County Sanitation Dist. No. 2 v. Los Angeles County Employees Assn.* (1985) 38 Cal.3d 564, 580 (*County Sanitation*).)

in the context of an allegedly unlawful intermittent strike. Specifically, we believe that the record of short-duration strikes in evidence here does not provide reasonable cause to believe the Unions' presumptively protected activities are in fact unlawfully intermittent because the walkouts were: (1) called by different bargaining units, with others going out in sympathy; (2) in part precipitated or provoked by a public employer's alleged unfair conduct; (3) preceded by a notice period of sufficient length to permit the University to prepare for continued operations during the strike; and (4) separated by variable intervals of time sufficient to dispel the notion that the Unions planned their activities in advance or embarked on a coordinated strategy of rolling economic strikes. While the presence of any of these indicia may be sufficient to rebut an intermittent strike allegation, insofar as the Unions' strikes presented all four, there was no reasonable cause to believe their activities were unlawful. Finally, even if there were reasonable cause to believe an unfair practice occurred, the University's contention that these strikes will cause disproportionate economic harm does not demonstrate that an injunction would be just and proper.

FACTS AND PROCEDURAL HISTORY

AFSCME represents two University-wide bargaining units: 9,500 service employees (SX unit), who work throughout the University, and 11,000 patient care technical (EX unit) employees, who work at the University's five medical centers (San Francisco, Davis, Los Angeles, Irvine, San Diego), as well as various clinics. AFSCME also represents a smaller unit of skilled tradespersons at its Santa Cruz campus (K7). AFSCME's most recent Memoranda of Understanding (MOU) with the University all expired by the end of 2017.

UPTE represents a bargaining unit of over 4,000 employees who provide various patient care services (HX unit) at the University's five major medical centers, as well as

various clinics. Additionally, UPTE represents a bargaining unit of research professionals (RX unit), and a unit of technical employees (TX unit), all of whom are employed at the University's medical centers. UPTE's MOU's expired on October 31, 2017.

Consistent with past practice, the University has not consented to coalition bargaining, instead choosing to negotiate with each unit at separate bargaining tables. The history of the parties' efforts to negotiate successor MOU's has been long, complicated, and fraught with divisions. The Unions filed numerous unfair practice charges against the University over the course of the negotiations and engaged in five walkouts of short duration since May 2018, as further described below.

First Strike – May 2018

On April 26, 2018, AFSCME notified the University that its SX unit would engage in a three-day economic strike beginning May 7, 2018. AFSCME also notified the University that the EX unit would strike in sympathy with the SX unit. The same day, UPTE notified the University that the HX, RX, and TX units would also strike in sympathy with AFSCME, though the UPTE strike would be for two days only beginning May 8, 2018.

Second Strike – October 2018

On October 12, 2018, AFSCME notified the University that the EX unit would engage in a three-day economic strike beginning October 23, 2018. The SX unit and K7 unit would also strike in sympathy. The same day, UPTE notified the University that the HX, RX, and TX units would each strike in sympathy with AFSCME for three days beginning October 23, 2018.

Third Strike – March 2019

On March 8, 2019, UPTE notified the University that its RX and TX units would engage in a one-day economic strike beginning on March 20, 2019. UPTE also notified the

University that the HX unit would strike in sympathy. The same day, AFSCME notified the University that the EX and K7 units would also strike in sympathy with UPTE.

Fourth Strike – April 2019

On March 29, 2019, AFSCME notified the University that the SX and EX units would engage in a one-day unfair practice strike beginning on April 10, 2019. AFSCME also notified UC that the K7 unit would strike in sympathy. The same day, UPTE notified UC that the HX, RX, and TX units would each strike in sympathy with AFSCME as well.

Fifth Strike – May 2019

On May 3, 2019, AFSCME and UPTE notified the University that the SX, EX, K7, HX, RX, and TX units would strike to protest the University's alleged unfair practices. Both unions referred specifically in the strike notices to unfair practice charges they recently filed over alleged subcontracting of bargaining unit work.

