

**OVERRULED by Long Beach Community College District (2003) PERB Decision No. 1564,
and Los Angeles Unified School District (2014) PERB Decision No. 2359**

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



CALIFORNIA STATE EMPLOYEES)
ASSOCIATION,)
)
Charging Party,) Case Nos. LA-CE-115-H
) LA-CE-119-H
v.)
) PERB Decision No. 718-H
CALIFORNIA STATE UNIVERSITY,)
SAN DIEGO,) January 17, 1989
)
Respondent.)

Appearances: Mark De Boer, Attorney, for California State Employees Association; William B. Haughton, Attorney, for California State University.

Before Hesse, Chairperson; Porter, Craib and Shank, Members.

DECISION

PORTER, Member: This case (Charge No. LA-CE-119-H)¹ is before the Public Employment Relations Board (PERB or Board) on exceptions filed by California State University (San Diego) (CSUSD) to the proposed decision of a PERB administrative law judge (ALJ). The ALJ found that CSUSD violated section 3571, subdivision (c) and, derivatively, subdivisions (a) and (b) of the Higher Education Employment-Employee Relations Act

¹At the beginning of the hearing in this case, the charging party moved to withdraw charge No. LA-CE-115-H. The ALJ granted the motion. Thus, the only charge now before the Board is charge No. LA-CE-119-H.

(HEERA).² We reverse the ALJ and dismiss the complaint for the following reasons.

FACTUAL SUMMARY

The charge in the instant case was filed by the California State Employees Association (CSEA) on November 26, 1984. It alleged that CSUSD violated HEERA section 3571, subdivision (c) and, derivatively, subdivisions (a) and (b) by its unilateral transfer of tree trimming work to CSUSD employees outside the unit. CSEA alleged that this occurred when CSUSD had certain Unit 6 employees--namely, one individual occupying a Plumber I classification--perform Unit 5 tree trimming work.

CSEA was certified as the exclusive representative of Unit 5 on February 16, 1982. Prior to CSEA's certification, PERB established statewide bargaining units by incorporating

²HEERA is codified at Government Code section 3560 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code. HEERA section 3571 provides, in pertinent part:

It shall be unlawful for the higher education employer to:

(a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.

(b) Deny to employee organizations rights guaranteed to them by this chapter.

(c) Refuse or fail to engage in meeting and conferring with an exclusive representative.

the numerous classifications already existing throughout the California State University system. The classifications describe jobs by title, task and the level of skill required. (See HEERA sec. 3579 and Unit Determination for Employees of the California State University and Colleges (1981) PERB Decision No. 176-H.) The two units implicated herein are Unit 5, identified as Operations-Support Services, and Unit 6, identified as Skilled Crafts.

Unit 5 includes, in part, the classifications of Groundswoker, Tree Trimmer I and Tree Trimmer II. Essentially, Tree Trimmer I and Tree Trimmer II are distinguished from the Groundswoker in that trimming trees constitutes the main function of the first two positions, with only incidental grounds maintenance work involved. Tree Trimmer II is distinguished from Tree Trimmer I in that it calls for a substantial portion of the work to be performed at a high elevation and involves the use of specialized climbing equipment.

There are approximately 40 employees in Unit 5 at CSUSD. Of these, 15 are Groundswokers. CSUSD has never had employees in the classifications of Tree Trimmer I or II. There has never existed a need for a permanent tree trimmer at the San Diego campus due to the number, height and types of trees which grow at CSUSD.

Unit 6 includes, in part, the classification of Plumber I. The definition of Plumber I is as follows:

PLUMBER I

Under direction, does skilled plumbing work, and related work, as required.

.

The incumbents of positions in this class install, maintain, inspect, and repair standard plumbing equipment concerned with water, gas, oil, sewage, fire control, steam and refrigeration systems; troubleshoot plumbing systems; install and repair pumps; maintain a plumbing shop; make rough sketches and estimate labor and materials for minor plumbing installations and repairs; advise on selection, ordering, and storage of plumbing supplies and equipment; consult with other tradespeople; keep simple records and make reports; instruct and lead unskilled assistants.

From this job description, it is clear that no part of a plumber's job includes the work of trimming trees. On the other hand, Unit 5 contains at least three classifications which involve tree trimming.

