STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

UNIVERSITY COUNCIL - AMERICAN FEDERATION OF TEACHERS,	)	
Charging Party,	)	Case No. LA-CE-394-H
v.	)	PERB Decision No. 1072-H
REGENTS OF THE UNIVERSITY OF CALIFORNIA,	)	December 7, 1994
Respondent.	)	

Appearance: Edward R. Purcell, UC-AFT Labor Relations Consultant, for University Council - American Federation of Teachers.

Before Blair, Chair; Caffrey and Johnson, Members.

DECISION AND ORDER

JOHNSON, Member: This case is before the Public Employment Relations Board (Board) on appeal by the University Council - American Federation of Teachers (UC-AFT) of a Board agent's dismissal (attached) of its unfair practice charge. UC-AFT alleged that the Regents of the University of California (University) refused to bargain over contracting out at the University's Riverside and Davis campuses in violation of section 3571(b) and (c) of the Higher Education Employer-Employee Relations Act (HEERA).[1]

[1]HEERA is codified at Government Code section 3560 et seq. Section 3571 states, in pertinent part:

> It shall be unlawful for the higher education employer to do any of the following:
>
> (b) Deny to employee organizations rights guaranteed to them by this chapter.

The Board has reviewed the warning and dismissal letters, UC-AFT's appeal and the entire record in this case. The Board finds the warning and dismissal letters to be free of prejudicial error and adopts them as the decision of the Board itself.

The unfair practice charge in Case No. LA-CE-394-H is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chair Blair joined in this Decision.

Member Caffrey's dissent begins on page 3.

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

CAFFREY, Member, dissenting: The original and amended unfair practice charges filed by the University Council-American Federation of Teachers' (UC-AFT) raise questions concerning the status of the parties' March 21, 1986, Letter of Understanding (LOU) as of February 1994, the time of the complained of conduct in this case. Consequently, I would reverse the regional attorney's dismissal and remand the case to the Public Employment Relations Board (PERB) general counsel for further investigation of this question prior to issuance of a complaint or dismissal of UC-AFT's charge.

A review of the March 1986 LOU reveals that it twice mentions "provisions of the Memorandum of Understanding" between UC-AFT and the Regents of the University of California (University), and references a specific article and paragraph (Article XXIX, Paragraph B) within that collective bargaining agreement (CBA). Obviously, these references are to the CBA in effect between the parties when the LOU was negotiated. The copy of the LOU document included in the case file contains pagination (A-4) and a typewritten date (August 1, 1986). Apparently, the LOU may have been included as part of a larger document, perhaps in August 1986. These circumstances suggest that the LOU was negotiated by the parties in 1986 as an addendum or appendix to the CBA in effect between them at that time.

Seven years later, in June 1993, UC-AFT was unaware of the existence of the LOU when it first demanded that the University bargain over the subject of contracting out bargaining unit work.

After the University provided a copy of the LOU, UC-AFT indicated that it would no longer be bound by its terms, and in February 1994 demanded that the University bargain over a subsequent plan to contract out bargaining unit work. In response, the University asserted that the LOU remained in effect in February 1994, describing it as:

> . . . simply another term and condition of employment previously agreed to and executed at the bargaining table. It, like other provisions of the MOU which are not reopened and renegotiated, simply continue in effect as part of the MOU which binds both parties for the new term of the agreement. (Emphasis added.)

This response clearly indicates the University's view that the LOU was negotiated as a provision of the CBA at some point, while UC-AFT's unfamiliarity with it in June 1993 suggests that the LOU had not been included within copies of the parties' written agreement for some time.

The case file is devoid of information concerning any discussions or negotiations between the parties with regard to the subject matter addressed by the LOU, from the period of March 1986 to June 1993. Absent some inquiry into this area, under the circumstances described above, I am unwilling to assign full effectiveness to the LOU nearly eight years after it was agreed to by the parties. Instead, I would remand the case to the PERB general counsel for further investigation.

