STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA FACULTY ASSOCIATION, Charging Party, v. TRUSTEES OF THE CALIFORNIA STATE UNIVERSITY (SAN DIEGO), Respondent.	Case No. LA-CE-822-H PERB Decision No. 1955-H April 24, 2008

Appearances: Rothner, Segall & Greenstone by Bernard Rohrbacher, Attorney, for California Faculty Association; Steven Raskovich, University Counsel, for Trustees of the California State University (San Diego).

Before Neuwald, Chair; McKeag and Rystrom, Members.

DECISION

McKEAG, Member: This case comes before the Public Employment Relations Board (Board) on appeal by the California Faculty Association (CFA) of a proposed decision (attached) by an administrative law judge (ALJ). The charge alleged that the Trustees of the California State University (CSU) violated the Higher Education Employer-Employee Relations Act (HEERA)[1] when the California State University, San Diego (CSUSD) discontinued staffing remedial mathematics and writing classes. CFA alleged that this conduct constituted a violation of HEERA section 3571(a), (b) and (c).

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

BACKGROUND

From 1984 to 2004, CSUSD and San Diego Community College (SDCC) jointly staffed remedial writing and mathematics courses for CSUSD students. These classes were taught on the CSUSD campus. Due to budgetary reductions, however, CSUSD unilaterally stopped staffing those classes in 2004 without negotiating with CFA. Thus, the question in this case is whether CSU committed an unlawful unilateral change when it stopped staffing the remedial classes.

The ALJ found that CSUSD would have stopped teaching the remedial classes regardless of whether SDCC agreed to teach the discontinued classes. Relying on San Diego Adult Educators v. Public Employment Relations Bd. (1990) 223 Cal.App.3d 1124 [273 Cal.Rptr. 53], the ALJ held that CSUSD did not unlawfully contract out work and dismissed the case.

The Board has reviewed the entire record in this matter and finds the proposed decision well-reasoned, adequately supported by the record and in accordance with applicable law. Accordingly, we conclude the ALJ properly dismissed this case and adopt the proposed decision as a decision of the Board itself.

ORDER

The unfair practice charge in Case No. LA-CE-822-H is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chair Neuwald and Member Rystrom joined in this Decision.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA FACULTY ASSOCIATION, Charging Party, v. TRUSTEES OF THE CALIFORNIA STATE UNIVERSITY (SAN DIEGO), Respondent.	UNFAIR PRACTICE CASE NO. LA-CE-822-H PROPOSED DECISION (4/4/06)

Appearances: Gerry Daley, Representation Specialist, for California Faculty Association; Steven Raskovich, University Counsel, for Trustees of the California State University (San Diego).

Before Thomas J. Allen, Administrative Law Judge.

PROCEDURAL HISTORY

In this case, a union alleges an employer unilaterally and unlawfully increased the contracting-out of unit work. The employer denies any violation of law.

The California Faculty Association (CFA) filed an unfair charge against the Trustees of the California State University (San Diego) (SDSU) on May 28, 2004. The General Counsel of the Public Employment Relations Board (PERB) issued a complaint against SDSU on September 22, 2004. SDSU filed an answer to the complaint on October 14, 2004, and an amended answer on October 28, 2004.

PERB held an informal settlement conference on December 17, 2004, but the case was not settled. PERB held a formal hearing on March 10-11, 2005.[1] With the receipt of final post-hearing briefs on June 28, 2005, the case was submitted for decision.

[1] At the beginning of the hearing, CFA withdrew allegations that SDSU had unreasonably delayed providing information requested by CFA, and those allegations were stricken from the complaint.

FINDINGS OF FACT

SDSU is a higher education employer under the Higher Education Employer-Employee Relations Act (HEERA).[2] CFA is an employee organization under HEERA and is the exclusive representative of a unit including SDSU's faculty employees.

For several years, SDSU students have been required to demonstrate competency in standard written English and basic mathematics. Unless they are exempt because of national test scores or previous college level courses, incoming SDSU students must take an English Placement Test (EPT) and an Entry Level Mathematics test (ELM). Those who fail the tests must enroll in remedial courses in their first semester, and successfully complete them by the end of their third term, or face disenrollment.

