**STATE OF CALIFORNIA**
**DECISION OF THE**
**PUBLIC EMPLOYMENT RELATIONS BOARD**

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| ACADEMIC PROFESSIONALS OF CALIFORNIA,<br><br>Charging Party,<br><br>v.<br><br>TRUSTEES OF THE CALIFORNIA STATE UNIVERSITY,<br><br>Respondent. | CaseNo.LA-CE-717-H<br><br>PERB Decision No. 1760-H<br><br>March 30, 2005 |

Appearances: Lee Norris, Labor Relations Representative, for Academic Professionals of California; Janette Redd Williams and Victor King, University Counsels, for Trustees of the California State University.

Before Duncan, Chairman; Whitehead and Shek, Members.

DECISION

SHEK, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Academic Professionals of California (APC) to a proposed decision of a PERB administrative law judge (ALJ). In the proposed decision, the ALJ found that APC had failed to establish that the Trustees of the California State University (CSU or University) made a unilateral change in policy or practice regarding the quantity of employee representatives permitted at a Skelly hearing[1] and their right to speak on behalf of the

[1]The reference is to the pre-disciplinary meeting between the public employee and the Review Officer as set forth in Skelly v. State Personnel Bd. (1975) 15 Cal.3d 194 [124 Cal.Rptr. 14] (Skelly). In Skelly, the Court holds that due process mandates that the employee be accorded certain procedural rights before the discipline becomes effective. These safeguards include "notice of the proposed action, the reasons therefore, a copy of the charges and materials upon which the action is based, the right to respond, either orally or in writing, to the authority initially imposing discipline." (Skelly, at p. 215.)

employee during the hearing. The ALJ thereupon dismissed the complaint and the underlying unfair practice charge.

The Board has reviewed the entire record in this matter, including the ALJ's proposed decision, APC's exceptions and the University's response. As discussed in the decision below, the Board agrees that APC has failed to establish a unilateral change in policy or practice, and on that basis, dismisses the complaint.

## PROCEDURAL HISTORY

This action was commenced on November 11, 2002, when APC filed an unfair practice charge against the University. The Office of the General Counsel of the Board followed on April 30, 2003, by issuing a complaint against the University. The complaint alleged that before July, 1997, it was the University's policy or practice to permit more than one employee representative at a Skelly hearing, and to allow them to speak on behalf of the employee. The complaint further alleged that effective July 1997, the University adopted the "Instructions for Skelly Review Officers," which limited the quantity of employee representatives to one. On August 22, 2002, a Skelly review officer (Skelly officer) announced before the commencement of a scheduled Skelly hearing at CSU Los Angeles, that he would disallow more than one employee representative, and prohibit the representative to speak on behalf of the employee. By making these changes, the complaint alleged, the University had violated the Higher Education Employer-Employee Relations Act (HEERA)[2] section 3571 (a) and (c).

The matter was not settled at the conclusion of an informal conference on June 26, 2003.

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

On motion by APC, the complaint was amended on August 14, 2003, to add the allegation that the University had unlawfully promulgated a change in the Skelly policy on a statewide basis.

A hearing into these allegations was conducted before the ALJ on September 16, 2003, at the PERB office in Los Angeles. With the filing of post-hearing briefs, the matter was submitted for decision on November 14, 2003. The ALJ issued the proposed decision on December 4, 2003, dismissing the complaint and the underlying unfair practice charge.

## FINDINGS OF FACT

The University is an employer as defined in HEERA section 3562(g). APC is an employee organization as defined in Section 3562(h). At all times relevant, APC has been the exclusive representative, as defined in Section 3562(i), of an appropriate unit of the University's employees. A collective bargaining agreement was in effect between the parties during the relevant period. However, it contains no provision that arguably prohibits the conduct at issue.

### The University's Policy Regarding Skelly Review Officers Before 1997

The function of a Skelly officer is to provide an objective review of the employee's response to the employer's charge, and to evaluate whether there is evidence to justify disciplinary action. The University appoints Skelly officers on a voluntary ad-hoc basis. They are usually managers or supervisors, who receive no training and many of whom have no prior experience as Skelly officers.

