

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



MARTHA MAIRE O'CONNELL, KEVIN)
JOHNSON and KRISTEN WIGREN,)
)
Charging Parties,) Case No. SF-CE-271-H
)
v.) PERB Decision No. 729-H
)
THE CALIFORNIA STATE UNIVERSITY,) April 14, 1989
CHICO,)
)
Respondent.)
_____)

Appearances: Bill Halloway, Representative, for Martha Maire O'Connell, Kevin Johnson and Kristen Wigren; William B. Haughton, Attorney, for the California State University.

Before Hesse, Chairperson; Shank and Camilli, Members.

DECISION

CAMILLI, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by California State University, Chico (CSU or University) to the proposed decision of the administrative law judge (ALJ). The ALJ found that CSU violated section 3571(a), (b) and (d) of the Higher Education Employer-Employee Relations Act (HEERA or Act)¹ by

¹The HEERA is codified at Government Code section 3560 et seq. Unless otherwise indicated, all statutory references are to the Government Code.

Section 3571(a), (b) and (d) states that it shall be unlawful for the 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.

denying the right of access to CSU's mail system and interfering with employees' rights to form, join and participate in the activities of employee organizations of their own choice.

After a review of the entire record, the Board finds the ALJ's findings of fact to be free from prejudicial error. In accordance with the discussion below, we affirm the ALJ's conclusions of law.

FACTUAL SUMMARY

Several employees of San Jose State University (SJSU) who were members of the California State Employees Association (CSEA), formed a dissident organization called Employees for Employees (EFE). The purpose of the new organization was to represent employees in grievances and work-related complaints and to inform employees of their rights under HEERA, applicable collective bargaining agreements, and other laws. One of the founders of the group, Martha O'Connell (O'Connell), wrote the

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

.

(d) Dominate or interfere with the formation or administration of any employee organization, or contribute financial or other support to it, or in any way encourage employees to join any organization in preference to another; provided, however, that subject to rules and regulations adopted by the board pursuant to Section 3563, an employer shall not be prohibited from permitting employees to engage in meeting and conferring or consulting during working hours without loss of pay or benefits.

EFE constitution which was a document patterned after the CSEA constitution.

During the spring of 1986, EFE attempted to distribute materials through the internal mail system at SJSU. EFE was first informed that it needed to pay a fee in order to use the mailroom. As a result of a settlement of an earlier unfair practice charge,² however, EFE was eventually permitted to use the mail system at SJSU free of charge.

During the summer of 1987, O'Connell, on behalf of a group of employees at SJSU, hereafter referred to as Concerned Employees,³ delivered to the CSU mailroom approximately 500 flyers entitled "Sick of CSEA???? Let's Network for Solutions!" The flyer questioned CSEA's record in areas such as pay raises, grievance representation, comparable worth, expenditures of dues money, etc. The flyer also stated: "WE WORK AT SAN JOSE STATE UNIVERSITY AND ARE PART OF A GROWING GROUP OF EMPLOYEES WHO ARE TIRED OF THE DIRECTION OF CSEA." The flyer encouraged those employees, who were interested in assisting this organization, to write or call three of the SJSU employees, who were members of Concerned Employees. As some members were also part of EFE,

²The parties had earlier reached an agreement in a separate unfair practice charge which also involved payment of a fee in return for distribution rights under the Act (SF-CE-223-H). Violation of the earlier settlement agreement is not at issue in this case.

³During the course of the ALJ hearing, this new organization was referred to as Concerned Employees. Therefore, that name will be used hereafter in this decision.

their names were not included on the flyer so as to prevent any confusion with EFE.

O'Connell testified that she presented the flyers to an unidentified mailroom supervisor and stated that she wanted them "shotgunned to the employees." According to O'Connell, this meant that a few copies were to be sent to each department. The flyers were not placed in campus envelopes, nor were they addressed to specific departments or employees. During a conversation with Dennis Heffer (Heffer), vice provost at CSU, O'Connell was told that she should assume that the flyer was mailed unless she heard otherwise.

After receiving no responses from any CSU employees, O'Connell and another member of Concerned Employees sent a letter of inquiry to Heffer. Heffer responded that the \$20 "distribution fee" had not been received.⁴ O'Connell responded in turn that imposition of a distribution fee had already been

⁴California Administrative Code, Title 5, section 43707, provides that CSU may impose certain charges for use of the mail system:

Subject to reasonable regulations, including charges where additional costs are incurred, representatives of verified employee organizations shall be afforded access to campus mail services and mail boxes for the purpose of distributing material to employees. All materials distributed under this provision must identify the employee organization which is distributing the materials. One copy of all materials distributed through campus mail services or mail boxes must be directed to the Chief Executive Officer along with the name and telephone number of the representative responsible for the distribution.

determined to be improper in an earlier unfair practice case. The flyers were never distributed or returned.

Under California Administrative Code, Title 5, section 43710, employee organizations are required to register with the chancellor's office as a prerequisite to using the internal mail system.⁵ Neither EFE nor Concerned Employees registered with the

⁵California Administrative Code, Title 5, section 43710, states:

Verification of Employee Organizations.