Students who fail the EPT must take developmental writing courses in the Department of Rhetoric and Writing Studies (DRWS). Students who fail the ELM must take general mathematics studies courses, which are also in the DRWS. Credit for these remedial courses does not count towards a baccalaureate degree.

Before 1984, SDSU fully staffed these courses with its own faculty. In that year, however, SDSU found itself overenrolled and underfunded, and it began discussions with San Diego City College (SDCC) about teaching the courses. SDCC was already teaching such remedial courses on its own campus and elsewhere in the community. As a way of stretching SDSU funds, and as a convenience to SDSU students, SDSU and SDCC entered into a series of agreements under which SDCC partially staffed the remedial courses on the SDSU campus.

It appears that SDSU and SDCC entered into a new agreement at the beginning of each school year. In the record are the agreements for the 2000-01, 2001-02, 2002-03 and 2003-04

[2] HEERA is codified at Government Code section 3560 and following.

school years. These agreements were "made and entered into" on August 28, 2000, on September 4, 2001, on September 3, 2002, and on September 2, 2003, respectively.

In each agreement, SDCC agreed in part to "provide partial monetary support" in a specified amount for the remedial classes SDCC itself staffed on the SDSU campus. This monetary support was in addition to what SDCC paid its staff, and it was to be used to offset SDSU's costs "associated with providing supplies and services and student assistant support" for the classes. SDCC could provide such monetary support because it was receiving the state funding for the remedial classes it staffed, even though SDSU received the student fees.[3]

Attached to each agreement was a six-page Memorandum of Understanding (MOU) between SDSU and SDCC. The MOU specified in part the number of class sections to be staffed by SDCC. All classes were to be listed in the SDSU class schedule, but the students in SDCC-staffed sections had to be admitted to SDCC and were to be considered SDCC students.

According to the MOU, the classes were "intended only for SDSU students." It appears that as a matter of law the SDCC-staffed classes had to be open to all SDCC students, but there is no evidence of non-SDSU students in those classes.

Also according to the MOU, the curriculum was designed to satisfy SDSU's competency requirements in English and mathematics. Any curriculum changes were to be initiated by the SDCC program coordinator after consultation with the SDSU program coordinator.

The MOU set enrollment caps for SDCC-staffed sections. Theses limits could be extended only by a joint decision of the SDSU and SDCC coordinators.

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[3]The state legislature appears to have authorized such an arrangement. Education Code section 76300(e)(2) allows a community college district not to charge fees to California State University (CSU) students enrolled in remedial classes provided by the district on a CSU campus, for whom the district claims an attendance apportionment pursuant to an agreement between the district and CSU.

The SDSU and SDCC coordinators were to "confer about and address faculty issues as needed." The SDCC-provided instructors were to be evaluated using SDCC procedures, including those established by SDCC's agreement with its own faculty union. Those instructors were also to be paid by SDCC in accordance with that agreement.

Until the fall of 2004, the great majority of remedial sections at SDSU continued to be taught by SDSU's own faculty, although the numbers of sections and enrollments were decreasing. In the fall of 2001, for example, SDSU faculty taught 102 out of a total of 169 sections. In the fall of 2002, they taught 83 out of 118 sections, and in the fall of 2003 they taught 63 out of 92 sections.

In the fall of 2004, however, SDSU faculty taught only a small minority of the remedial sections. While the total number of sections declined from 92 to 80, the number of SDSU-taught sections dropped from 63 to 12. Meanwhile, the number of SDCC-taught sections more than doubled, from 29 to 68.

The first public announcement of this change came in a memo from the DRWS chair dated January 23, 2004, stating:

> With sadness, I am writing to report that Academic Affairs has determined that at the conclusion of this semester, San Diego State University will no longer staff developmental mathematics and writing courses. Beginning in Fall 2004, all courses will be taught by City College instructors. Both programs will continue to be offered on the San Diego State University campus.
>
> The details of this change have yet to be finalized, and many key questions are still unanswered. It is my hope that this department can continue to oversee the developmental math and writing programs, particularly in terms of scheduling, curriculum, and assessment. I am working with the administration to maintain this oversight, but I simply do not know how much we will be able to salvage. At this point, I believe that we will continue to offer RWS 101, and it is my understanding that approximately half of the budget for tutoring will remain.