Linda MacAllister (MacAllister), former staff attorney in the general counsel's office of the University, testified at the hearing before the ALJ that prior to July 1997, guidelines for Skelly officers were contained in a one-page document. Although the University was unable

to locate this document, MacAllister testified that she was familiar with both the guidelines and general policy concerning Skelly officers during that time period.

MacAllister testified that the guidelines, consisting of an outline of the responsibilities of Skelly officers, were inadequate to address all the issues regarding the Skelly review process. Skelly officers would receive additional verbal communications regarding general policies, one of which concerned the quantity of representatives the employees were allowed to have during Skelly hearings.

APC witnesses were not familiar with the University's guidelines regarding Skelly officers before 1997. They testified as to their experiences in approximately seven Skelly hearings, none of which occurred before 1997. As APC offered no evidence to rebut MacAllister's testimony, the Board agrees with the ALJ's factual finding that MacAllister properly described the University's policy as it existed before 1997.

The relevant portions of the pre-1997 policy are stated as follows. There was a preference for only one representative at the hearing, however, Skelly officers had the discretion to allow more. Although employees were encouraged to speak on their own behalf, the employee representatives were permitted and not restricted to speak in the course of their representation.

In or around May 1997, MacAllister recommended to the University's general counsel that all of the University's existing policies regarding its review officers' conduct of Skelly hearings be codified. The intent, according to MacAllister, was to:

> [C]ome out with a document that put into simple English the advice, the legal advice, we had been given [sic] our clients for as long as I've been doing disciplines in the office and hopefully save the University counsel time in not getting repeat questions. It was to put into writing legal advice we had been giving our campuses over the phone.
> (R.T. p. 63.)

MacAllister emphasized in her testimony that the intent was to put the current policies in writing rather than to develop "new" policies.

The University's Adoption of the Instructions for Skelly Review Officers in 1997

The University's general counsel office completed a draft of the "Revision of the Instructions Provided to Skelly Review Officers," in May 1997, sent it to the University campus personnel officers and requested feedback on the revisions. In July 1997, the draft was adopted as "Instructions for Skelly Review Officers" (instructions), and distributed to the presidents and personnel directors of the various CSU campuses. It is undisputed that during this process, the University did not provide APC a copy of the instructions.[3]

The relevant portions of the instructions are stated in the following:

> The employee is entitled to have *one* representative when s/he meets the Review Officer, if s/he chooses. Other persons to support the employee may only attend if the Review Officer consents. Since additional persons can be distracting and/or create confusion, their involvement is generally discouraged. The employee's representative may be a union representative or an attorney. In either case, formal representative of management is not required given the limited role of the Review Officer. If the employee is accompanied by any representative, the Review Officer should make clear that s/he is there to hear from the employee, and *not* other persons whose purpose in attendance is to provide support. [Italics in original.]

APC argues that based on the above language, employees are entitled to have only one representative during Skelly hearings. The instructions allegedly give the Skelly officers no discretion to allow more than one employee representative.

The University disputes APC's interpretation of the instructions. MacAllister, who drafted the instructions, testified that since 1989, Skelly officers had always had the discretion

[3]The University also claimed during the hearing that the instructions were intended to constitute legal advice, and thus, were protected by the attorney-client privilege. However, it is undisputed that the instructions are now provided to Skelly officers upon their appointments, and are available to the public on the CSU's website.

to allow more than one employee representative at the hearings. The instructions were intended to merely codify existing policy or practice, and not to restrict the Skelly officers' discretion in determining the quantity of employee representatives permitted to participate at the hearing. She testified that:

> [W]e don't restrict them to one. We strongly encourage that there be only one representative. If they show up with more than one representative, the hearing is not canceled. It is left up to the Skelly review officer to determine whether or not to go forward. In my practice of being involved with these since 1989, there's never been one that has been canceled because there was more than one person there.
> (R.T. p. 78.)

MacAllister added that the instructions do not prohibit or restrict the representative's ability to speak on behalf of the employee.

Two APC witnesses testified to their experiences in approximately seven Skelly hearings. At a prior hearing that occurred in January 2002,[4] APC was notified that only one employee representative would be allowed. APC objected, and after an exchange of e-mails between the campus director of human resources and the campus steward, two representatives were allowed. In all other instances to which the witnesses testified, except for the present matter, at least two representatives were permitted to remain and participate in the Skelly hearings.

