STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

LUIS ALONSO ALVAREZ, Charging Party, v. AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, COUNCIL 10, Respondent.	)	Case No. SF-CO-24-H PERB Decision No. 984-H March 23, 1993

Appearance: Mary G. Higgins, for Luis Alonso Alvarez.

Before Blair, Chair; Hesse and Caffrey, Members.

DECISION AND ORDER

BLAIR, Chair: This case is before the Public Employment Relations Board (PERB or Board) on an appeal filed by Luis Alonso Alvarez (Alvarez), to the Board agent's dismissal (attached hereto) of his unfair practice charge. The charge alleged that the American Federation of State, County and Municipal Employees, Council 10 (AFSCME), exclusive representative for the systemwide clerical and patient care technical bargaining units, violated sections 3571(b), 3571.l(e), 3578 and 3579 of the Higher Education Employer-Employee Relations Act (HEERA)[1] by negotiating

[1]HEERA is codified at Government Code section 3560 et seq. Unless otherwise indicated, all statutory references are to the Government Code. Section 3571 states, in pertinent part:

> It shall be unlawful for the higher education employer to do any of the following:
>
> (b) Deny to employee organizations rights guaranteed to them by this chapter.

and reaching agreement with the Regents of the University of California to transfer certain job classifications (classes) from the clerical to the patient care technical unit.[2] The amended charge also alleged a violation of the "sunshine" provisions of HEERA.[3]

Section 3571.1 provides, in relevant part:

> It shall be unlawful for an employee organization to:
>
> (e) Fail to represent fairly and impartially all the employees in the unit for which it is the exclusive representative.

Section 3578 provides:

> The employee organization recognized or certified as the exclusive representative shall represent all employees in the unit, fairly and impartially. A breach of this duty shall be deemed to have occurred if the employee organization's conduct in representation is arbitrary, discriminatory, or in bad faith.

Section 3579 states, in relevant part:

> (a) In each case where the appropriateness of a unit is an issue, in determining an appropriate unit, the board shall take into consideration all of the following criteria: [criteria omitted].

[2]Alvarez is an Admitting Worker, one of the classes transferred.

[3]HEERA section 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.
>
> (b) Meeting and conferring shall not commence on an initial proposal until

The Board has reviewed the entire record in this case de novo[4] and, finding the dismissal to be free of prejudicial error, adopts it as the decision of the Board itself.[5]

The unfair practice charge in Case No. SF-CO-24-H is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Hesse and Caffrey joined in this Decision.

> a reasonable time has elapsed after the submission of the proposal to enable the public to become informed and the public has the opportunity to express itself regarding the proposal at a meeting of the higher education employer.

[4]The substantive record consists of the warning and dismissal letters, charge, amended charge and appeal.

[5]Charges relating to HEERA sections 3571(b) and 3579 are addressed in Regents of the University of California (Alvarez) (1993) PERB Decision No. 983-H.

STATE OF CALIFORNIA PETE WILSON, *Governor*

PUBLIC EMPLOYMENT RELATIONS BOARD San Francisco Regional Office
177 Post Street, 9th Floor
San Francisco, CA 94108-4737
(415)557-1350

December 16, 1992

Mary G. Higgins

Re: **DISMISSAL OF UNFAIR PRACTICE CHARGE/REFUSAL TO ISSUE COMPLAINT**
Luis Alonzo Alvarez v. American Federation of State. County and Municipal Employees. Unfair Practice Charge No. SF-CO-24-H

Dear Ms. Higgins:

The above-referenced unfair practice charge, filed on May 18, 1992, alleges that the American Federation of State, County and Municipal Employees (AFSCME) agreed to the transfer of classifications from the Clerical and Allied Services bargaining unit to the Patient Care Technical bargaining unit. This conduct is alleged to violate Government Code sections 3571.1(e) and 3578 of the Higher Education Employer-Employee Relations Act (HEERA).

