

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



ACADEMIC PROFESSIONALS OF
CALIFORNIA,

Charging Party,

v.

TRUSTEES OF THE CALIFORNIA STATE
UNIVERSITY,

Respondent.

Case No. LA-CE-721-H

PERB Decision No. 1656-H

July 8, 2004

Appearances: Rothner, Segall & Greenstone by Bernhard Rohrbacher, Attorney, for Academic Professionals of California; Marlene B. Jones, University Counsel, for the Trustees of the California State University.

Before Duncan, Chairman; Whitehead and Neima, Members.

DECISION

NEIMA, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the Academic Professionals of California (APC) of a Board agent's dismissal (attached) of its unfair practice charge. The charge alleged that the Trustees of the California State University (CSU) violated the Higher Education Employer-Employee Relations Act (HEERA)¹ by unilaterally implementing a non-discrimination policy for students.

The Board has reviewed the entire record in this matter including the unfair practice charge, the warning and dismissal letters, APC's appeal and CSU's response.² The Board

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

²Pursuant to PERB Regulation 32136, the Board finds that good cause exists to excuse CSU's late-filed response. (PERB regs. are codified at Cal. Code Regs., tit. 8, sec. 31001, et seq.)

finds the warning and dismissal letters to be free of prejudicial error and adopts them as the decision of the Board itself.

ORDER

The unfair practice charge in Case No. LA-CE-721-H is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chairman Duncan and Member Whitehead joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD



San Francisco Regional Office
1330 Broadway, Suite 1532
Oakland, CA 94612-2514
Telephone: (510) 622-1022
Fax: (510) 622-1027



July 16, 2003

Lee O. Norris, LR Representative
Academic Professionals of California
8726-D S. Sepulveda Blvd., #C172
Los Angeles, CA 90045

Re: Academic Professionals of California v. Trustees of the California State University
Unfair Practice Charge No. LA-CE-721-H
DISMISSAL LETTER

Dear Mr. Norris:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on November 6, 2002. The Academic Professionals of California alleges that the Trustees of the California State University violated the Higher Education Employer-Employee Relations Act (HEERA)¹ by unilaterally implementing a non-discrimination policy for students.

I indicated to you in my attached letter dated June 23, 2003, 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 June 30, 2003, the charge would be dismissed. I later extended this deadline to July 11, 2003.

On July 16, 2003, Charging Party left a telephone message indicating it would not be filing an amended charge. As I have not received either an amended charge or a request for withdrawal, I am dismissing the charge based on the facts and reasons contained in my June 23, 2003, letter.

Right to Appeal

Pursuant to PERB Regulations,² 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. (Regulation 32635(a).) Any document filed with the Board must contain the case

¹HEERA is codified at Government Code section 3560 et seq. The text of the HEERA and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

²PERB's Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

name and number, and the original and five (5) copies of all documents must be provided to the Board.

A document is considered "filed" when actually received before the close of business (5 p.m.) on the last day set for filing or when mailed by certified or Express United States mail, as shown on the postal receipt or postmark, or delivered to a common carrier promising overnight delivery, as shown on the carrier's receipt, not later than the last day set for filing. (Regulations 32135(a) and 32130.)

A document is also considered "filed" when received by facsimile transmission before the close of business on the last day for filing together with a Facsimile Transmission Cover Sheet which meets the requirements of Regulation 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Regulations 32135(b), (c) and (d); see also Regulations 32090 and 32130.)

The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95814-4174
FAX: (916) 327-7960

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. (Regulation 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 Regulation 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. A document filed by facsimile transmission may be concurrently served via facsimile transmission on all parties to the proceeding. (Regulation 32135(c).)

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. (Regulation 32132.)

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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
General Counsel

By _____
Kristin L. Rosi
Regional Attorney

Attachment

cc: Marlene Jones

PUBLIC EMPLOYMENT RELATIONS BOARD



San Francisco Regional Office
1330 Broadway, Suite 1532
Oakland, CA 94612-2514
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June 23, 2003

Lee O. Norris, LR Representative
Academic Professionals of California
8726-D S. Sepulveda Blvd., #C172
Los Angeles, CA 90045

Re: Academic Professionals of California v. Trustees of the California State University
Unfair Practice Charge No. LA-CE-721-H
WARNING LETTER

Dear Mr. Norris:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on November 6, 2002. The Academic Professionals of California alleges that the Trustees of the California State University violated the Higher Education Employer-Employee Relations Act (HEERA)¹ by unilaterally implementing a non-discrimination policy for students.

