

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



OLIVIA JIMENEZ-NEWBY,

Charging Party,

v.

UPTE, CWA LOCAL 9119,

Respondent.

Case No. LA-CO-206-H

PERB Decision No. 1819-H

February 16, 2006

Appearances: Werner Witke, Representative, for Olivia Jimenez-Newby; Leonard Carder by Margot Rosenberg, Attorney, for UPTE, CWA Local 9119.

Before Duncan, Chairman; Shek and McKeag, Members.

DECISION

DUNCAN, Chairman: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Olivia Jimenez-Newby (Jimenez-Newby) of a Board agent's partial dismissal (attached) of her unfair practice charge. The charge alleges that UPTE, CWA Local 9119 (UPTE) violated the Higher Education Employer-Employee Relations Act (HEERA)¹ by sending a defective Hudson notice.²

The Board has reviewed the entire record in this case, including the unfair practice charge, the response, the warning and dismissal letters, the appeal by Jimenez-Newby and the response filed by UPTE. The Board finds the warning and dismissal letters to be free of prejudicial error and adopts them as the decision of the Board itself for the reasons set forth below.

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

² Under Chicago Teachers Union, Local 1 v. Hudson (1986) 475 U.S. 292 [121 LRRM 2793] (Hudson), the exclusive representative is required to provide a notice of agency fee payer rights prior to collecting agency fees.

PROCEDURAL HISTORY

In her unfair practice charge, Jimenez-Newby alleges that UPTE committed the following unlawful acts: (1) UPTE unlawfully collected agency fees prior to providing a Hudson notice to nonmembers; (2) UPTE unlawfully benefited from an “interest free loan” during the time between the collection of the fees and the refund of the challenged fees; (3) the retention of these wrongfully retained fees constituted forced speech in violation of the First Amendment; and (4) the Hudson notice provided by UPTE was defective.

The Board agent determined that Jimenez-Newby stated a prima facie case for the first three allegations listed above, but failed to state a prima facie case for the allegation regarding a defective Hudson notice. Accordingly, the Board agent issued a partial dismissal for this later allegation, and Jimenez-Newby appealed. Because a complaint was issued for the other allegations, this decision solely addresses the dismissed allegation.

DISCUSSION

Jimenez-Newby alleges that UPTE has sent a Hudson notice with information related to the audit of UPTE that is not to the level required under current law. She maintains that the chargeable and nonchargeable expenses indicated by UPTE as having been spent should have been further scrutinized. She cites the Board decision in San Ramon Valley Education Association, CTA/NEA (Abbot and Cameron) (1990) PERB Decision No. 802 (San Ramon) as a basis for her position. There, as here, one of the issues was whether the exclusive representative provided adequate financial information under the Hudson criteria. There, the exclusive representative “failed to supply potential objectors with any information regarding its own financial budget.” (San Ramon at p. 19.) The Board found that it was not for the auditor to determine whether the union’s determination of what is chargeable was misplaced. (San Ramon at p. 21.) The Board in San Ramon held, “the [auditors] review of expenditures to

be sufficient to allow fee payers to form a basis for an objection.” (San Ramon at p. 22.)

UPTE has provided that in the case before us.

Jimenez-Newby is correct that there must be an accounting verified by an authority outside the union. It is the level of scrutiny that is questioned. This is addressed in Harik v. California Teachers Association (2003) 326 F.3d 1042 [172 LRRM 2193] (Harik). The Ninth Circuit Court of Appeals found a formal audit is not necessary. Harik found that “the union must provide a statement of its chargeable and nonchargeable expenses, together with an independent verification [by someone outside the union] that the expenses were actually incurred.” In Harik, some of the smaller unions involved were having union officers sign under penalty of perjury that the expenses had been made. The court found that was not sufficient and that the verification needed to be independent of the union.