I indicated to you in my attached letter dated October 28, 1992, that the above-referenced charge did not state a prima facie case. You were advised that, if there were any factual inaccuracies or additional facts which would correct the deficiencies explained in that letter, you should amend the charge. You were further advised that, unless you amended the charge to state a prima facie case or withdrew it prior to November 5, 1992, the charge would be dismissed. At your request I granted you two extensions of time, first until November 13, and then until November 16, 1992, to respond.

Your amended charge containing allegations intended to supplement the charge and respond to the deficiencies noted in my October 28, 1992 letter was received by PERB after the close of business on November 16, 1992. Accordingly, it was deemed to have been filed on November 17, 1992, and was, therefore, late. Because I did not receive a timely filed amended charge, I am dismissing the charge based on the facts and reasons contained in my October 28, 1992 letter. However, I have reviewed the amended charge and found that even if timely filed, the new allegations would have been insufficient to demonstrate a prima facie violation involving the duty of fair representation.

You assert that AFSCME failed to provide a process for informing employees of the proposed transfer of classifications, and that Mr. Alvarez learned of the proposal "second hand" from a member

of the Unit #13 bargaining team. You assert that AFSCME was unwilling to talk to Mr. Alvarez and, as a consequence, that Mr. Alvarez's response to the proposal "was in an information vaccuum."

You were informed in the October 28 warning letter that facts must be alleged "indicating how and in what manner the union acted without a rational basis or in a way that is devoid of honest judgement." In response you state the following: "'Honest' is not synonymous with 'competency'," and assert that neither the AFSCME bargaining team nor AFSCME's chief negotiator was aware of contractual differences between Unit #12 and Unit #13 or of "the labor relations environmental affects of reuniting."

You also raise, for the first time, the issue of whether the proposed transfer of classifications was "sunshined" as required by HEERA. You state that AFSCME and the employer engaged in discussions concerning the issue of classification transfer which were separate, but parallel to, their negotiations for a new agreement. You also state that the proposal to transfer classifications was not a part of' the latter negotiations until a tentative agreement was nearly reached. You expressed a belief that there was neither a public presentation of, nor an opportunity for public comment upon, the proposal to transfer classes.

Public notice complaints under HEERA may not be adjudicated in the context of an unfair practice charge. Rather, they must be filed in accordance with PERB's regulations governing public notice complaints. (State of California (Department of Personnel Administration) (1992) PERB Decision No. 921-S.) However, this does not preclude consideration of the allegations in evaluating AFSCME's conduct as it relates to its duty of fair representation.

The assertions that you have made in the amended charge, including the assertion of a failure to "sunshine" the proposed transfer of classifications, express a profound dissatisfaction with the process utilized by AFSCME in advance of its agreement to transfer classes. The facts as alleged do reflect an unwillingness on AFSCME's part to involve Mr. Alvarez in the decisionmaking process, and further, a failure to consider factors which Mr. Alvarez perceived to be important. However, in substance, these allegations portray the same picture as those which were discussed in the warning letter, and therefore, must be viewed as simply cumulative. Even with the additional allegations, the charge fails to show that AFSCME's conduct toward a member of the bargaining unit was arbitrary, discriminatory, or in bad faith.

Finally, you appear to be asserting that by demonstrating that AFSCME lacked competency, you effectively are demonstrating that the union acted without "honest judgement." However, neither negligence nor poor judgement violates the duty of fair representation. (Los Angeles City and County School Employees Union (Scates and Pitts) (1983) PERB Decision No. 341.)

Right to Appeal

Pursuant to Public Employment Relations Board regulations, you may obtain a review of this dismissal of the charge by filing an appeal to the Board itself within twenty (20) calendar days after service of this dismissal. (Cal. Code of Regs., tit. 8, sec. 32635(a).) To be timely filed, the original and five copies of such appeal must be actually received by the Board itself before the close of business (5 p.m.) or sent by telegraph, certified or Express United States mail postmarked no later than the last date set for filing. (Cal. Code of Regs., tit. 8, sec. 32135.) Code of Civil Procedure section 1013 shall apply. The Board's address is:

Public Employment Relations Board
1031 18th Street
Sacramento, CA 95814

If you file a timely appeal of the refusal to issue a complaint, any other party may file with the Board an original and five copies of a statement in opposition within twenty (20) calendar days following the date of service of the appeal. (Cal. Code of Regs., tit. 8, sec. 32635(b).)