University witnesses also testified about their experiences with Skelly hearings. They testified that before and after 1997, they understood that the University had a preference for one employee representative, but that Skelly officers had the discretion to allow more. Although the University had a preference to hear directly from the employee, the representatives were allowed to speak provided that they did not disrupt the hearings.

[4] All dates hereafter refer to the year 2002, unless otherwise specified.

The Skelly Hearing at CSU Los Angeles on August 22. 2002

The Skelly hearing that resulted in this unfair practice charge was the only instance in which the Skelly officer would not allow two representatives. This incident arose at CSU Los Angeles, on August 22. Ben Figueroa (Figueroa) was the Skelly officer. Appearing at the hearing were the employee and two APC representatives, Lee Norris (Norris) and the campus steward. The APC representatives informed Figueroa that the employee would not speak during the hearing, and that they would speak on her behalf.

Figueroa announced before the scheduled hearing that the employee could have only one representative. Norris insisted that there be two, and that he would do all the speaking for the employee. Figueroa, unsure of whether to go forward under these conditions, attempted to consult with the Department of Human Resources. However, he was unable to reach anyone in that department or in the office of general counsel. He made the decision finally, based on his understanding of the instructions, to stand by his first announcement.

Figueroa also stated that while one APC representative could speak during the hearing, the employee's failure to speak on her own behalf could influence his recommendation as to her discipline. The APC representatives did not agree to these conditions, and the meeting ended without the hearing being held.[5]

At the hearing before the ALJ, Figueroa testified that based on his reading of the instructions, he believed he had no authority to allow more than one representative. On redirect examination, Figueroa was asked to read that portion of the policy discussing additional "support" persons. After reading that section, Figueroa appeared to change his mind and testified that he did have the discretion to allow more than one representative.

[5]There is a dispute between Norris and Figueroa as to whether Norris was unduly angry and who caused the meeting to end. The ALJ found no need to resolve this dispute, and neither party filed exceptions over this point.

APC's Request for Instructions

After the Skelly hearing was cancelled on August 22, APC made a written information request seeking all documents which a Skelly officer would rely on or which limited the number of representatives an employee might have at a Skelly hearing. In response, the University provided a copy of the instructions on September 18. In a letter dated October 11, Norris claimed that the University had "unilaterally promulgated" a new policy by implementing the instructions, and requested all documents governing Skelly hearings preceding adoption of the instructions. The University's assistant vice-chancellor responded in writing on October 25, that no policies had been issued and practices regarding Skelly hearings had remained unchanged.

APC claims that before September 18, it had no knowledge of the instructions adopted by the University in 1997, or of the one-page guideline which predated it. APC contends that, assuming the one-page document existed, the adoption of the 1997 instructions was a change in policy, of which it learned for the first time on September 18. APC further contends that employees have a statutory right to representation at Skelly hearings which the University may not limit without first bargaining with APC.

## DISCUSSION

The issues in the present case are whether or not the University made a unilateral change in its policy regarding employee representation at Skelly hearings, and thereby failed to meet and negotiate in good faith by: first, adoption of the instructions for Skelly review officers in 1997; and second, Skelly Officer Figueroa's refusal to permit more than one employee representative at a Skelly hearing on August 22, 2002, at CSU Los Angeles, and disallowing the representatives to speak on behalf of the employee.

HEERA section 357l(c) states that a unilateral change in policy or practice violates the duty to meet and confer in good faith. In determining whether a party has violated HEERA section 357 l(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.)

To prevail on a complaint of unilateral change, the exclusive representative must establish by a preponderance of the evidence that the employer breached or altered the parties' written agreement or own established past practice; such action was taken without giving the exclusive representative notice or an opportunity to bargain over the change; the change was not merely an isolated breach of the contract, but amounts to a change of policy (i.e., has a generalized effect or continuing impact upon the terms and conditions of employment of bargaining unit members); and the change in policy concerns a matter within the scope of representation. (Grant Joint Union High School District (1982) PERB Decision No. 196: State of California (Department of Forestry and Fire Protection) (1993) PERB Decision No. 999-S.)