The parties stipulated at hearing that CSUSD assigned Unit 6 employees to perform tree trimming work on three separate occasions in 1984. The first of these events occurred on April 2, 1984, and involved a large branch of a eucalyptus tree which fell on a parked car. It was removed by employees in an emergency or "E" crew, which includes an equipment operator and at least one skilled laborer; both positions belonging to Unit 6. None of the work required the use of tree climbing equipment.

The second event occurred on September 20, 1984, when a tree fell on a major public street and partially obstructed traffic.

It, thus, became incumbent upon CSUSD to remove the tree very quickly. CSUSD dispatched the same E crew, and also the plumber. In order to properly remove the tree in this emergency situation, an individual experienced in the use of tree climbing equipment was required. The plumber, who had once been a groundskeeper, was the only employee at the San Diego campus who had been trained in the use of such equipment. Thus, on this occasion he was assigned to perform the necessary climbing required to disengage the tree branches. The E crew then disposed of the cut branches.

The third event occurred on October 4, 1984, when a storm caused a large branch to split from a tree and fall, so that it was hanging over a major walkway. Again, the plumber was assigned to go up the tree and to make a cut in order to release the limb so that the E crew could dispose of it.

The amount of tree trimming work the plumber performed on the September 20 and October 4 occasions was no more than four hours, or approximately two hours for each incident.

With respect to the past practice, in 1980 and 1981, when CSUSD was required to remove some trees, the plumber performed the necessary cutting. This work is estimated to have totaled no more than 40 hours during each year. In addition, on other occasions occurring both before and since 1980 and 1981, the plumber performed, on a temporary and sporadic basis, a few hours of "tree trimming" work in situations similar to those at issue here -- where safety concerns were implicated. While the

testimony indicates this practice went back as far as seven years, it is not clear whether all of those occasions occurred after he became a plumber, or while he was still a groundskeeper. In any event, the practice of assigning him to such tasks on a sporadic basis continued after he became a plumber, and after CSEA was certified as the exclusive representative on February 16, 1982.

The occasional tree trimming work at CSUSD campus of a routine, nonemergency character is performed by employees classified as Groundswokers. Since it is accomplished standing on the ground, it falls within one of the job functions spelled out in the Groundswoker classifications. The testimony indicates that there was no shortage of work to occupy the 14 Groundswoker positions. Indeed, their supervisor was, at the time of hearing, seeking authority to add additional positions because of workload needs.

PROPOSED DECISION

At the hearing before the ALJ, CSUSD moved to dismiss the allegation relating to the first incident of April 2, 1984, on the basis that the charge was not timely filed. In ruling on CSUSD's motion, the ALJ found that CSUSD waived its right to assert the untimeliness of the charge due to its failure to raise it in advance of hearing. (See PERB Reg. 32644, subd. (b)(6) and Walnut Valley Educators Association (1983) PERB Decision No. 289.)

Concerning the merits of the case, the ALJ cited PERB precedent for the proposition that the decision to transfer work out of the bargaining unit is negotiable if it impacts upon a subject within the scope of representation. (Lincoln Unified School District (1984) PERB Decision No. 465.) With respect to the incident of April 2, 1984, the ALJ found that no unlawful transfer occurred inasmuch as the Unit 6 plumber was not utilized, and there otherwise existed the potential for overlap concerning the duties of the Unit 6 employees employed on April 2, 1984 (an equipment operator and skilled laborer), and the duties of Unit 5 employees (groundskeepers and tree trimmers).

As to the incidents of September 20 and October 4, 1984, while the same potential for overlapping duties existed between (Unit 6) equipment operators and skilled laborers and (Unit 5) groundskeepers and tree trimmers, the assignment of the plumber on these two occasions could not be justified on any such theory. In finding a violation of HEERA, the ALJ rejected CSUSD's argument that no work was transferred because employees in Unit 5 had never performed work as tree trimmers at the San Diego site. The ALJ ultimately concluded that CSUSD was left with the option of giving a Unit 5 employee the opportunity to learn the use of tree climbing equipment, or, in the alternative, to meet and negotiate with CSEA regarding its decision to transfer unit work on an emergency basis.