PUBLIC EMPLOYMENT RELATIONS BOARD

Los Angeles Regional Office
3S30 Wilshire Blvd., Suite 650
Los Angeles, CA 90010-2334
(213) 736-3127

June 6, 1994

Edward R. Purcell
Labor Consultant, UC-AFT
419 Carroll Canal
Venice, CA 90291

Re: DISMISSAL AND REFUSAL TO ISSUE COMPLAINT, Unfair Practice Charge No. LA-CE-394-H, UC-AFT v. Regents of the University of California

Dear Mr. Purcell:

In the above-referenced charge, filed on March 17, 1994, and amended on May 2, 1994, UC-AFT alleges that the University of California refused to bargain over contracting out at the University's Riverside and Davis campuses in 1994. This conduct is alleged to violate Government Code sections 3571(b) and (c) of the Higher Education Employer-Employee Relations Act (HEERA).

I indicated to you, in my attached letter dated May 3, 1994, that the above-referenced 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 the charge to state a prima facie case or withdrew it prior to May 12, 1994, the charge would be dismissed. I later extended the deadline to May 26, 1994.

On June 3, 1994, I received from you a second amended charge, accompanied by a letter. The allegations in the amended charge and the arguments in the letter do not alter the analysis set forth in my May 3 letter. Certain points do bear further discussion, however.

In the letter, you argue that there is something equivocal or inconclusive about the waiver language in Article 38, Paragraph E, of the collective bargaining agreement, as quoted in my May 3 letter. On its face, however, the language is clear and unambiguous, and its plain meaning must be given effect. Marysville Joint Unified School District (1983) PERB Decision No. 314; Los Rios Community College District (1988) PERB Decision No. 684. The charge contains no allegations of past practice or bargaining history which suggest any ambiguities in the waiver language.

In the amended charge, UC-AFT alleges that in February 1994 it demanded to bargain over the impact of contracting out at the Riverside campus. It cites the letter attached to the charge as Attachment E, but this letter (quoted in full in my May 3 letter) does not in fact say anything about impact or effects. Under these circumstances, it cannot be said that the University refused to bargain over impact or effects. Newman-Crows Landing Unified School District (1982) PERB Decision No. 223.

In the amended charge, UC-AFT also alleges that in April 1994 it demanded to bargain over the impact of contracting out at the Davis campus. In this instance, the allegation is consistent with the letter it cites, attached to the charge as Attachment H. The status quo established by the 1986 letter of understanding, however, was that impact "shall be governed by the express provisions of the Memorandum of Understanding," unless "the AFT identifies a significant impact on the terms and conditions of employment of the unit members which is not covered by the express provisions of the Memorandum of Understanding," in which case negotiations regarding the impact shall occur but "shall not delay the implementation." In neither of its letters of February 1994 and April 1994, nor in the present charge, has UC-AFT identified any impact not covered by the collective bargaining agreement.

In the letter, you also argue that the University apparently bypassed UC-AFT, because the University's letter informing UC-AFT of the proposed "cooperative agreement" with Sacramento City College stated in part, "Preliminary discussions have also included a review of the impact on existing staff." There is no allegation or evidence, however, that these "preliminary discussions" were with members of the bargaining unit represented by UC-AFT, rather than simply among University managers.

I am therefore dismissing the charge, based on the facts and reasons contained in this letter and my May 3 letter.

Right to Appeal

Pursuant to Public Employment Relations Board regulations, 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. (Cal. Code of Regs., tit. 8, sec. 32635(a).) To be timely filed, the original and five copies of such appeal must be actually received by the Board itself before the close of business (5 p.m.) or sent by telegraph, certified or Express United States mail postmarked no later than the last date set for filing. (Cal. Code of Regs., tit. 8, sec. 32135.) Code of Civil Procedure section 1013 shall apply. 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 copies of a statement in opposition within twenty (20) calendar days following the date of service of the appeal. (Cal. Code of Regs., tit. 8, sec. 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 Cal. Code of Regs., tit. 8, sec. 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. (Cal. Code of Regs., tit. 8, sec. 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
Deputy General Counsel

By _____
THOMAS J. (ALLEN
Regional Attorney

Attachment

STATE OF CALIFORNIA PETE WILSON, *Governor*

PUBLIC EMPLOYMENT RELATIONS BOARD

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May 3, 1994

Edward R. Purcell
Labor Consultant, UC-AFT
419 Carroll Canal
Venice, CA 90291

Re: WARNING LETTER, Unfair Practice Charge No. LA-CE-394-H, UC-AFT v. Regents of the University of California

Dear Mr. Purcell:

In the above-referenced charge, filed on March 17, 1994, and amended on May 2, 1994, UC-AFT alleges that the University of California refused to bargain over contracting out at the University's Riverside and Davis campuses in 1994. This conduct is alleged to violate Government Code sections 3571(b) and (c) of the Higher Education Employer-Employee Relations Act (HEERA).