In its exceptions, APC argues that the ALJ erred in finding that the University had a pre-1997 policy of preferring only one union representative in Skelly hearings. The University's evidence consisted solely of MacAllister's testimony, and absent any documentary proof to the contrary, the only conclusion is that the University did not limit the number of union representatives in Skelly hearings before 1997. This policy was changed when Figueroa denied an employee her right to have more than one representative at a Skelly hearing on August 22, at CSU Los Angeles. Figueroa's conduct of the hearing was not an isolated breach of the contract, but amounted to a change of policy or practice.

The University contends in its response that the evidence shows the University policy or practice regarding Skelly hearings has been consistent in its preference for one union

representative at Skelly hearings, and hearing directly from the employee rather than the representative. The testimony of two APC witnesses, stating that more than one union representative were allowed in several Skelly hearings, is insufficient to establish that the University had a "past practice."

The first issue before the Board is whether the University's adoption of the instructions in 1997 constituted a unilateral change in policy or practice. The preponderance of the evidence in the present case shows that before July 1997, the University's policy or practice was to inform Skelly officers that it was preferable to have only one representative present at the Skelly hearings, but that they had the discretion to allow more. Skelly officers were further instructed that it was preferable to hear directly from the employee during the Skelly hearings, but that representatives were not prohibited from speaking, and in fact, were permitted to speak.

To determine whether or not the University departed from this past policy or practice by adopting the instructions in July 1997, we must first interpret the language of the instructions. The plain language of the policy must be accepted if it is clear and unambiguous. (County of San Joaquin (2003) PERB Decision No. 1570-M; Westlands Water District (2004) PERB Decision No. 1622-M.) Where an ambiguity exists, it is proper to rely on extrinsic evidence to ascertain the meaning of the policy. (Modesto City Schools (1983) PERB Decision No. 347 (Modesto).) In Modesto, a case involving a teacher evaluation policy, the Board held that when the policy did not "unambiguously preclude" consecutive evaluations, but was only "silent" as to the frequency of such evaluations, the Board should "interpret the policy's silence in accord with the purpose intended to be served by the policy."

In the present matter, the instructions state that the "employee is entitled to have one representative when s/he meets with the Review Officer, if s/he chooses. Other persons to

support the employee may only attend if the Review Officer consents." The instructions are silent as to whether the employee is entitled to only one representative and whether the Skelly officer has discretion to allow more. The purpose intended to be served by the instructions is to guarantee the employee certain procedural rights before the discipline becomes effective. (Skelly.) Inherent with the due process protection for the employee as warranted by the Skelly decision are notices of the nature, reasons, and facts supporting the charges of the proposed disciplinary action, and the opportunity to respond. Under these circumstances, it seems incongruous to find that the University, by its silence, intended to restrict the employee's right to representation.

The instructions specifically permit "other persons to support the employee" to attend the hearing, if the Skelly officer "consents." The instructions are again silent as to whether or not the additional representative(s) can be permitted to attend the hearing as the employee's other support person(s). In reaching its decision in Modesto, the Board considered extrinsic evidence, including the testimony of a witness who was responsible for drafting the policy, in clarifying any ambiguity therein. Accordingly, we refer to the testimony of MacAllister who drafted the instructions. MacAllister testified that the instructions did not remove from Skelly officers their discretion to allow more than one representative. She further testified that in her personal experience, no Skelly officer had interpreted the instructions as prohibiting the exercise of his or her discretion to allow additional representatives, except the Skelly officer in the present matter. When Figueroa was placed under redirect examination during the hearing before the ALJ, Figueroa was asked to read that portion of the policy discussing additional "support" persons. After reading that section, Figueroa testified that he did have the discretion to allow more than one representative. Based on this testimonial evidence and the discussion

above, the Board finds that the instructions did not constitute a change in policy or practice with respect to the quantity of representatives allowed in Skelly hearings.

APC contends that the University unilaterally changed its past practice of permitting the employee representative to speak on behalf of the employee at a Skelly hearing. The instructions are silent on the ability of the employee's representative to speak. On their face, the instructions state that where an employee has a representative, the involvement of other support persons is generally discouraged since they can be distracting and/or create confusion. This does not mean that the employee representative, whose role is distinguishable from that of a support person, is prohibited from speaking. This interpretation is supported by MacAllister's testimony stating that the University's policy or practice, which has remained consistent before and after the adoption of the instructions, permits both the employee and the representative to speak.