Service

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding, and a "proof of service" must accompany each copy of a document served upon a party or filed with the Board itself. (See Gal. Code of Regs., tit. 8, sec. 32140 for the required contents and a sample form.) The document will be considered properly "served" when personally delivered or deposited in the first-class mail, postage paid and properly addressed.

Extension of Time

A request for an extension of time, in which to file a document with the Board itself, must be in writing and filed with the Board at the previously noted address. A request for an extension must be filed at least three (3) calendar days before the expiration of the time required for filing the document. The request must indicate good cause for and, if known, the

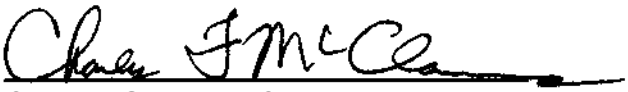
position of each other party regarding the extension, and shall be accompanied by proof of service of the request upon each party. (Cal. Code of Regs., tit. 8, sec. 32132.)

Final Date

If no appeal is filed within the specified time limits, the dismissal will become final when the time limits have expired.

Sincerely,

ROBERT THOMPSON
Deputy General Counsel

By 
CHARLES F. McCLAMMA

Public Employment Relations Board

Attachment

cc: Linda Preston

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
177 Post Street, Suite 900
San Francisco, CA 94108-4737
(415) 557-1350

October 28, 1992

Mary G. Higgins

Re: WARNING LETTER
Luis Alonzo Alvarez v. American Federation of State County and Municipal Employees. Unfair Practice Charge No. SF-CO-24-H.

Dear Ms. Higgins:

The above-referenced unfair practice charge, filed on May 18, 1992, alleges that the American Federation of State, County and Municipal Employees (AFSCME) agreed to the transfer of classifications from the Clerical and Allied Services bargaining unit to the Patient Care Technical bargaining unit. This conduct is alleged to violate Government Code sections 3571.l(e) and 3578 of the Higher Education Employer-Employee Relations Act (HEERA).

My investigation revealed the following facts. Luis Alonzo Alvarez is employed by the Regents of the University of California (Regents) at the University of California at San Francisco as an admitting worker. His job duties are predominantly clerical in nature, although he has contact with hospital patients in the performance of these duties.

On July 11, 1983, AFSCME was certified by PERB as the exclusive representative of employees of the Regents in Unit #13 (Patient Care Technical). On July 12, 1983, AFSCME was also certified by PERB as the exclusive representative of employees of the Regents in Unit #12 (Clerical and Allied Services). Employees in the classification of admitting worker were included in Unit #12.

On April 30, 1992, AFSCME, through the Executive Director of AFSCME Council 10, concluded Unit # 13 collective bargaining negotiations with the Regents. A part of the parties' tentative agreement provided for the transfer of certain classifications, including that of admitting worker, from Unit #12 to Unit #13. The transfer was contingent upon ratification of the collective bargaining agreement. Members of Unit #12 were not allowed to participate in the decision-making process which led to the agreement to transfer classifications.[1] Further, the employees

[1]AFSCME asserts that affected employees were made aware of the possible transfer in advance of the tentative agreement, and

in the affected classifications were not allowed to vote on the transfer, and only AFSCME members within Unit #13 were allowed to vote on contract ratification.

On June 9, 1992, AFSCME Council 10 filed a unit modification petition with PERB seeking approval of the aforementioned transfer. The Regents concurred in the request. Therefore, on June 9, 1992, the Regional Director of the PERB San Francisco Regional Office issued a Unit Modification Order approving the deletion of the identified classifications from the Clerical and Allied Services Unit and their addition to the Patient Care Technical Unit.

Based on the facts stated above, the charge as presently written fails to state a prima facie violation of the HEERA for the reasons that follow.