Each employee organization which desires to represent campus employees shall be required to furnish the Office of the Chancellor at the time of initial verification, and subsequently between October 1 and 15 of each year, a written statement containing:

- (a) The name and address of the employee organization, its parent body, if any, and its affiliates, if any.
- (b) The names and addresses of the employee organization's principal officers and all representatives who are authorized to represent the organization, specifying to which campus(s) each officer's and representative's authority applies.
- (c) A description of the employee classifications the employee organization is seeking to represent.
- (d) A copy of the Constitution and By-laws of the organization, its parent body, if any, and its affiliates, if any.
- (e) A statement that one of the organization's purposes is the representation of CSU employees concerning, in whole or in part, grievances, labor disputes, wages, hours, and other terms and conditions of employment of employees.

Employee organizations shall promptly amend these written statements during each year as changes occur. The Office of the Chancellor

chancellor's office at CSU.

DISCUSSION

The University raises several exceptions to the ALJ's proposed decision. The University takes exception to the ALJ's finding of a violation of section 3571(b) based on CSU's discriminatory and inconsistent application of the verification requirement. CSU argues that the ALJ incorrectly concluded that because EFE was permitted to use the mail system at SJSU to distribute materials, Concerned Employees should have been allowed similar rights at CSU. Since the mailroom at the SJSU campus was being used by EFE pursuant to a settlement agreement, which did not specifically require prior compliance with the verification requirement, the University argues that Concerned Employees' denial of use at CSU, on grounds of non-compliance with the verification requirement, cannot be grounds for a finding of discrimination.

Assuming arguendo, that EFE was permitted to use the mailroom only for the reasons set forth under its settlement agreement, unrebutted testimony was presented that at least one other organization, San Jose State University Staff for Individual Rights, was permitted to use the SJSU mailroom to distribute letters and flyers without being a verified organization under California Administrative Code, Title 5. On this basis alone, the Board affirms the ALJ's finding that the University's discriminatory and inconsistent application of the

will notify each campus of the filings concerning the campus.

verification requirement infringed upon Concerned Employees' section 3568 access rights by which the University violated section 3571(b).

The University has also excepted to the finding that the imposition of the fee violated the Act. We affirm the ALJ's conclusion that imposition of a \$20 fee by CSU for delivery of the flyers was not a reasonable regulation, as the Board has previously held that the exercise of statutory access rights cannot be conditioned upon the payment of fees to an employer.

(University of California. Berkeley (Wilson) (1984) PERB Decision No. 420-H, p. 9, reversed on other grounds; Regents of the University of California v. Public Employment Relations Board (1988) 485 U.S.____, 99 L.Ed.2d 664; Regents of the University of California (Lawrence Livermore National Laboratory) (1982) PERB Decision No. 212-H, reversed on other grounds; Regents of the University of California v. Public Employment Relations Board (1985) 168 Cal.App.3d 937.)

The University also excepts to the ALJ's finding that the flyer sought to be delivered in the present case was not a "letter" within the meaning of the Private Express Statutes (18 U.S.C. 1693-1699, 1724; 39 U.S.C, sections 601-606)⁶ which prohibits the distribution of unstamped mail. The University argues that this case is virtually parallel with the recently decided United States (U.S.) Supreme Court case in Regents of the

⁶These statutes establish the postal monopoly of the U.S. Postal Service and generally prohibit the private carriage of letters over postal routes without payment of postage.

University of California v. Public Employment Relations Board, supra, 485 U.S.____, 99 L.Ed.2d 664 (Regents). In Regents, the U.S. Supreme Court held that neither the Letters of the Carrier nor the Private Hands Without Compensation exceptions to the federal Private Express Statutes permitted a university to carry unstamped union letters in its internal mail system.⁷

We agree with the ALJ's conclusion that although there are similarities between this case and Regents, Regents is not controlling. To be covered by the postal statutes, the Concerned Employees' flyer must fall within the definition of a "letter." The definition of a "letter," codified at 39 C.F.R. section 310.1(3), provides, in pertinent part:

(a) "Letter" is a message directed to a specific person or address and recorded in or on a tangible object, subject to the following:

.....

(3) A message is directed to a "specific person or address" when, for example, it, or the container in which it is carried, singly or with other messages, identical or different, is marked for delivery to a specific person or place, or is delivered to a specific person or place in accordance with a selective delivery plan. Selective delivery plans include delivery to particular persons or addresses by use of detached address labels or cards; address lists; memorized groups of addresses; or "piggy-backed" delivery with addressed articles of merchandise publications, or other items. Selective delivery plans do not include

⁷The "letters of the carrier" exception covers letters which "relate" to the "current business" of the carrier. The "private hands" exception covers carriage of letters "by private hands without compensation." Regents of the University of California v. PERB, supra, 99 L.Ed. 2d, 664, 671, 673.

distributions of materials without written addresses to passersby on a particular street corner, or to all residents or randomly-selected residents of an area. A message bearing the name or address of a specific person or place is a letter even if it is intended by the sender to be read or otherwise used by some person or persons other than or in addition to the addressee.

