

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



SERVICE EMPLOYEES INTERNATIONAL)
UNION, LOCAL 87,)
)
Charging Party,) Case No. S-CE-21-H
)
v.) PERB Decision No. 521-H
)
HORNET FOUNDATION, INC.,) September 20, 1985
)
Respondent.)
_____)

Appearances: Van Bourg, Weinberg, Roger & Rosenfeld by Stewart Weinberg for Service Employees International Union, Local 87; Kronick, Moskovitz, Tiedemann & Girard by James E. Mesnier for Hornet Foundation, Inc.

Before Hesse, Chairperson; Jaeger, Morgenstern, Burt and Porter, Members.

DECISION AND ORDER

Charging Party, Service Employees International Union, Local 87, appeals the dismissal, attached hereto, by the regional attorney of its unfair practice charge against Hornet Foundation, Inc. (Respondent), for failure to state a prima facie case. While the parties disagree over whether a prima facie violation of section 3571 of the Higher Education Employer-Employee Relations Act (HEERA) (Government Code section 3560 et seq.) was alleged by the charge, both parties assert on appeal that the issue of the sufficiency of the charge should not have been reached without first addressing whether or not the Respondent's relationship to California State University, Sacramento, is such that Respondent

is subject to the provisions of HEERA, and thus subject to Public Employment Relations Board (Board) jurisdiction.

Because we agree that the regional attorney erred in failing to address the jurisdictional issue first, it is hereby ORDERED that this case be remanded to the General Counsel for appropriate action. By this Decision, the Board makes no representation as to the accuracy of the regional attorney's determination with regard to the sufficiency of the charge.

By the BOARD

PUBLIC EMPLOYMENT RELATIONS BOARD

SACRAMENTO REGIONAL OFFICE
1031 18TH STREET, SUITE 102
SACRAMENTO, CALIFORNIA 95814
(916) 322-3198



May 16. 1985

William A. Sokol
Van Bourg, Weinburg, Roger & Rosenfeld
875 Battery Street
San Francisco. CA 94111

Re: SEIU Local 87 v. Hornet Foundation. Inc.
Unfair Practice Charge No. S-CE-21-H

Dear Mr. Sokol:

The above-referenced charge alleges that the Hornet Foundation. Inc. (Foundation) has refused to sign a collective bargaining agreement which it negotiated with the Service Employees International Union. Local 87 (Union). This conduct is alleged to violate section 3571 of the Higher Education Employer-Employee Relations Act (HEERA).

I indicated to you in my letter dated May 1. 1985 that the above-referenced charge did not state a prima facie case, and that unless you amended the charge to state a prima facie case, or withdrew it prior to May 8, 1985. it would be dismissed. This deadline was extended to May 13. 1985. More specifically. I informed you that if there were any factual inaccuracies or additional facts which would correct the deficiencies explained in that letter, you should amend the charge accordingly.

I have not received either a request for withdrawal or an amended charge and am therefore dismissing this charge based on the facts and reasons contained in my May 1. 1985 letter which is attached as Exhibit 1.

Pursuant to Public Employment Relations Board regulation section 32635 (California Administrative Code, title 8. part III), you may appeal the refusal to issue a complaint (dismissal) to the Board itself.

Right to Appeal

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 (section 32635(a)). To be timely filed, the original and five (5) copies of such appeal must be actually received by the Board itself before the close of business (5:00 p.m.) on June 5. 1985. or sent by telegraph or certified

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United States mail postmarked not later than June 5, 1985 (section 32135). The Board's address is:

Public Employment Relations Board
1031 18th Street
Sacramento, CA 95814

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 (5) copies of a statement in opposition within twenty (20) calendar days following the date of service of the appeal (section 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 section 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.

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 (section 32132).

Final Date

If no appeal is filed within the specified time limits, the dismissal will become final when the time limits have expired.

Very truly yours.