In this case, Mr. Alvarez has alleged that AFSCME has failed to represent all the employees in the unit fairly and impartially by agreeing to the transfer of classifications, and further, of acting arbitrarily, discriminatorily, or in bad faith in that it failed to consult with or allow participation of affected employees concerning the decision to transfer classes. He further alleges that AFSCME has violated Government Code section 3579 (HEERA Article 6. Unit Determinations), noting that the HEERA directs PERB to resolve cases where the appropriateness of a unit is an issue. Finally, he alleges unspecified provisions of HEERA have been violated by the failure to allow him to vote on whether he wished to be transferred to a different bargaining unit.

Duty of Fair Representation

The Public Employment Relations Board (PERB) has held that a breach of the duty of fair representation occurs when a union's conduct toward a member of the bargaining unit is arbitrary, discriminatory, or in bad faith. (Rocklin Teachers Professional Association (Romero) (1980) PERB Dec. No. 124.)

An exclusive representative is accorded considerable discretion in the negotiations process. In Redlands Teachers Association (Faeth and McCarty) (1978) PERB Dec. No. 72, PERB quoted the following language of the Supreme Court:

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that some of these employees, including Alvarez, communicated their disapproval to AFSCME.

> Any authority to negotiate derives its principal strength from a delegation to the negotiators of a discretion to make such concessions and accept such advantages as, in the light of all relevant considerations, they believe will best serve the interests of the parties represented. A major responsibility of negotiators is to weigh the relative advantages and disadvantages of differing proposals . . . . Inevitably, differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete goof faith and honesty of purpose in the exercise of its discretion.

Ford Motor Co. v. Huffman (1953) 345 U.S. 330, 31 LRRM 2548, at 2551.

In Service Employees International Association (Kimmett) (1979) PERB Dec. No. 106, PERB Stated:

> The duty of fair representation implies some consideration of the views of various groups of employees and some access for communication of those views, but there is no requirement that formal procedures be established, (citations omitted)

In order to state a prima facie case involving a breach of the duty of fair representation, facts must be alleged in the charge indicating how and in what manner the union acted without a rational basis or in a way that is devoid of honest judgement. (Reed District Teachers Association, CTA/NEA (Reyes) (1983) PERB Dec. No. 332.)

The facts alleged do not indicate that AFSCME failed to consider the views of Mr. Alvarez and other affected employees or to provide a means by which they could communicate those views. The rights which Mr. Alvarez alleges have been denied him by AFSCME, namely, the right to vote on and to be a part of the decision making process concerning the unit transfer of a classification,

are not rights that are expressly granted to an employee by HEERA, and thus, are not rights which could have been harmed or denied by AFSCME.

Unit Appropriateness

Mr. Alvarez also alleges that AFSCME violated "all of Article 6. Unit determination." However, Article 6 (HEERA section 3579) imposes no duty upon an exclusive representative, but rather imposes on PERB the duty to consider the criteria listed in that section in determining an appropriate unit. Such consideration by PERB occurs only when raised as an issue by a party to a PERB proceeding. Further, through its regulations governing unit modifications (sections 32781 through 32786), PERB has established procedures for either an employer or an exclusive representative to raise unit appropriateness issues involving changes to existing bargaining units. However, a petition for unit modification may only be filed by an employer or an exclusive representative, or both, and need not be filed at all if they are in agreement. (PERB Regulation 32781.) An individual employee does not have standing to file a unit modification petition (Riverside Unified School District (1985) PERB Order No. Ad-148.), and cannot attempt to accomplish the same result by filing an unfair practice charge. (Riverside Unified School District (1985) PERB Dec. No. 512.)

For these reasons the charge as presently written does not state a prima facie case. If there are any factual inaccuracies in this letter or any additional facts that would correct the deficiencies explained above, please amend the charge accordingly. The amended charge should be prepared on a standard PERB unfair practice charge form clearly labeled First Amended Charge, contain all the facts and allegations you wish to make, and must be signed under penalty of perjury by the charging party. The amended charge must be served on the respondent and the original proof of service filed with PERB. If I do not receive an amended charge or withdrawal from you before November 5, 1992, I shall dismiss this charge. If you have any questions, please call me at (415) 557-1350.

Sincerely,

CHARLES F. MCCLAMMA
Public Employment Relations Specialist