DISCUSSION

Timeliness of Charge

The unfair in this matter was filed on November 26, 1984. The first allegation in the charge dealt with conduct occurring on April 2, 1984. Thus, the charge was filed more than six months from the date of the occurrence of conduct allegedly constituting an unfair. In applying PERB Regulation 32644, subdivision (b)(6), the ALJ found the allegation to be timely on the ground that CSUSD did not raise the defense of untimeliness in its answer and thereby waived it. (Walnut Valley Educators Association, supra.) We now find we are without jurisdiction to consider this allegation inasmuch as HEERA section 3563.2, subdivision (a) proscribes the Board from issuing a complaint concerning conduct occurring more than six months before the charge was filed.

Preliminarily, it is important to recognize that this Board has only such jurisdiction and powers as have been conferred on it by statute. (Association For Retarded Citizens v. Department of Developmental Services (1985) 38 Cal.3d 384, 391-392 and Fertig v. State Personnel Board (1969) 71 Cal.2d 96, 103.) Further, this Board acts in excess of its jurisdiction if it acts in violation of the statutes conferring or limiting its jurisdiction and powers. (Abelleira v. District Court of Appeal (1941) 17 Cal.2d 280, 288-291; Kennaley v. Superior Court (1954) 43 Cal.2d 512, 514; and Graves v. Commission on Professional Competence (1976) 63 Cal.App.3d 970, 976, hg. den.) Moreover,

where the Board is without jurisdiction, it cannot acquire jurisdiction by the parties' consent, agreement, stipulation or acquiescence, nor by waiver or estoppel. (Schlyen v. Schlyen (1954) 43 Cal.2d 361, 375; Keithley v. Civil Service Board of City of Oakland (1970) 11 Cal.App.3d 443, 448, hg. den.; Summers v. Superior Court (1959) 53 Cal.2d 295, 298; and Sampsell v. Superior Court (1948) 32 Cal.2d 763, 773, 776.) Finally, the absence of jurisdiction cannot be overcome by the established practices or customs of this Board, nor by Board regulation. (J.R. Norton Co. v. Agricultural Labor Relations Board (1979) 26 Cal.3d 1, 29; Morris v. Williams (1967) 67 Cal.2d 733, 737, 748; and California State Restaurant Association v. Whitlow, Chief, Division of Industrial Welfare (1976) 58 Cal.App.3d 340, 347, hg. den.)

HEERA section 3563.2, subdivision (a) provides:

Any employee, employee organization, or employer shall have the right to file an unfair practice charge, except that the board shall not issue a complaint in respect of any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge. (Emphasis added.)

In construing a statute, we begin with the fundamental rule that a court "should ascertain the intent of the Legislature so as to effectuate the purpose of the law." (Moyer v. Workmen's Compensation Appeals Board (1973) 10 Cal.3d 222, 230.) Further, it is a fundamental maxim of statutory construction that, where no ambiguity exists, the intent of the Legislature in enacting

a law is to be gleaned from the words of the statute itself, according to the usual and ordinary import of the language employed. Thus, where the language of a statute is clear and unambiguous, case law holds that the construction intended by the Legislature is obvious from the language used. (Noroian v. Department of Administration, Public Employees' Retirement System (1970) 11 Cal.App.3d 651, 654, hg. den.; McQuillan v. Southern Pacific Co. (1974) 40 Cal.App.3d 802, 805-806; Hoyme v. Board of Education (1980) 107 Cal.App.3d 449; Great Lakes Properties, Inc. v. City of El Segundo (1977) 19 Cal.3d 152, 155; and People v. Boyd (1979) 24 Cal.3d 285, 294.)

The Legislature's intent to limit this Board's jurisdiction to issue a complaint referring to conduct occurring more than six months before the charge was filed is clearly expressed by its choice of the mandatory language, "the Board shall not issue a complaint. . . ." (HEERA, sec. 3563.2, subd. (a).) This language is clearly directed to the Board and not to the parties. In the recent PERB decision of Lake Elsinore School District (1987) PERB Decision No. 646, this Board was required to determine the effect of similar language in the Educational Employment Relations Act (EERA), namely section 3541.5, subdivision (a), which precludes the Board's exercise of jurisdiction where the alleged conduct is prohibited by the parties' contract and covered by its grievance procedures providing for binding arbitration. More specifically,

subdivision (a) of EERA section 3541.5 provides, in pertinent part:

Any employee, employee organization or employer shall have the right to file an unfair practice charge, except that the board shall not . . . issue a complaint against conduct also prohibited by the provisions of the agreement between the parties until the grievance machinery of the agreement, if it exists and covers the matter at issue, has been exhausted, either by settlement or binding arbitration. (Emphasis added.)