> In addition to the loss of developmental mathematics and writing, our department will face other budget cuts, although – once again – the specific details of these reductions are unknown at this time. I am certain, though, that our instructional staff will be significantly smaller than it has been in the past and, inevitably, jobs will be lost. Let me assure you that the department will continue to handle the periodic review and reappointment of lecturers in as fair a manner as possible, following established policies and procedures. In addition, I will do my best to keep you apprised of budgetary developments. Please feel welcome to consult with me at any time.

"RWS 101" was the course number for the 12 sections that SDSU faculty would in fact continue to teach.

The one witness at the hearing who actually participated in the decision to make the change was Ethan Singer (Singer), an SDSU associate vice president. In early January 2004, Singer and the SDSU provost knew that SDSU was facing a major budget reduction. Singer and the provost therefore recommended to the campus president that SDSU stop staffing remedial classes and focus its resources elsewhere. Although the president did not make a final decision until probably May 2004, Singer regarded the recommended change as a "done deal." He informed the DRWS chair, but he did not consult CFA.

At the same time (January 2004), Singer called Ron Manzoni (Manzoni), an SDCC vice president. According to Singer, his conversation with Manzoni went this way:

> I basically told him that -- Well, first I'm sure I asked him how things were going at City College facing the budget reduction. I told him the size of ours, and one of the -- probably one of the results of that would be that we would no longer be teaching remediation, and asked him to think about that for what City [College] might do, want to do, could do.

Singer further testified:

> I think, as I recall, Ron was -- he was thoughtful. He needed some time to think about it. I basically said what the implications would be for him, what they could or would -- might want to do. And at that point I said, well, at this point it's

> between you and the Department chair, you know, what can or cannot be done.

Singer assumed that SDCC and the DRWS chair would be talking about staffing remedial classes, but he did not know whether SDCC would have the funding to do it.

Singer consistently testified that SDSU made its decision "[t]otally independent" of SDCC. When asked what effect there would have been on SDSU's decision had SDCC not ultimately staffed remedial classes at SDSU, he replied, "None whatsoever." If that had happened, he thought that SDSU would probably have tried to play a "logistic role" in getting SDSU students who needed remedial classes to the nearest community college campus (which was not SDCC). The SDCC president, who also testified, confirmed that to the best of his knowledge SDCC "played no role" in SDSU's decision.

When asked why SDSU specifically chose not to staff remedial classes, Singer testified as follows:

> For budget purposes. When we were looking and faced with this 12.4 million dollar reduction, we had to decide where we would reduce budgets. Several years earlier, I should mention, the budget for remedial courses was moved from the Rhetoric and Writing Department's budget to the provost's office. The reason that was done was, as we were -- as the enrollments in remedial courses dropped, what we didn't want to have to do each year is have to permanently reduce the budget each year. And we believed eventually that was going to be a very small number of course sections.
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> So, we took all those funds, put them in the provost's office, and then we would allocate them out. It was a lot easier to allocate them out each year based on the number of sections that we offered. And as we looked over our budget in the provost office, as well as considering what the budget reductions would need to be in the colleges, we made the judgment we could just no longer support the San Diego State's teaching remedial courses in lieu of, again, as the situation we had in the past of not being offered -- or having severely reducing the number of courses that we would offer for graduation.

By "graduation" I understand Singer to mean graduation with a baccalaureate degree, towards which remedial courses did not count. As Singer later testified, the choice was to "reduce remedial courses or the regular courses."

The agreement between SDSU and SDCC for the 2004-05 school year is not in the record, nor is there evidence of when SDSU and SDCC entered into that agreement. Based on their practice for at least the previous four school years, I would assume that they entered into the agreement in late August or early September 2004.

ISSUE

Did SDSU unilaterally and unlawfully increase the contracting-out of unit work?

CONCLUSIONS OF LAW

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.)

