

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



UNITED PROFESSORS OF CALIFORNIA,)
)
Charging Party,) Case No. LA-CE-213-H
)
v.) PERB Decision No. 719-H
)
CALIFORNIA STATE UNIVERSITY,) January 19, 1989
)
Respondent.)
_____)

Appearance: Van Bourg, Weinberg, Roger & Rosenfeld by Stewart Weinberg for United Professors of California.

Before Porter, Craib and Shank, Members.

DECISION

CRAIB, Member: This case is before the Public Employment Relations Board (PERB or Board) on an appeal by the United Professors of California (UPC) from the Board agent's dismissal of its unfair practice charge against the California State University (CSU or Employer). UPC charged that CSU violated the Higher Education Employer-Employee Relations Act (HEERA)¹ by failing to make public a factfinding report which arose out of impasse proceedings between CSU and the California Faculty Association (CFA), the exclusive representative of the faculty at CSU.

FACTUAL SUMMARY

UPC's interest in the bargaining relationship between CSU and CFA arises out of a representation election between CFA and

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

UPC in 1982. CFA prevailed in a runoff election by a small margin. In March of 1983, CFA was certified by PERB as exclusive representative of the faculty at CSU.

During 1986, CSU and CFA began negotiating a new memorandum of understanding to take effect July 1, 1986. The parties reached impasse December 22, 1986. A factfinding hearing was held in March 1987. During the impasse proceedings, the parties continued private negotiations. A draft factfinding report and recommendation was informally circulated to the parties. Shortly thereafter, prior to the formal conclusion of the factfinding process, the parties reached a tentative agreement. The factfinding chair wrote CSU and CFA on May 8, 1987, to confirm that an agreement had been reached without the necessity of the factfinding panel issuing a formal report. PERB was notified of the outcome of the impasse proceedings.

In the agreement executed by the parties, an April 25, 1987 factfinding report is referenced twice, once in a section on a faculty workload study (to be conducted in accordance with the recommendations of the factfinding panel in that report), and also in a supplemental agreement, referred to as a "side" letter (in which CSU agreed to implement the factfinding panel's recommendation regarding claims of discrimination), but not made part of the collective bargaining agreement.

On May 18, 1987, UPC requested that CSU make the factfinding report public. CSU did not do so. UPC, on August 21, 1987, filed an unfair practice charge with PERB, alleging violations of

HEERA sections 3564; 3571, subdivisions (a) and (e); 3595; and a violation of PERB Regulation 32800, subdivisions (b) and (c).²

The charge reads, in pertinent part, as follows:

The charging party is informed and believes that Mr. Tamoush³ issued a report containing findings of fact and recommended terms of settlement. More than 10 days have now elapsed since the issuance of the fact-finding report, yet the employer has never made the report public nor notified the public of the availability of the report. On or about May 18, 1987, the charging party asked that the report be made public in order that it may inform its members of the findings and recommendations. The employer has ignored that request. Government Code section 3595 allows PERB to adopt regulations to implement the public's right to know about issues which are being met and conferred upon. Pursuant to that authority PERB adopted regulations including section 32800 (b) and (c) requiring public disclosure of the fact-finding report.

DISCUSSION

The Board agent dismissed this charge on a number of grounds. Primarily, she found that the UPC had no standing to bring a section 3571, subdivision (e)⁴ charge under the Board's analysis in Hanford Unified High School District (1978) PERB Decision No. 58. In Hanford, the Board held that a nonexclusive representative had no standing to file an unfair practice charge

²PERB Regulations are codified in the California Administrative Code, title 8, section 31001 et seq.

Philip Tamoush was the neutral member of the factfinding panel.

⁴Section 3571, subdivision (e) provides, in pertinent part, that it is unlawful for an employer to "[r]efuse to participate in good faith in the impasse procedure."

concerning the implementation of a change in the school calendar without meeting and conferring. The Board relied on a section of the Educational Employment Relations Act (EERA) which provides that nonexclusive representatives have certain rights but that those rights are terminated when the exclusive representative is certified. (Ibid. at p. 6; see sec. 3543.1, subd, (a).)

The Board agent concluded that, since CFA was the exclusive representative, CFA had the exclusive right to challenge, under section 3571, subdivision (e), the Employer's refusal to publish the factfinding report.

UPC contends that since Hanford was decided under EERA, and HEERA does not have an analog to section 3543.1, the Board agent's analysis should fail. Thus, UPC would have us read into HEERA broader rights for nonexclusive representatives than the statute provides. Quite the contrary is true. The Court of Appeal has held that nonexclusive representatives under HEERA have no rights as an organization. (Regents of the University of California v. PERB (1985) 168 Cal.App.3d 937, 945 (prior to the certification of an exclusive representative, "[t]he employee has a right to be represented [by a nonexclusive representative], but the organization does not have an independent right to represent." (Emphasis in original.)).) UPC's argument that it has a right to assert a section 3571, subdivision (e) violation must, therefore, fail.

At the heart of this case is the application of sections 3593⁵ and 3595,⁶ as well as Regulation 32800.⁷ UPC argues that it

⁵Section 3593 provides, in pertinent part:

If the dispute is not settled within 30 days after the appointment of the panel, or, upon agreement by both parties, within a longer period, the panel shall make findings of fact and recommend terms of settlement, which recommendations shall be advisory only. Any findings of fact and recommended terms of settlement shall be submitted in writing to the parties privately before they are made public. The panel, subject to the rules and regulations of the board, may make such findings and recommendations public 10 days thereafter. During this 10-day period, the parties are prohibited from making the panel's findings and recommendations public.