Investigation of the charge revealed the following. APC and CSU are parties to a collective bargaining agreement that expires on June 30, 2003. With regard to the effect of the agreement ("zipper clause"), Article 3.2 states in relevant part:

Except as provided for in this Agreement, the Employer and the Union, for the life of this Agreement, voluntarily and unqualifiedly waive the right, and each agrees that the other shall not be obligated, to bargain collectively with respect to any subject or matter referred to or covered by this Agreement, or with respect to any subject or matter not specifically referred to or covered in this Agreement, even though such subjects or matters may not have been within the knowledge of or contemplation of either or both of the parties at the time that they negotiated or signed this Agreement.

Article 12 of the Agreement contains a detailed discipline procedure which applies to all discipline contemplated by CSU.

¹HEERA is codified at Government Code section 3560 et seq. The text of the HEERA and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

In 2001, the Office of Civil Rights (OCR) informed Humboldt State University that its September 2000 procedures for processing discrimination complaints needed revision.² HSU consulted with OCR regarding the revisions, and OCR approved a draft in September.

On September 30, 2002, CSU sent a copy of the revised Humboldt State University Nondiscrimination Policy, together with HSU Procedures for Processing Discrimination Complaints to all exclusive representatives, including APC. The University stated its belief that the policy did not impact any matters within the scope of representation, but agreed to meet and confer if any organization wished to discuss the policy. The Discrimination Policy governs student complaints of unlawful discrimination and complaints by some unrepresented employees.³ The Policy states in relevant part:

I. Purpose: The purpose of these procedures is to provide an opportunity to resolve matters alleging discrimination to students and to employees who are not covered by collective bargaining agreements or California State University system-wide procedures for processing complaints of discrimination. . . .

II. Jurisdiction: Complaints by employees who are covered by collective bargaining agreements or system-wide procedures shall be processed in accordance with the applicable collective bargaining agreement or system-wide procedures

V.O. Corrective Action: If the Appropriate Administrator or Designee finds "Cause" , s/he shall also issue a separate recommendation regarding corrective actions. This may include individual remedies for the Complainant or a range of formal or informal disciplinary measures or other personnel actions. If it is determined that disciplinary charges should be initiated, disciplinary proceedings shall be conducted in accordance with the current applicable collective bargaining agreement, or for charges against administrators or other non-represented employees, appropriate University policies shall be utilized. (emphasis added.)

On October 22, 2002, APC replied to the University letter and Discrimination Policy by stating that it believed the topic to be within the scope of representation. Additionally, instead of

² This directive arose in conjunction with the resolution of a complaint by a HSU student. Many CSU campuses, pursuant to federal law and enforced by OCR, have policies that protect students from unlawful discrimination and provide procedures for processing their complaints.

³ APC's agreement does not contain provisions regarding discrimination against or the filing of complaints by students or employees not covered by an agreement. There are few, if any, non-represented employees.

requesting to bargain the decision and/or effects of the Policy, APC stated that it could not be required to discuss the new Policy because the MOU contained the zipper clause quoted above. None of the other exclusive representatives objected to the policy or requested negotiations.

On November 15, 2002, CSU again informed APC that the Discrimination Policy needed to be put in place and that the University was willing to meet and confer over the impact of the policy. The letter also addressed APC's argument that negotiations were barred by the zipper clause in Article 3. Finally, CSU stated that it wished to implement the policy in December and gave APC until January 6, 2003, to request a meet and confer session.

APC did not request to meet and confer over the decision and/or impact of the Discrimination Policy.

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

In determining whether a party has violated HEERA section 3571(c), PERB utilizes either the "per se" or "totality of the conduct" test, depending on the specific conduct involved and the effect of such conduct on the negotiating process. (Stockton Unified School District (1980) PERB Decision No. 143.) Unilateral changes are considered "per se" violations if certain criteria are met. Those criteria are: (1) the employer implemented a change in policy concerning a matter within the scope of representation, and (2) the change was implemented before the employer notified the exclusive representative and gave it an opportunity to request negotiations. (Walnut Valley Unified School District (1981) PERB Decision No. 160; Grant Joint Union High School District (1982) PERB Decision No. 196.)