DENNIS M. SULLIVAN
General Counsel

By
Robert Thompson
Regional Attorney

PUBLIC EMPLOYMENT RELATIONS BOARD

SACRAMENTO REGIONAL OFFICE
1031 18TH STREET, SUITE 102
SACRAMENTO, CALIFORNIA 95814
(916) 322-3198



May 1, 1985

William A. Sokol
Van Bourg. Weinburg. Roger & Rosenfeld
875 Battery Street
San Francisco, CA 94111

Re: SEIU Local 87 v. Hornet Foundation, Inc.
Unfair Practice Charge No. S-CE-21-H

Dear Mr. Sokol:

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My investigation revealed the following facts. The Hornet Foundation is a nonprofit corporation organized under the provisions of the Nonprofit Public Benefit Corporation Law. It is an auxiliary organization to the Cal State University campus in Sacramento. As such it is governed by section 89900 et seq. of the Education Code and title 5, section 42400 et seq. of the California Administrative Code. According to its bylaws, the Foundation's affairs are controlled by a nine-person board of directors.

The Union has represented food service employees of the Foundation for several years and has been a party to a collective bargaining agreement with the Foundation since 1966. After negotiating during 1984, the Foundation and the Union reached a tentative agreement as to a new collective bargaining agreement effective through June 30, 1987. On August 23, 1984, the food service director of the Foundation, Russell Leverenz, forwarded copies of the proposed memorandum of understanding (MOU) to the Union. His cover letter stated in part:

[f]ollowing acceptance by the employees,
please contact me so that we may coordinate
the signing and dating of the memorandum to
forward to the Hornet*Foundation Board of
Directors for final ratification.

EXHIBIT I

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A signed copy of the memorandum was returned to Mr. Leverenz from the Union on October 12. Three days later Mr. Leverenz notified the union by letter that the Foundation's legal counsel had informed him that the language negotiated in Article 2.01 and 2.02 was illegal. This language reads as follows:

ARTICLE* II - UNION RECOGNITION AND SECURITY

2.01. Recognition: The employer hereby recognizes the Union as the exclusive bargaining organization for its covered Food Service employees for the purposes of negotiating wages, hours and other terms and conditions of employment on behalf of covered employees excluding confidential, supervisory, management and casual/student employees.

It shall be a condition of employment that all employees of the employer covered by this memorandum who are presently members of the Union shall remain members in good standing during the life of this memorandum. It shall be a condition of employment that employees who are not presently members of the union on the execution date of the memorandum shall, within thirty-one (31) days following execution date of this memorandum, become either members in good standing in the Union or be required to pay an amount equal to initiation fees and periodic dues set by the Union.

It shall also be a condition of employment that all employees covered by this memorandum and hired on or after execution date shall, within thirty-one (31) days following beginning of such employment, become and remain members in good standing in the Union.

Employees who are required hereinunder to maintain membership and fail to do so and employees who are required hereinunder to

render a "fair share fee" deduction and fail to do so shall, upon notice of such action in writing from the Union to the employer, be terminated within seven (7) days of such notification.

2.02. Dues Deduction and Indemnification;
The employer agrees to deduct and remit to Union all authorized deductions from Union members who have signed an approved authorization card or cards for such deductions in the form provided.

1. Union agrees to indemnify, defend and hold harmless the employer against any claims of any nature and any lawsuit instituted against employer made or arising from employer check off for dues.
2. The written authorization for dues or "fair share fee" of an amount equal to such dues deduction shall remain in force and effect during the life of this memorandum.
3. The employer will promptly remit membership dues or fees deducted to the Union, together with a list of the employees who have had said dues or fees deducted. Deductions of membership dues or fees will be made from each pay period in which an employee is in pay status; provided, however, the employer and Union may make other arrangements by mutual agreement consistent with employee's written authorization, (emphasis in original).

Mr. Leverenz concluded his letter by stating:

As a result of this review, I have prepared a draft of the language which I propose we use in the memorandum of understanding replacing the previous language. Enclosed is a copy as you requested in our phone conversation this morning.

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Please review the draft and feel free to contact me if you have questions concerning the proposal. We would like to resolve this matter in a timely and legal manner.

On November 7, Bill Freitas, a representative of the Union, argued with Mr. Leverenz that the contract, as proposed, was legal. At that time, the parties exchanged the names, addresses and telephone numbers of their respective attorneys. The Union and the Foundation continued to discuss the matter until December 14, when the Union filed a charge with the National Labor Relations Board (NLRB) in San Francisco. On January 31, the regional director of the NLRB notified the parties of his conclusions:

The investigation revealed that the employer is an integral part of the State University System under pervasive state control. Therefore, it is concluded that the employer is exempt from the coverage of the Act pursuant to the provisions of section 2(2). I am, therefore, refusing to issue complaint in this matter.

