

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



STATE EMPLOYEES TRADES COUNCIL
UNITED,

Charging Party,

v.

REGENTS OF THE UNIVERSITY OF
CALIFORNIA (SAN DIEGO),

Respondent.

Case No. SF-CE-770-H

PERB Decision No. 1832-H

March 24, 2006

Appearances: Leonard Carder by Francisco M. Ugarte, Attorney, for State Employees Trades Council United; Daniel M. Wyman, Labor Relations Advocate, for Regents of the University of California (San Diego).

Before Duncan, Chairman; Shek and Neuwald, Members.

DECISION

DUNCAN, Chairman: This case is before the Public Employment Relations Board (Board) on appeal by the State Employees Trades Council United (SETC) of a Board agent's partial dismissal (attached) of its unfair practice charge. The partial dismissal portion of the charge alleged that the Regents of the University of California (San Diego) (University) violated the Higher Education Employer-Employee Relations Act (HEERA)¹ by transferring bargaining unit work out of the unit, and refusing to meet and confer in good faith about the transfer. SETC alleged that this conduct violated HEERA section 3571(c).

The Board has reviewed the entire record in this matter, including, but not limited to, the initial and amended unfair practice charge, the warning and partial dismissal letters of the

¹HEERA is codified at Government Code section 3500, et seq.

Board agent, SETC's appeal and the University's response.² The Board finds the warning and partial dismissal letters to be without prejudicial error and adopts them as the decision of the Board itself.

ORDER

The partial dismissal of the unfair practice charge in Case No. SF-CE-770-H is hereby AFFIRMED.

Member Neuwald joined in this Decision.

Member Shek's concurrence begins on page 3.

²Documents from both parties filed after the case was placed on the Board's docket were not considered by the Board because they were untimely.

SHEK, Member, concurring: I respectfully concur with and supplement the majority opinion.

The State Employees Trades Council United (SETC) contends on appeal to the Public Employment Relations Board (PERB or Board) that it did not receive the partial warning letter dated November 22, 2005, from the General Counsel's office because it was directed to the wrong address. It alleges that it received the partial warning letter only as an attachment to the partial dismissal letter dated December 8, 2005.

When the SETC consultant filed the initial and amended charges on behalf of SETC, he stated, "9647 Folsom Blvd., #322, Sacramento, CA 95827" as his mailing address. The Board's proof of service by mail dated November 22, 2005, showed that the partial warning letter was mailed to the SETC consultant at the same street address, but to a different suite number, "307."

The General Counsel's office sent the partial warning letter to one of the SETC consultant's known business address on record with PERB. On December 19, 2005, the SETC consultant sent a letter by facsimile transmission to the PERB Regional Director. SETC's mailing address on the facsimile cover sheet was identical to that on the partial warning letter.

The Board agent is mandated to advise the charging party in writing of the deficiencies in the charge in a warning letter, unless otherwise agreed by the Board agent and the charging party. (PERB Reg. sec. 32620(d).¹)

¹PERB regulations are codified at California Code of Regulations, title 8, section 31001, et seq.

A letter correctly addressed and properly mailed is presumed to have been received in the ordinary course of mail. (Evidence Code, sec. 641.)

SETC is entitled to receive the partial warning letter prior to the issuance of the partial dismissal by the Board agent. However, the evidence shows that the partial warning letter was correctly addressed and properly mailed to one of the SETC consultant's known business addresses on record. It is therefore presumed that SETC received the partial warning letter dated November 22, 2005, in the ordinary course of mail.

PUBLIC EMPLOYMENT RELATIONS BOARD



Sacramento Regional Office
1031 18th Street
Sacramento, CA 95814-4174
Telephone: (916) 327-8383
Fax: (916) 327-6377



December 8, 2005

Patrick Hallahan, Labor Consultant
SETC-United
9647 Folsom Blvd., Suite 307
Sacramento, CA 95827-1202

Re: State Employees Trades Council United v. Regents of the University of California (San Diego)
Unfair Practice Charge No. SF-CE-770-H
PARTIAL DISMISSAL

Dear Mr. Hallahan:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on September 9, 2005, and a First Amended Charge was filed on October 14, 2005. The State Employees Trades Council United (SETC) alleges that the Regents of the University of California (San Diego) (San Diego) (University or UCSD) violated the Higher Education Employer-Employee Relations Act (HEERA)¹ by transferring bargaining unit work out of the unit, refusing to meet and confer in good faith, and refusing to provide relevant and necessary information. This letter does not address the allegation concerning the alleged refusal to provide information.

I indicated to you, in my attached letter dated November 22, 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 December 2, 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 November 22, 2005 letter.

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.

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 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

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

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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

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 _____
Les Chisholm
Regional Director

Attachment

cc: Daniel M. Wyman

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November 22, 2005

Patrick Hallahan, Labor Consultant
SETC-United
9647 Folsom Blvd., Suite 307
Sacramento, CA 95827-1202

Re: SETC-United v. Regents of the University of California (San Diego)
Unfair Practice Charge No. SF-CE-770-H
PARTIAL WARNING LETTER

Dear Mr. Hallahan:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on September 9, 2005, and a First Amended Charge was filed on October 14, 2005. The SETC-United (SETC) alleges that the Regents of the University of California (San Diego) (University or UCSD) violated the Higher Education Employer-Employee Relations Act (HEERA)¹ by transferring bargaining unit work out of the unit, refusing to meet and confer in good faith, and refusing to provide relevant and necessary information. This letter does not address the allegation concerning the alleged refusal to provide information.