In interpreting EERA section 3541.5, subdivision (a), this Board relied on the existence of the mandatory language of "shall not" in reaching its conclusion that the provision was jurisdictional.³ (See Fair v. Hernandez (1981) 116 Cal.App.3d 868, 878, hg. den.; Hogya v. Superior Court, San Diego County (1977) 75 Cal.App.3d 122, 133, hg. den.; Garcia v. County Board of Education (1981) 123 Cal.App.3d 807, 811-813; and Tarquin v. Commission on Professional Competence (1978) 84 Cal.App.3d 251, 257-258, hg. den.) Inasmuch as EERA section 3541.5, subdivision (a) contains language parallel to the time proscription of HEERA section 3563.2, subdivision (a), this Board should apply the same rules of statutory construction.

Further, the conclusion that the language of HEERA section

³The Board's construction of EERA section 3541.5, subdivision (a) was affirmed by the California Court of Appeal, Fourth District, Division Two, in an unpublished decision issued July 28, 1988. (See Elsinore Valley Education Association, CTA/NEA v. PERB (Lake Elsinore School District), Case No. E005078.)

3563.2, subdivision (a) is mandatory and jurisdictional comports with the Legislature's purpose in providing an administrative forum for the prompt resolution of labor disputes. Unlike the typical litigants involved in a civil lawsuit, parties in a labor dispute must sustain an ongoing collective bargaining relationship, despite pending unfair practice charges or grievances. Extending the time during which an unfair practice charge may be raised prolongs the threat of disruption of such collective bargaining relationships, and is antithetical to HEERA's foremost goal of promoting the improvement of harmonious employer-employee relations. (HEERA, sec. 3560, subds. (a) and (d).) Moreover, the legislative history of HEERA and its sister Acts, EERA and the Ralph C. Dills Act (Dills), supports this interpretation. Significantly, in the Final Report of the Assembly Advisory Council on Public Employee Relations (1973), at page 51, it is stated:

In the interest of eliminating "stale" claims, the Board should be forbidden to issue a complaint in respect of any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge, . . .
(Emphasis added.)

Turning to our prior precedent, this Board has traditionally treated HEERA section 3563.2, subdivision (a), and parallel provisions of EERA and Dills, as a nonjurisdictional "statute of limitations." In treating it as such, it is considered an affirmative defense which can be waived if not timely asserted. (See San Dieguito Union High School District (1982) PERB

Decision No. 194; Walnut Valley Educators Association, supra,
PERB Decision No. 289; California State University, Hayward
(1987) PERB Decision No. 607-H; and PERB Reg. 32644(b)(6).)

For example, in Walnut Valley Educators Association, the Board
reasoned:

It is a well-settled principle of California law that the statute of limitations is a personal privilege which must be affirmatively invoked by appropriate pleading or it is waived. 3 Witkin Cal.Procedure (2d. ed) Procedure section 939. The defense must be asserted either by demurrer or affirmatively in the answer. Stafford v. Russell (1953) 117 CA 2d 319. Thus, under California law, the District waived this defense by failing to raise it in a timely fashion. Travelers Indemnity Co. v. Bell (1963) 213 Cal.App.2d 541; Mitchell v. County Sanitation District (1957) 150 Cal.App.2d 366. PERB regulation 32640(f) is in accord with California civil procedure.

We disagree with the Board's rationale in Walnut Valley. To the extent that it treats EERA section 3541.5, subdivision (a), and parallel provisions of HEERA and Dills as an affirmative defense subject to a party's waiver, it is inconsistent with the jurisdictional proscriptions expressed in those provisions.⁴

⁴Although they do not contain identical language, a comparison may, nonetheless, be made between section 3563.2, subdivision (a) of HEERA and section 10, subdivision (b) of the National Labor Relations Act. PERB, however, is not bound by the National Labor Relations Board (NLRB) precedent in its interpretation of HEERA. See Los Angeles Unified School District (1976) EERB Decision No. 5, where the Board held that it was not bound by NLRB decisions in cases arising under the EERA. In the present case, the Board has reviewed the

filed, its failure to do so cannot be used as a basis for expanding this Board's jurisdiction. Accordingly, we disapprove of any application of the foregoing regulations in such a manner as to make the untimeliness of an unfair practice charge an affirmative defense subject to a party's waiver.