The pertinent information about the five strikes is summarized in the following table:

Date(s) of Strike	Days Since Last Strike	Days of Notice	Primary Strike Unit
May 7-9, 2018	n/a	11	AFSCME SX
October 23-25, 2018	167	11	AFSCME EX
March 20, 2019	146	12	UPTE RX and TX
April 10, 2019	21	12	AFSCME EX and SX
May 16, 2019	36	13	AFSCME and UPTE

The University alleges that the Unions coordinated each of the five strikes and jointly determined the timing of the walkouts. Relying principally on *Fremont USD*, *supra*, PERB Order No. IR-54, the University argues that the strikes were thus unlawfully intermittent and should therefore be enjoined because they were designed to inflict a "disproportionate level of economic damage."

The whole of the evidence presented by the University consists of two declarations. The first, from the University's counsel, attaches a series of newspaper articles and

communications from Local 3299. The second is a three page declaration from University's Executive Director of Labor Relations, Peter Chester (Chester), who argues that the Unions' strikes were not precipitated by unfair practices. The declaration concludes with two paragraphs discussing Chester's opinion of the economic impact of the strikes, the factual basis of which is mostly "information and belief."

We address the University's legal theories and factual support below.

DISCUSSION

As noted, the Board cannot seek an injunction against strikes unless there is reasonable cause to believe an unfair practice has or will be committed, and an injunction is just and proper under the circumstances to prevent irreparable harm. (*Modesto, supra,* 136 Cal.App.3d at p. 895.) The University contends that its charges establish reasonable cause to believe that the Unions committed an unfair practice because, in its view, the above-referenced facts demonstrate a pattern of intermittent strike activity, "where the employees are allegedly retaining the benefits of working and striking at the same time." (*Fremont USD, supra,* PERB Order No. IR-54, p. 9.) We disagree.

Reasonable Cause

In *Fremont USD,* a majority of the Board concluded that intermittent strikes were unlawful under the Educational Employment Relations Act (EERA),[3] and that an employer satisfied the "reasonable cause" element necessary for an injunction if it could establish that employees were seeking "to pick and choose when they work, [in order to] be able to afford to strike because of the economic benefit earned when not striking." (*Id.*, at p. 9, emphasis original.) In reaching this conclusion, the Board in *Fremont USD* had the following facts in

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

evidence: a single bargaining unit of certificated teachers had called three economic strikes within two months, the last two occurring with only two-days' notice, while it threatened but failed to carry out additional one-day strikes. On this record, the Board majority discerned a pattern of conduct that it believed constituted an unlawful pressure tactic.[4]

No such pattern is discernable in this case.[5] For one, the first three strikes were called by different bargaining units, with the remainder choosing to give notice of their intent to respect the primary picket line and strike in sympathy. The University contends this conduct was coordinated,[6] and cites as evidence a newspaper article purporting to quote Local 3299 praising UPTE members, as well as the fact that the Unions are represented by the same law firm. The University also asserts in its brief, but offers no evidence in support, that there is overlap between AFSCME's SX and EX unit bargaining teams and "some employees" claimed there was a plan to engage in a series of one-day strikes. With no other evidence the

[4] Nevertheless, the Board declined to authorize an injunction in *Fremont USD* because the school district could not establish that injunctive relief was "just and proper" since its hearsay evidence and declarations based on information and belief failed to demonstrate that the strikes presaged a total breakdown in education or negotiations. (*Fremont USD, supra,* PERB Order No. IR-54, pp. 14-15.)

[5] To assess the existence of reasonable cause, the Board relies on facts developed in the General Counsel's investigation of the University's request and supporting unfair practice charges. The relevant facts are set out above. However, the ultimate determination of the facts in this case must await the outcome of PERB's administrative procedures. (*City of Fremont* (2013) PERB Order No. 57-M, p. 19, fn 8.)

[6] Of course, like any type of protected concerted activity, strikes require a certain degree of coordination to be successful. That degree necessarily increases when unions commit to giving the employer advanced notice of their intent to strike, as occurred here. We cannot understand the University's charge to allege that any and all such coordination is evidence of an unlawful pressure tactic because such an assertion would undermine the very possibility of concerted activities like sympathy strikes, which are clearly protected under PERB law. (*City & County of San Francisco* (2017) PERB Decision No. 2536-M, p. 21.)