SETC is the exclusive representative of skilled crafts employees at UCSD. SETC was first certified as the exclusive representative in September 2003. SETC and the University completed agreement on a memorandum of understanding in March 2005. The University also employs persons in development technician classifications that are not included in the skilled crafts unit, but instead are included in a systemwide technical unit represented by a different employee organization.

In its charge, SETC contends that, since March 2005, UCSD has "allowed" employees in development technician classifications to perform skilled crafts work, including carpentry, painting, plumbing and sheet metal fabrication, in various departments'. The charge provides details regarding such "out of unit" work involving the Biology, Chemistry and Biochemistry Departments, among others, and also relates a chronology of efforts by SETC to stop the alleged transfer of work through meetings with various University officials. In its amended charge, SETC emphasizes that the alleged transfer of work is not only continuing but that certain UCSD departments are actively soliciting other departments to have skilled craft work done by their development technicians.

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 its responses to the charge and amended charge, UCSD denies that an unfair practice violation has been committed, arguing in part that development technicians have performed similar work to that now complained of by SETC for over twenty-five years. Thus, according to the University, no cognizable transfer violation has occurred.

In addition, the University contends that the instant charge is untimely filed, relying here in large part on a unit modification petition filed earlier by SETC. According to both UCSD and PERB case records, SETC filed a unit modification (UM) petition, PERB Case No. SF-UM-619-H, in August 2004, that was later withdrawn on September 22, 2005. In the UM case, SETC sought to include development technicians employed in UCSD's Biology Department in the skilled crafts unit. In support of its petition, SETC cited examples of skilled crafts work performed by the development technicians dating back to 2003, as well as prior examples as far back as 1996-1997.

Discussion

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 Unified High School District (1982) PERB Decision No. 196.)

PERB has held that the transfer of work from bargaining unit employees to those in a different or no bargaining unit is a subject within the scope of representation. (Rialto Unified School District (1982) PERB Decision No. 209.) However, not all transfers of bargaining unit work are negotiable. In Eureka City Schools (1985) PERB Decision No. 481, the Board held that a change in the distribution of duties between unit and non-unit employees, where there is an established practice of overlapping duties, does not always give rise to a duty to bargain. In Eureka, the Board stated that:

In our view, in order to prevail on a unilateral transfer of work theory, the charging party must establish, as a threshold matter, that duties were, in fact, transferred out of the unit; that is, that unit employees ceased to perform work which they had previously performed or that nonunit employees began to perform duties previously performed exclusively by unit employees. However, where, as here, unit and nonunit employees have traditionally had overlapping duties, an employer does not violate its duty to negotiate in good faith merely by increasing the

quantity of work which nonunit employees perform and decreasing the quantity of work which unit employees perform.

[Emphasis in Original; footnote omitted.]

A duty to bargain may still be found where there are negotiable effects such as a reduction of hours in the bargaining unit positions (Id.) or if unit employees cease to perform the overlapping work. (Calistoga Joint Unified School District? 1989) PERB Decision No. 744.)

The instant charge does not state a prima facie violation under these standards. The information submitted with the charge, as well as in the University's response, demonstrates only that there is an arguable change in the quantity of work being assigned to the SETC unit and to the development technicians in a different unit. The charge does not establish that the skilled crafts unit has ceased performing any work that was previously assigned exclusively to the SETC unit. Nor does the charge establish that there are negotiable effects of the change in relative quantity, such as a reduction of hours in the skilled crafts unit. The allegations must for these reasons be dismissed.

In addition, HEERA section 3563.2(a) prohibits PERB from issuing a complaint with respect to "any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge." The limitations period begins to run once the charging party knows, or should have known, of the conduct underlying the charge. (Gavilan Joint Community College District (1996) PERB Decision No. 1177.) The statute of limitations is an affirmative defense which has been raised by the respondent in this case. (Long Beach Community College District (2003) PERB Decision No. 1564.) Therefore, charging party now bears the burden of demonstrating that the charge is timely filed. (cf. Tehachapi Unified School District (1993) PERB Decision No. 1024; State of California (Department of Insurance) (1997) PERB Decision No. 1197-S.) In this case, as noted by the University, SETC's own petition in SF-UM-619-H demonstrates that SETC had knowledge of the overlapping work assignments complained of here at least as early as August 2004. Thus, the allegations are also untimely and must be dismissed.

Conclusion

For these reasons the allegations that UCSD unlawfully transferred bargaining unit work and failed to meet and confer over the issue, as presently written, do 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 December 2, 2005, I shall

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dismiss the above-described allegations. If you have any questions, please call me at the above telephone number.

Sincerely,

Les Chisholm
Regional Director