UPTE has complied with what is required under PERB regulation and case law. The Hudson notice includes a letter dated July 23, 2004, from the independent accounting firm that did the UPTE audit. Included with it, as part of the Hudson notice, is the list of assets and liabilities indicating the expenses were actually made. There is a second letter as part of the notice that was proffered by Jimenez-Newby to indicate UPTE had not sent an appropriate notice. That letter, dated August 20, 2004, is also from the certified public accountant firm that did the audit. It indicates the auditors compiled the statement of expenses and the allocation between chargeable and nonchargeable expenses. The letter states that the union management provided the figures and they were not audited. This is what is required under the Harik case. There, the court specifically stated, “We hold that, while a formal audit is not required, the union must provide a statement of its chargeable and nonchargeable expenses,

together with an independent verification that the expenses were actually incurred.” (Harik at p. 1046.) The court explained further by referring to the holding in Prescott:³

In Prescott, we did not hold that ‘a separate verified audit’ is always required. . . . We held some independent verification must be provided: ‘[W]hat is required is a real independent verification of the financial data in question to make sure that expenditures are being made the way the union says they are.’ . . . (Harik at p. 1048, citations omitted.)

If an agency fee payer has questions regarding the credibility of the amounts listed as chargeable or nonchargeable, the correct procedure is to file a timely objection after receiving the Hudson notice and request that an arbitration hearing on whether the amounts indicated as chargeable or nonchargeable were accurately determined.

ORDER

The partial dismissal of the unfair practice charge in Case No. LA-CO-206-H is hereby AFFIRMED.

Members Shek and McKeag joined in this Decision.

³Prescott v. County of El Dorado (9th Cir. 1999) 177 F.3d 1102 [161 LRRM 2257] (Prescott).

PUBLIC EMPLOYMENT RELATIONS BOARD

Los Angeles Regional Office
3530 Wilshire Blvd., Suite 1435
Los Angeles, CA 90010-2334
Telephone: (213) 736-3008
Fax: (213) 736-4901



May 2, 2005

Werner Witke

Re: Olivia Jimenez-Newby v. UPTE, CWA Local 9119
Unfair Practice Charge No. LA-CO-206-H
PARTIAL DISMISSAL

Dear Mr. Witke:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on December 21, 2005. The charging party alleges that UPTE, CWA Local 9119 violated the Higher Education Employer-Employee Relations Act (HEERA)¹ by collecting agency fees prior to providing a notice of agency fee payers rights as required by Chicago Teachers Union, Local No. 1 v. Hudson (1986) 475 U.S. 292 [106 S.Ct. 1066, 121 L.R.R.M. 2793] (Hudson) and PERB Regulation 32992. The charge further alleges that the notice UPTE sent in September 2004 was not valid.

I indicated to you, in my attached letter dated April 18, 2005, that certain allegations contained in the 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 these allegations to state a prima facie case or withdrew them prior to April 28, 2005, the allegations would be dismissed.

I have not received either an amended charge or a request for withdrawal. Therefore, I am dismissing those allegations which fail to state a prima facie case based on the facts and reasons contained in my April 18, 2005 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. (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. (Regulation 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.)

Final Date

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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

Mary Creith
Regional Attorney

Attachment

cc: Margot Rosenberg, Attorney

MC

PUBLIC EMPLOYMENT RELATIONS BOARD

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April 18, 2005

Werner Witke

Re: Olivia Jimenez-Newby v. UPTE, CWA Local 9119
Unfair Practice Charge No. LA-CO-206-H
PARTIAL WARNING LETTER

Dear Mr. Witke:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on December 21, 2005. The charging party alleges that UPTE, CWA Local 9119 violated the Higher Education Employer-Employee Relations Act (HEERA)¹ by collecting agency fees prior to providing a notice of agency fee payers rights as required by Chicago Teachers Union, Local No. 1 v. Hudson (1986) 475 U.S. 292 [106 S.Ct. 1066, 121 L.R.R.M. 2793] (Hudson) and PERB Regulation 32992. The charge further alleges that the notice UPTE sent in September 2004 was not valid. The charge contains an affidavit signed by various people stating that they did not receive the UPTE-CWA Annual Report and Audit. Since the charging party did not sign the affidavit, the allegation that the Report was never received is not addressed in this letter.

UPTE is the exclusive representative of more than 10,000 individuals employed by the University of California (UC). UPTE has three bargaining units: research professionals, technical employees and health care professionals. UPTE and the UC are party to a collective bargaining agreement for these units and the agreement contains agency fee provisions. Charging party are nonmember agency fee payers.

In July, August and September, agency fees were deducted from Charging Party's paychecks. Although UPTE placed the collected fees in escrow, UPTE did not send notices as required by PERB Regulation 32992 until September 3 and 7, 2004.