University states it is informed and believes the strikes were impermissibly coordinated. But even setting aside the obvious evidentiary problems, the University's argument lacks merit.

This series of primary and sympathy strikes could as easily be characterized as a reflection of the University's decision to bargain separately with each bargaining unit. That is, each bargaining unit maintained a separate and distinct right to take what actions it considered necessary to protect its members and position at the bargaining table. We will not infer impermissible coordination based solely on the University's "information and belief" that such coordination must be present (*Fremont USD, supra*, PERB Order No. IR-54, pp. 14-15 [declaring such unsupported allegations insufficient to warrant injunctive relief]), because such unsupported allegations cannot overcome the Unions' established and presumptive right to exercise the ultimate recourse to strike and to stand in solidarity with their sister employee organizations.

Second, the two most recent of these strikes were preceded by the filing of various unfair practice charges. There is no question that a strike provoked by an employer's unfair labor practices is protected at any time it occurs during the negotiating process, and we are not at liberty to ignore such charges when faced with a request to enjoin strike activity. (*San Ramon Valley Unified School District* (1984) PERB Order No. IR-46, p. 10, citing *Modesto City Schools* (1983) PERB Decision No. 291, p. 64.) Thus, we cannot infer an unlawful intent to engage in an intermittent strike when the employer's alleged unfair practices are squarely at issue. Indeed work stoppages that respond to distinct employer actions or issues, even if close in time, are simply not pursuant to a plan to strike intermittently for a single goal, and are therefore protected. (See *NLRB v. Robertson Industries* (9th. Cir. 1976)

560 F.2d 396, 399 [finding substantial evidence supported NLRB's finding that strike was in response to employer conduct and was not an unprotected intermittent strike].)

Third, the Unions gave ample notice of their intent to strike, thus enabling the University to prepare continuity plans well in advance of each walkout. While such notice is not statutorily required, the fact that the Unions gave more than 10-days' notice[7] for each strike indicates that they did not convert their protected activities into an unlawful pressure tactic. At the very least, this advance notice is completely inconsistent with the notion that these were "'hit and run' strikes engaged in as part of a planned strategy intended 'to harass the company into a state of confusion[.]'" (*United States Service Industries, Inc.* (1994) 315 NLRB 285, fn. omitted.)

Finally, a significant period of time elapsed between each strike, indicating again that the Unions did not intend to pick and choose when to work without any regard for the safe and efficient operation of the workplace. Although the three most recent strikes were comparably closer in time than the first two, there is no detectable pattern evidencing an original intent to engage in a series of strikes. Rather, these intervals strongly suggest that the Unions were acting consistent with their stated aims, viz. to protest the University's alleged unfair practices, advance the negotiations, and bring lawful pressure on the University to amend its conduct.

We do not mean to imply that a series of strikes is unlawfully intermittent unless it presents all these countervailing indicia of lawful intent—indeed, the presence of any one

[7] As a point of comparison, federal law governing labor relations in the private sector requires unions to give only 10-days' notice "before engaging in any strike, picketing, or other concerted refusal to work at any health care institution." (29 U.S.C. § 158(g).)

could well establish that the series of strikes were motivated by distinct, lawful reasons.[8] But the fact that the Unions' walkouts occurred under these circumstances strongly militates against the necessary finding of reasonable cause, i.e., it is far from "probable that a violation of the Act has been committed." (*Fremont USD*, *supra*, PERB Order No. IR-54, p. 8, emphasis original.) In combination with the relative weakness of the University's contention that an injunction would be "just and proper," we are obliged to deny the University's request to enjoin these employees from exercising their right to strike.

Just and Proper Standard

In addition to its failure to establish a substantial or non-frivolous theory of an unfair practice, the University's charges raise no colorable claim that "there exists a probability that the purposes of the [HEERA] will be frustrated unless temporary relief is granted . . . [or] the circumstances of a case create a reasonable apprehension that the efficacy of the Board's final order may be nullified, or the administrative procedures will be rendered meaningless." (*Modesto*, *supra*, 136 Cal.App.3d at p. 902.) This is because the University complains only that the strikes will inflict "a disproportionate level economic harm," which, even if true, does not warrant injunctive relief in this case.