In applying the "letter" definition in the underlying unfair practice charge in Regents, PERB determined that, with the possible exception of union newsletters, all the materials the union attempted to distribute through the University's mail system were "letters". University of California at Berkeley (Wilson) (1984) PERB Decision No. 420-H, p. 18, fn. 9.

Here, the University primarily relies upon: (1) the language in the regulations defining a letter as a "message directed to a specific person or address," and (2) the language defining a "message directed to a 'specific person or address'" as one, inter alia, "delivered to a specific person or place in accordance with a selective delivery plan." However, this reliance is misplaced. Under the regulation,

selective delivery plans do not include distributions of materials without written addresses to passersby on a particular street corner or to all residents or randomly selected residents of an area . . .
(Emphasis added.)

In the present case, the uncontradicted testimony was that Concerned Employees attempted to send one-page flyers through the campus mails by "shotgunning" them. During the hearing, "shotgunning" was defined as ". . . mean[ing] you just send out a few copies to each department just as is, it's not in an inter-

campus envelope, which is policy at San Jose State." (RT p. 15.)

Shotgunning was also described as "You just take a flyer, as many as you want mailed out you take them to the mailroom and they just send out to each department. If there is enough for two for each department then they send it out. In other words, it is not in an inter-campus envelope and it does not have a specific name on it." (RT p. 23.)

Concerned Employees attempted a random distribution of the flyer to each department. The flyers were not directed to specific persons or, as far as we can tell, to specific locations in each department.⁸ The "shotgunning," or random distribution of the flyers, takes them outside the definition of a "letter" within the meaning of the federal postal regulations.

This finding is consistent with federal cases addressing what is a "letter" under postal statutes and regulations. In Associated Third Class Mail Users v. United States Postal Service (D.C. Cir. 1979) 600 F.2d 824, the court, in deciding whether advertising circulars addressed to particular persons or locations were "letters" under postal statutes and regulations, concluded that the circulars were letters as they were intended for the perusal of the addressees. The court found that the determining factor was that the sender's goal was to reach the particular persons who had been identified as most likely to be interested in the advertised products.

In another major case addressing the issue of what is a

⁸The record does not reflect what was to happen with the flyers once they reached each department.

"letter," National Association of Letter Carriers. AFL-CIO
(10th Cir. 1972) 470 F.2d 265, the court held that the defendants violated the postal monopoly by delivering Christmas cards. The court found that a "letter" is:

. . . a message in writing, printed or otherwise in whole or part, addressed to a particular person or concern and may be in a sealed or unsealed envelope or not in an envelope at all. The Court further finds and concludes that the ordinary Christmas card when addressed to a particular person or concern is a letter within the meaning of the above definition.

As testimony and case law support the finding that the Concerned Employees' flyer does not fit within the postal regulations definition of a "letter,"⁹ the Board affirms the ALJ's decision and conclusions of law in accordance with the discussion above.

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in the case, and pursuant to section 3563.3 of the Higher Education Employer-Employee Relations Act, the Board orders that the California State University Board of Trustees and its representatives shall:

1. CEASE AND DESIST FROM:

a. Denying to employee organizations rights guaranteed by the Higher Education Employer-Employee Relations

⁹As the Board finds that the flyer in this case is not a "letter" within the federal postal statutes, there is no need to determine whether the mail system at the Chico campus overlaps with the postal routes in Chico.

Act, including the right of access without charge to the California State University's mail system;

b. Interfering with the rights of employees under the Higher Education Employer-Employee Relations Act, including the right to form, join and participate in the activities of employee organizations of their own choice.

2. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE ACT:

a. Within thirty-five (35) days following the date this Decision is no longer subject to reconsideration, sign and post at all locations on the Chico campus where notices to employees are customarily placed, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the California State University Board of Trustees indicating that the CSU will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to insure that the Notice is not reduced in size, altered, defaced or covered by any other material.

b. Written notification of the actions taken to comply with this Order shall be given to the Los Angeles Regional Director of the Public Employment Relations Board in accordance with his or her instructions and shall be served concurrently on the charging parties.

Chairperson Hesse and Member Shank joined in this Decision.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD
An Agency of the State of California



After a hearing in Unfair Practice Case No. SF-CE-271-H, Martha Maire O'Connell, Kevin Johnson and Kristen Wigren v. California State University (Chico), in which all parties had the right to participate, it has been found that the California State University, Chico, violated Government Code sections 3571(a), (b) and (d).

As a result of this conduct we have been ordered to post this Notice, and will abide by the following. We will:

1. CEASE AND DESIST FROM:

(a) Denying to employee organizations rights guaranteed by the Higher Education Employer-Employee Relations Act, including the right of access without charge to the California State University's mail system.

(b) Interfering with the rights of employees under the Higher Education Employer-Employee Relations Act, including the right to form, join and participate in the activities of employee organizations of their own choice.

Dated: _____ CALIFORNIA STATE UNIVERSITY, CHICO

By _____
Authorized Agent

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR AT LEAST THIRTY (30) CONSECUTIVE WORKDAYS FROM THE DATE OF POSTING AND MUST NOT BE REDUCED IN SIZE, DEFACED, ALTERED OR COVERED BY ANY MATERIAL.