On February 12, Mr. Leverenz notified the Union that the Foundation wished to proceed "expeditiously to resolve the Article 2.01 and 2.03 [sic] language in the memorandum of understanding." On February 27, the Union filed the present unfair practice charge with PERB.

Based on the facts described above, this charge fails to state a prima facie violation of the HEERA for the reasons which follow.

It is arguable that the State University system so closely controls the workings and labor relations policy of the Hornet Foundation that the University can be deemed a "joint employer" of Hornet employees, thereby making them "employees" covered by the HEERA, see Alameda County Board of Education et al. (6/30/83) PERB Decision NO. 323, at pp. 13-19. At this time it is unclear whether such a joint employer relationship exists; however, for the purposes of this letter the Foundation will be treated as if subject to PERB's jurisdiction. If the deficiencies in the charge, as identified below, are cured, a determination of the joint employer issue will be made.

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HEERA Section 3562(d) defines the employer's meet and confer obligation as limited to matters within the scope of representation. HEERA section 3582 reads as follows:

Subject to the limitations set forth in this section, organizational security shall be within the scope of representation.

The legal forms of organizational security are discussed in section 3583 which reads:

Permissible forms of organizational security shall be limited to an arrangement pursuant to which an employee may decide whether or not to join the recognized or certified employee organization, but which requires the employer to deduct from the wages or salary of any employee who does join, and pay to the employee organization which is the exclusive representative of such employee, the standard initiation fee, periodic dues, and general assessments of such organization for the duration of the written memorandum of understanding. However, no such arrangement shall deprive the employee of the right to resign from the employee organization within a period of 30 days prior to the expiration of a written memorandum of understanding. (emphasis added).

Article 2.01 of the proposed memorandum of understanding reads in pertinent part:

It shall also be a condition of employment that all employees covered by this memorandum and hired on or after execution date shall, within thirty-one (31) days following beginning of such employment, become and remain members in good standing in the Union.

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This clause which requires Union membership for new employees hired after the execution of the agreement is a form of organizational security which is not permitted by HEERA section 3583. That section, when read in conjunction with section 3565¹, specifically limits the form of an organizational security clause to one which recognizes the individual employee's right to decide whether or not to join the employee organization. Any other form of organizational security clause would be considered outside the scope of representation under section 3582. Thus, Article 2.01 and 2.02 of the proposed memorandum of understanding is outside the scope of representation. HEERA section 3562(r) states in pertinent part:

All matters not within the scope of representation are reserved to the employer and may not be subject to meeting and conferring, provided that nothing herein may be construed to limit the right of the employer to consult with any employees or employee organization on any matter outside the scope of representation.

Thus, the employer is under no obligation to meet and confer over Article 2.01 or 2.02. In light of HEERA section 3583, the union shop provision of the MOU appears to be impermissible. The employer's refusal to sign an agreement containing this language does not, therefore, violate the HEERA.

Section 2.01 also contains the requirement for present employees to either become members of the Union or "be required to pay an amount equal to initiation fees and periodic dues set by the Union." Such an "agency fee" provision is also outside the permissible forms of organizational security outlined

¹HEERA section 3565 provides in pertinent part;

Higher education employees shall also have the right to refuse to join employee organizations or to participate in the activities of these organizations subject to the organizational security provision permissible under this chapter.

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in HEERA section 3583. Finally, the Memorandum of Understanding contains no provision for members of the Union to resign during the final 30 days of the MOU. The lack of such a provision brings section 2.01 into conflict with the provisions of HEERA section 3583.

For these reasons, charge number S-CE-21-H, as presently written, does not state a prima facie case. If you feel that there are any factual inaccuracies in this letter or any additional facts which would correct the deficiencies explained above, please amend the charge accordingly. 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 be served on the respondent and the original proof of service must be filed with PERB. If I do not receive an amended charge or withdrawal from you before May 8, 1985, I shall dismiss your charge. If you have any questions on how to proceed, please call me at (916) 322-3198.

Sincerely yours,

Robert Thompson
Regional Attorney

cc: Bill Freitas