By coincidence, the precedential decision most relevant to the present case also comes from San Diego: San Diego Adult Educators v. Public Employment Relations Bd. (1990) 223 Cal.App.3d 1124 [273 Cal Rptr. 53] (San Diego). As that case indicates, it is well established that an employer may reduce unit work, as a managerial decision, without negotiating. (Id. at 1133-34.) An employer may not, however, contract out unit work without negotiating (id. at

1133), or significantly increase the amount of contracting out without negotiating (Beverly Hills Unified School District (1990) PERB Decision No. 789; Oakland Unified School District (1983) PERB Decision No. 367).

In San Diego, the community college district had unilaterally contracted with an educational foundation for the teaching of both "popular" and "minor" languages. In March 1983, the district had decided to stop teaching the popular languages, for economic reasons. In May 1983, however, the district responded to public pressure by deciding to ask the foundation to offer the popular language classes, and in June 1983 it contracted for the foundation to do so. In August 1983, the district decided to add minor language classes to the contract with the foundation and to discontinue its own minor language classes.

The court of appeal concluded that the district made an unlawful unilateral change when it "contemporaneously" decided to contract for the teaching of minor languages and to discontinue its own teaching of those languages. (San Diego at 1135.) With regard to the popular languages, however, the court reached the opposite conclusion. The court ruled that the district had not contracted out unit work because the district had terminated that work before it contracted with the foundation. (Id. at 1134.)

In the present case, it does not appear that SDSU decided "contemporaneously" to contract with SDCC for more remedial classes and to cut its own remedial classes. On the contrary, it appears most likely (based on past practice) that SDSU and SDCC did not enter into an agreement for the 2004-05 school year until late August or early September 2004, months after SDSU's decision to cut its own classes was final. Indeed, SDSU's Singer testified he only called SDCC's Manzoni once he regarded SDSU's decision as a "done deal."

I do not base my decision on timing alone, however. After all, SDSU had contracted with SDCC for years, and SDSU clearly hoped that SDCC would be willing and able keep the

remedial program going on the SDSU campus for at least the immediate future. In the present case, I believe that the real issue is whether SDSU's decision to cut classes was dependent on or independent from its contract with SDCC. Timing is certainly a factor relevant to this issue, but it is not necessarily the only factor. (Cf. Whisman Elementary School District (1991) PERB Decision No. 868.)

SDSU's Singer credibly testified that SDSU's decision had been "[t]otally independent" of SDCC, and SDCC's president agreed. Singer specifically testified that if SDCC had not staffed remedial classes at SDSU in the 2004-05 school year there would have been no effect "whatsoever" on SDSU's decision. In Singer's mind, at least, SDSU had a possible backup plan: to play a "logistic role" in getting SDSU students needing remediation to the nearest community college campus (which was not SDCC).

Singer also credibly testified there were reasons other than the contract with SDCC for SDSU to cut its remedial classes in particular. First of all, enrollment in those classes had been dropping, and the drop was expected to continue. Second, faced with a major budget reduction, SDSU simply decided it was more important to preserve "regular" classes that counted toward a baccalaureate degree than to preserve remedial classes that did not.

I conclude that SDSU would have cut the remedial classes taught by members of the CFA bargaining unit regardless of whether SDSU contracted with SDCC. I therefore cannot conclude that SDSU contracted out what otherwise would have been unit work. For that reason, the unfair practice charge must be dismissed.

PROPOSED ORDER

Based upon the foregoing findings of fact and conclusions of law and the entire record in this matter, the complaint and the underlying unfair practice charge in Case No.

LA-CE-822-H, California Faculty Association v. Trustees of the California State University (San Diego), are hereby DISMISSED.

Pursuant to California Code of Regulations, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the Public Employment Relations Board (PERB or Board) itself within 20 days of service of this Decision. The Board's address is:

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

In accordance with PERB regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. (Cal. Code Regs., tit. 8, sec. 32300.)

A document is considered "filed" when actually received before the close of business (5 p.m.) on the last day set for filing. (Cal. Code Regs., tit. 8, secs. 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 California Code of Regulations, title 8, section 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. (Cal. Code Regs., tit. 8, sec. 32135(b), (c) and (d); see also Cal. Code Regs., tit. 8, secs. 32090 and 32130.)

Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served

on a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, secs. 32300, 32305, 32140, and 32135(c).)

Thomas J. Allen
Administrative Law Judge