In conclusion, the Board finds the language of the instructions ambiguous and/or silent on the issues of whether a Skelly officer has the discretion to allow more than one representative and whether the representative has a right to speak. The Board has considered the testimony of MacAlister, who drafted the instructions, that the instructions give Skelly officers the discretion to allow more than one representative, permit the representative(s) to speak on behalf of the employee, and make clear that the Skelly officer is there to hear from the employee. The Board finds MacAllister's testimony convincing in that the instructions do not depart from established University policy or practice. MacAllister's testimony is supported by the APC witnesses' statements that except for the present matter, multiple representatives are allowed to attend Skelly hearings and speak on behalf of the employee. The Board notes

that as the charging party, APC has the burden of proof. (PERB Reg. 32178.[6]) In this matter, APC has failed to present any rebuttal evidence to show that MacAllister's testimony concerning the pre-1997 policy was incorrect, and that APC's recollection or knowledge of the policy contradicted that of MacAllister. In the absence of any contradictory evidence, the Board finds that the instructions represent the past and current University policy or practice regarding the Skelly review process. APC has therefore failed to establish that the adoption of the instructions constituted a unilateral change.

The Board now addresses the issues raised by the Skelly hearing scheduled for August 22 at CSU Los Angeles. Before the commencement of the hearing, Figueroa announced that he would allow only one union representative to attend the Skelly hearing with the employee. According to Figueroa's testimony, his refusal to allow two representatives was based on his interpretation of the instructions, and belief that he had no discretion to allow more than one representative.

Before the commencement of the August 22, Skelly hearing, Figueroa also stated that he wanted to hear directly from the employee, and that the employee's refusal to speak could influence his decision. The Board finds nothing improper about Figueroa's request to hear directly from the employee. As discussed earlier, an employee is entitled to certain due process safeguards at a Skelly hearing. These safeguards include, among other things, "the right to respond, either orally or in writing, to the authority initially imposing discipline." (Skelly, at p. 215.) The University's policy of preferring to hear directly from the employee who is accompanied by a representative, rather than from the other person whose purpose in attendance is to provide support, is therefore congruent with the employee's right to respond

[6]PERB regulations are codified at California Code of Regulations, title 8, section 31001, et seq.

under the Skelly decision. Furthermore, by insisting that the employee speak on her own behalf, Figueroa never stated that the employee's representative would be prohibited from speaking or representing the employee. As such, the Board finds that Figueroa did not breach the University's policy allowing representatives to speak or represent the employees at Skelly hearings.

The only remaining issue is whether Figueroa's failure to follow the University's policy to allow more than one representative constituted a change in policy or practice. As is evident from Figueroa's testimony, he was confused about how to interpret the instructions, and after futilely seeking clarifications from the director of human resources and the general counsel's office, he concluded on his own that only one representative would be permitted. In the absence of any evidence showing that the University had authorized Figueroa to exclude the second representative, Figueroa's misinterpretation of the instructions cannot be imputed on the University.

There is no evidence that Figueroa's interpretation was adopted by the University. To the contrary, Figueroa's interpretation was reputed by MacAllister and the APC witnesses who testified that with the exception of this single incident, more than one employee representative were permitted at Skelly hearings. As a result, the Board finds that Figueroa's actions only constituted a one-time breach of the University's policy, and did not have a generalized effect or continuing impact upon the terms and conditions of employment of a bargaining unit member.[7]

[7]As this appears to be a one-time violation with no continuing impact, the State of California (Department of Forestry and Fire Protection) (1993) PERB Decision No. 999-S and Hacienda La Puente Unified School District (1997) PERB Decision No. 1186 decisions cited by APC are distinguishable.

Accordingly, the Board concludes that the University made no unilateral change when it adopted the instructions in July 1997, and when Figueroa misinterpreted the instructions and announced that only one representative would be permitted at a Skelly hearing on August 22, and that the representative could not speak on behalf of the employee. The complaint must be dismissed.

Having dismissed the complaint on the grounds that there has been no change in policy or practice, the Board does not find it necessary to address the timeliness and scope of representation issues.

## ORDER

The unfair practice charge and complaint in Case No. LA-CE-717-H is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chairman Duncan and Member Whitehead joined in this Decision.