When an employer refuses to yield, whether on questions concerning its bargaining proposals or alleged unfair conduct, a strike becomes the ultimate, and often only, recourse available to employees. (*County Sanitation*, *supra*, 38 Cal.3d at p. 581 [observing that "without the right to strike, or at least a credible strike threat, public employees have little negotiating strength"].) While the right to strike may be qualified depending on the

[8] Conversely, direct, incontrovertible evidence of unlawful intent could well require an intermittent strike finding even in the presence of these and other indicia of lawful intent.

circumstances, e.g., pre- or post-impasse, the protected activity itself is always meant to impose a cost on the employer. In other words, every strike is meant to inflict economic harm on the employer to achieve the union's collective goals. If we were to accept the notion that a protected strike becomes unprotected (or unlawful, as the University here contends) simply because it threatens "disproportionate" economic harm to the employer, then public employees would have the right to engage only in those work stoppages that their employers are economically prepared and willing to resist. This would blunt the ultimate tool for forcing the employer to bargain in good faith, and for no other purpose than to save employers money. (Cf. *Fremont USD, supra*, PERB Decision Order No. IR-54, pp. 14-15 [injunction request denied because employer failed to demonstrate that intermittent strikes caused a "total breakdown in either education or negotiations"].) Furthermore, it would encourage a rule which focuses on the proportionality of harm suffered by the employer versus striking employees, without any metric to consider the risks and costs borne by individuals. In other words, far from encouraging a resolution, an injunction to prevent vigorous strike activity would tend only to prolong the parties' dispute. (*County Sanitation*, *supra*, 38 Cal.3d at p. 583 [strikes and credible threats to strike encourage good faith bargaining].)[9]

The University also argues that an injunction would be just and proper because the Board has no statutory authority to award it damages should we later conclude that the Unions'

[9] The University's "disproportionate economic impact" theory also fails because it did not marshal meaningful evidence to support the argument's factual predicate. The only evidence the University presented about disproportionate economic impact comes from one paragraph in Chester's declaration, that he is "informed and believe[s] that virtually all the private companies that provide replacement workers during a strike require at least a 36-hour commitment" and that he is "informed and believe[s]" the cost of a replacement is "at least 1 to 3 times more than the cost of a University employee." Neither of these statements gives evidence about the actual cost of the *University's* replacement workers for the strikes at issue.

strikes were unlawful. Indeed, as the University correctly notes, Government Code section 3563.3 explicitly deprives the Board of any power to award such damages: "the board shall have no authority to award strike-preparation expenses as damages, and shall have no authority to award damages for costs, expenses, or revenue losses incurred during, or as a consequence of, an unlawful strike."[10] But this specific statutory limitation on our remedial authority in no way renders meaningless the Board's procedures or power in general. (*Modesto, supra,* 136 Cal.App.3d at p. 902.) For instance, if the University's charges merit complaints and its evidence ultimately supports an unfair practice finding, we would, at a minimum, order each offending party to cease and desist its unlawful conduct. In reminding us that we lack the power to issue strike damages, section 3563.3 does not undermine the efficacy of such customary remedies or otherwise alter the equitable balance we must strike in these cases. Likewise, the Legislature's limitation of our authority does not create a new expansive mandate to seek injunctions against striking employees and their organizations.

ORDER

Based on the foregoing findings and conclusions, and the entire record in this case, the Board DENIES the requests to seek injunctive relief in Case Nos. SF-CO-233-H, SF-CO-234-H, and SF-CO-235-H.

Member Paulson joined in this Decision.

[10] The relevant amendment to the statute rejected and superseded aspects of our decision in *Regents of the University of California* (2010) PERB Decision No. 2094-H, where we exceeded our authority by awarding strike preparation damages to the University after declaring a nurses' strike unlawful. (Amended by Stats.2011, c. 539 (S.B.857), § 4 ["The amendments made by this act (viz. declaring that the Board has no power to award strike damages) do not constitute a change in, but are declaratory of, existing law"]).)