For the foregoing reasons, we dismiss the allegation that, on April 2, 1984, CSUSD transferred work out of the unit, on the basis that PERB is without jurisdiction to entertain it.⁵

Transfer of Unit Work

The ALJ's decision concluded that CSUSD, by utilizing the services of the plumber on September 20 and October 4, 1984, unilaterally transferred work belonging to Unit 5 employees. We disagree with the ALJ's initial assumption that a transfer in fact occurred. An unlawful transfer occurs when an employer unilaterally assigns work formerly done by employees in one bargaining unit to its employees in a different unit. (Rialto Unified School District (1982) PERB Decision No. 209 and Solano County Community College District (1982) PERB Decision No. 219.) It cannot be overlooked, however, that the character and magnitude of the alleged transfers at issue herein are considerably different from those which this Board has declared

⁵Even assuming arguendo, that HEERA section 3563.2, subdivision (a) does not provide a jurisdictional bar to the allegation concerning the incident of April 2, 1984, we would still affirm the ALJ's conclusion that no unlawful transfer of bargaining unit work occurred.

unlawful. (Cf. Rialto Unified School District, supra; Solano County Community College District, supra; San Antonio Community College District (1983) PERB Decision No. 334; Goleta Union School District (1984) PERB Decision No. 391.)

In the instant case, CSUSD did not eliminate a position in Unit 5, or otherwise transfer to a Unit 6 classification a substantial or even meaningful share of duties belonging to a Unit 5 position. On two occasions, and in response to emergencies involving hazardous conditions, it merely assigned a plumber to go aloft and extricate a tree limb -- a task that no Unit 5 employee at the San Diego campus was trained to perform, and one in which the plumber had past experience. On each of the two occasions (September 20 and October 4, 1984), the plumber was involved in tree trimming functions for a very short period of time (e.g., for approximately two hours on each occasion).

Further, the ALJ noted in his findings of fact that the record showed a longstanding past practice of CSUSD of assigning the plumber, on a sporadic basis, the task of removing tree limbs. Daniel Taylor, the Director of Physical Plant for CSUSD, testified that the plumber was used in the past whenever there was a safety issue in question. His testimony was corroborated by that of Ron Tessada, employed by CSUSD as a supervisor of grounds and landscape activities since approximately 1978.

CSEA put on no evidence rebutting the existence of the past practice of utilizing the plumber to go aloft for the purpose of

cutting limbs when potentially hazardous conditions prevailed. We find that the ALJ erred by his failure to attach any legal significance to CSUSD's past practice -- one in which CSEA apparently acquiesced -- of using the plumber to cut tree branches in response to emergency conditions.

In Eureka City School District, supra, the Board held that where unit and nonunit employees have previously performed work involving an overlapping of duties, the employer does not unlawfully transfer work out of the unit merely by increasing the quantity of work performed by nonunit employees.

Significantly, the Board stated:

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.
(P. 15.)

In the instant case, Unit 5 employees at the San Diego campus did not cease to perform work which they had previously performed. Even more significantly, in light of the past practice of the plumber's removal of tree limbs when potentially hazardous conditions prevailed, Unit 6 employees did not assume

the performance of duties previously performed exclusively by Unit 5 employees. Although the Plumber I job description does not specify tree trimming, the record revealed a past practice of utilizing the plumber whenever exigent circumstances required the immediate use of the plumber's specialized tree climbing skills. Thus, there was, in this limited sense, an overlapping of duties. We would find, on these facts, that no transfer of unit work occurred. (See also State of California (Department of Developmental Service) (1985) PERB Decision No. 484-S.)

ORDER

For the foregoing reasons, the unfair practice charges in Case No. LA-CE-119-H are hereby DISMISSED.

Chairperson Hesse and Members Craib and Shank joined in this Decision.