(Emphasis added.)

⁶Section 3595 provides, in pertinent part:

(a) All initial proposals of exclusive representatives and of higher education employers, which relate to matters within the scope of representation, shall be presented at a public meeting of the higher education employer and thereafter shall be public records.

(d) New subjects of meeting and conferring arising after the presentation of initial proposals shall be made public within 24 hours. If a vote is taken on such subject by the higher education employer, the vote thereon by each member voting shall also be made public within 24 hours.

⁷Regulation 32800 states, in pertinent part:

(b) Under HEERA, the employer shall make public the entire verbatim final report signed by the chairperson of the factfinding panel 10 days after its receipt by the parties.

(c) Publication shall be made by posting a

has a right, as a member of the public, to the contents of the factfinding report. Section 3593 provides in pertinent part that the factfinding panel, 10 days after disclosure to the parties, "may make such findings and recommendations public."⁸ (Emphasis added.) PERB Regulation 32800, subdivision (b) provides that: "under HEERA, the employer shall make public the entire verbatim final report. . ." (emphasis added). UPC argues that section 3593 and Regulation 32800 mandate disclosure to the public. UPC focuses on the mandatory language used in the regulation to argue that CSU was required to disclose to the public the last in a series of reports.

UPC errs in its analysis. Section 3593 only provides for discretionary disclosure of "findings and recommendations." Even though Regulation 32800, subdivision (b) appears to mandate

notice that the factfinder report has been issued and is available to the public. The notice shall be posted in the locations normally used for posting public notices regarding regular meetings of the employer and shall indicate the times and places where the public may inspect a copy of the report. The employer shall insure that a reasonable number of copies shall be made available to the public.

Pursuant to Regulation 32800, subdivision (c) the public is afforded access to the final factfinding report. UPC, as a member of the public, is entitled to seek enforcement of this regulation.

⁸See, supra, footnote 5 for more complete text of section 3593.

disclosure,⁹ it only requires that the "final" report be disclosed to the public. UPC argues that the last in a series of drafts is a final report, rather than that which the panel considers "final." This argument ignores the language of the regulation and the intent of impasse proceedings to provide an alternative bargaining forum to encourage resolution. Section 3593 expressly provides that the parties may view privately the panel's findings of fact and recommended terms of settlement before they are made public. Since UPC has failed to show that a "final" report was ever issued, its argument that CSU improperly failed to disclose the report must fail.¹⁰

The UPC's reliance on section 3595 is similarly misplaced. The Board agent rejected reliance on this section due to UPC's failure to provide facts to support the CSU's failure to make bargaining proposals public. In its brief on appeal, UPC argues that "new subjects of meeting and conferring arising after the presentation of initial proposals must be made public." This attempt to argue a potential violation of section 3595,

⁹The Board recently amended PERB Regulation 32800, subdivision (b), effective January 28, 1989, as follows:

[u]nder HEERA, should the factfinding panel decide to publish the report pursuant to Government Code section 3593, such publication shall be made by the employer in the manner described in subsection (c) below.

¹⁰Since UPC has failed to meet its initial obligation to show that a final report issued, we need not address the apparent mandatory nature of Regulation 32800, subdivision (b).

subdivision (d)¹¹ relies on the mere possibility that new subjects were raised during the impasse proceedings which were not made public.

This argument must fail for two reasons. First, UPC did not set forth facts regarding this violation in its charge and did not amend the charge when afforded the opportunity to do so. Second, after initial public disclosure and appropriate comment period, parties engage in closed sessions. There is always the potential that undisclosed topics will be raised. The "check" on this potential problem is the disclosure of the final agreement. If the agreement contains subjects previously undisclosed, a violation has occurred. To find otherwise would require disclosure of all bargaining notes or the opening of closed sessions. Additionally, the disclosure of the content of the closed sessions, prior to their conclusion, would seriously undermine their obvious usefulness.

UPC alleges one other potential violation. It contends, on appeal, that section 3571, subdivision (a) has been violated because

[e]mployees have now been given a contract which refers to a secret document. This contract effects their wages, hours, and working conditions. Without access to the secret document, they are unable to know what their rights are.

The Board agent dismissed UPC's allegation of a violation of section 3571, subdivision (a) because "there is no employee who

¹¹See footnote 6 for text of this section.

is alleged by UPC to have exercised rights under HEERA, or who is alleged to have been discriminated against because of the exercise of HEERA rights." The Board agent further found the allegation to be deficient in that there were no facts presented that an employee asked for and was denied access to the requested document. We agree with this analysis.¹²

ORDER

Therefore, since under none of the theories or facts presented is there a prima facie violation stated, we AFFIRM the Board agent's DISMISSAL WITHOUT LEAVE TO AMEND.

Members Porter and Shank joined in this Decision.

¹²To the Board agent's analysis, we would add that it is not clear whether the contract provided to employees included the portions of the draft factfinding report referenced. Furthermore, HEERA does not impose upon the employer the duty to provide individual copies of the contract to employees. The employer must, however, provide "a true copy of the agreement and any amendments" with the PERB regional office. (See PERB Regulation 32120.) A failure to do so may constitute a violation of that regulation. No such violation has been alleged.