I. Scope of Representation

APC contends the CSU violated the HEERA when it unilaterally adopted the Discrimination Policy. However, the charge fails to demonstrate the first prong of the test for unilateral change; that the decision to adopt the policy is within the scope of representation. It is undisputed that policies that protect employees from unlawful discrimination are within the scope of representation. (See, Jefferson School District (1980) PERB Decision No. 133; San Mateo City School District (1984) PERB Decision No. 375.) However, this policy does not serve to protect employees from discrimination, but seeks to protect student and unrepresented employees. As such, the above cited cases are inapplicable.

This case is more appropriately analyzed under Compton Community College District (1990) PERB Decision No. 798, which addresses public and student complaints against bargaining unit members. In Compton, the district unilaterally adopted a student grievance policy that allowed students to file complaints against certificated employees. The outcome of these complaints were placed in the employees' personnel file. In finding that the complaint procedure was within the scope of representation "because it sets up a procedure whereby an employee's performance in a particular situation is evaluated" the Board further held:

That we based this finding on the policy's requirement that student complaints and/or administrative determinations resulting from student complaints are placed in the personnel file of the employee charged. (Id. at 3.)

As such, in order for the Discrimination Policy to be a negotiable subject under Compton, the initial complaint and/or administrative determination must be placed in the employee's personnel file. Without such action, it cannot be said that an employee's performance will be evaluated. A review of the Discrimination Policy indicates that the complaint and corrective action plan remain confidential. There is no mention of such complaints being placed in the personnel file. Moreover, Article 11 of the MOU contains a detailed provision regarding the placement of materials in an employee's personnel file. Therefore, under the Compton analysis, the student policy fails to state a prima facie violation of the HEERA.

Although not raised by APC, the union could also argue that because the student discrimination policy could result in discipline to a bargaining unit member, the policy is a negotiable subject. It is again undisputed that disciplinary procedures and policies are within the scope of negotiation. (Arvin Union School District (1983) PERB Decision No. 300.) Indeed, the parties have already negotiated a comprehensive progressive discipline policy that governs actions from written and oral reprimands, to suspension and dismissal. (Article 12 of the MOU.)

Herein, the CSU adopted a policy for investigating student complaints of unlawful discrimination. CSU's adoption of this policy was federally mandated and is not directly or indirectly related to any economic activity by either party. The policy is merely a recitation of both California and Federal anti-discrimination law. Moreover, the state and federal statutes are not pre-empted by the HEERA, as such statutes provide "protections to individual union and nonunion workers alike, and neither encourage or discourage the collective bargaining process." (Fort Halifax Packing Company v. Coyne (1987) 482 U.S. 1, 21 (state statute requiring severance pay is not pre-empted by NLRA as it does not interfere with bargaining process).)

While the adoption of a federally mandated policy may not be negotiable, the impact of the procedure may be negotiable. However, the charge fails to present any negotiable disciplinary impact.⁴ The Discrimination Policy states any and all discipline arising from the policy will follow contractual guidelines. Moreover, the policy does not subject employees to a new work rule, as discriminatory conduct has arguably been considered unlawful and unprofessional under Education Code 89535 which pertains to CSU employees.⁵ As such, the adoption of the Discrimination Policy does not violate the HEERA.

⁴ APC contends the contractual zipper clause prohibits CSU from implementing the new policy. However, as noted above, there is no duty to bargain the decision to implement the policy, and as such the zipper clause is inapplicable.

⁵ Any permanent or probationary employee may be dismissed, demoted, or suspended for the following causes: (a) Immoral conduct. (b) Unprofessional conduct. (c) Dishonesty. (d)

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 additional facts that would correct the deficiencies explained above, please amend the charge. 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 be signed under penalty of perjury by the charging party. The amended charge must have the case number written on the top right hand corner of the charge form. The amended charge must be served on the respondent's representative and the original proof of service must be filed with PERB. If I do not receive an amended charge or withdrawal from you before June 30, 2003, I shall dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Kristin L. Rosi
Regional Attorney

KLR

Incompetency. (e) Addiction to the use of controlled substances. (f) Failure or refusal to perform the normal and reasonable duties of the position. (g) Conviction of a felony or conviction of any misdemeanor involving moral turpitude. (h) Fraud in securing appointment. (i) Drunkenness on duty.