By letter dated March 25, 2005, UPTE indicated that on January 13, 2005, it transmitted a check to the charging party which reflects the total amount of funds that were deducted from the charging party's paychecks for the period from July 1, 2004 through September 7, 2004, plus 7% interest.

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.

On April 13, 2005, UPTE notified me that the January 13, 2005 checks were not mailed until late March due to an administrative error.

Discussion

Charging party contends that UPTE violated PERB Regulation 32992 when it collected agency fees prior to providing Hudson notice to nonmembers, that UPTE will benefit from an "interest free loan" at the expense of charging party for the period occurring between collection and refund of challenged agency fees, and that retention of such funds paid by nonmembers amounts to "forced speech" in violation of the First Amendment. Charging party also challenges the validity of UPTE's Hudson notice. The allegations that UPTE violated PERB Regulation 32992 by failing to provide notice before collecting agency fees, that UPTE will benefit from an interest free loan and that UPTE has violated charging parties constitutional rights are not addressed in this letter.

Allegation that the Hudson notice is defective

Agency fees paid by nonmembers to compensate the union for its efforts on behalf of all employees in the bargaining unit for activities such as collective bargaining, contract administration, and grievance adjustment are known as "chargeable expenditures." The union may not, however, charge nonmembers fees to pay for those union activities not sufficiently related to collective bargaining to justify their being imposed on dissenters, such as member-only services and political activities.

In UPTE's September 2004 Agency Fee Notice, the auditor stated in its "Compilation Report" that:

The Statement of Expenses in column one of the accompanying Allocation Between Chargeable and Non-chargeable Expenses was taken from the University Professional and Technical Employees audited financial statements for the year ending December 31, 2003, of which we rendered a qualified audit opinion.

The Compilation Report continues:

The calculation to determine chargeable and non-chargeable percentages was prepared by management and is the responsibility of management. It was not audited or reviewed and, accordingly, we do not express an opinion or any other form of assurance on the calculation.

The types of expenditures that are chargeable and nonchargeable were listed in the Agency Fee Notice.

Regulation 32992, subdivision (b) provides:

(a) Each nonmember who will be required to pay an agency fee shall annually receive written notice from the exclusive representative of:

(1) The amount of the agency fee which is to be expressed as a percentage of the annual dues per member based upon the chargeable expenditures identified in the notice;

(2) The basis for the calculation of the agency fee; and

(3) A procedure for appealing all or any part of the agency fee.

(b) All such calculations shall be made on the basis of an independent audit that shall be made available to the nonmember.

PERB Regulation 32992 requires that the determination of what is chargeable and nonchargeable must be based on an audited statement of expenses. The UPTE statement of expenses was audited and the determination of which items were chargeable and which items were nonchargeable were based on the audited statement of expenses. Thus, UPTE complied with the requirements of Regulation 32992. The fact that the auditor did not make any assurance regarding the chargeable and nonchargeable determination itself does not render the notice invalid since there is no requirement in the PERB Regulations or elsewhere that the auditor vouch for the chargeable and nonchargeable determination.

This reading of PERB Regulation 32992 is consistent with Harik v. California Teachers Association (2003) 326 F.3d 1042. In that case the Ninth Circuit interpreted Hudson and addressed the question of what financial information unions must provide to nonmembers in order to support the amount of the agency fee. (Id. at p. 1045.) The court concluded that “while a formal audit is not required, the union must provide a statement of its chargeable and nonchargeable expenses, together with an independent verification that the expenses were actually incurred.” (Id. at pp. 1046, 1047-48.) This means that the determination of what expenses are chargeable and nonchargeable must be provided with an audited statement of actual expenses.

In addition, agency fee objectors are protected by PERB Regulation 32994, Agency Fee Appeal Procedure, which provides objecting agency fee payers with the opportunity to challenge the chargeable and nonchargeable determination in a prompt hearing before an impartial decisionmaker.

For these reasons the allegation that UPTE’s Hudson Notice is defective, 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,

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clearly labeled First Amended Charge, contain all the facts and allegations you wish to make, and be signed under penalty of perjury by you. 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 a withdrawal from you before April 28, 2005, I shall dismiss the above-described allegation from your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Mary Creith
Regional Attorney

MC