My investigation of this charge reveals the following facts.

UC-AFT is the exclusive representative of employees in the University's Bargaining Unit 18. In June 1993, UC-AFT became aware of a "cooperative agreement" between the University's Davis campus and Sacramento City College. On June 25, 1993, UC-AFT sent the University a letter, stating in part that the cooperative agreement:

> represents the contracting of Unit 18 work, and as such, cannot be properly accomplished without prior bargaining with our Union. This letter constitutes a request to engage in such bargaining prior to the finalization of plans or contracts to move English A work out of Unit 18.

On June 29, 1993, the University responded in part as follows:

> You may not be aware of the fact that the University and the UC-AFT entered into a Letter of Understanding in 1986 which covers this type of situation. For your convenience, I enclose a copy of the Letter of Understanding. As you can see, the University is not obligated to bargain with the union prior to implementation. The University is obligated to meet and discuss

regarding the proposal, and we will do so if you wish. Furthermore, any impact on unit members which results from the implementation of an agreement, such as the one planned by the UC Davis campus, is governed by the express provisions of the MOU. The University's implementation of the planned agreement will not be delayed by discussions between the University and the union.

The enclosed letter of understanding, signed by UC-AFT and the University on March 21, 1986, stated in full as follows:

> It is the intent of the undersigned that any decision by the University to enter into an Agreement(s) with another entity for the purpose of providing educational services to the University is a non-enumerated Management Right covered by Article XXIX, Paragraph B.
>
> Before any decision to enter into an agreement with another entity to provide educational services is made final, the University agrees to give notice to the UC/AFT and upon request to meet and discuss concerning the proposal.
>
> It is agreed that any impact on a member or members of the bargaining unit as a result of the implementation of such an agreement to provide educational services shall be governed by the express provisions of the Memorandum of Understanding entered into by the University and the UC/AFT.
>
> In the event that the AFT identifies a significant impact on the terms and conditions of employment of the unit members which is not covered by the provisions of the Memorandum of Understanding, the parties agree that negotiations regarding the impact shall not delay the implementation of the Agreement reached regarding the provision of educational services.
>
> The undersigned agree that liability for the terms of Agreements between the University and other entities for the provision of educational services extends to the parties to those Agreements and not to the UC/AFT.

> Nothing in this Letter of Understanding precludes the UC/AFT from pursuing applicable statutory remedies.

In a letter dated July 12, 1993, UC-AFT acknowledged that "this agreement covers the Davis situation presently at hand" but stated:

> please be informed that UC-AFT will no longer consider the document to be valid and binding effective this date. In that context, we will no longer abide by its content, including the various waivers of union bargaining rights contained therein.

During this same period of time (the summer of 1993), UC-AFT and the University negotiated a new collective bargaining agreement. The parties did not, however, negotiate any change in Article 29 (Management Rights), Paragraph B, which stated as follows:

> The foregoing enumeration of management rights is not inclusive and does not exclude other management rights not specified, nor shall the exercise or non-exercise of rights retained by the University be construed to mean that any right is waived.

Article 38 (Waiver), Paragraph E, stated as follows:

> Except as otherwise provided for in this Memorandum of Understanding, or upon mutual consent of the parties to seek written amendment thereto, the University and the UC-AFT, for the life of this Memorandum of Understanding, each voluntarily and unqualifiedly waives the right, and each agrees that the other shall not be obligated, to bargain collectively with respect to any subject or matter referred to or covered in this Memorandum of Understanding, or with respect to any subject or matter not specifically referred to or covered by this Memorandum of Understanding, even though such subject or matter may not have been within the knowledge or contemplation of either or both of the parties at the time they negotiated or signed this Memorandum of Understanding.

By its terms, the agreement remains in full force and effect until June 30, 1997, with the opportunity to reopen in 1996.

In February 1994, UC-AFT sent the University the following letter:

> It has come to the Union's attention that the Riverside campus is presently exploring the possibility of contracting out its Subject A program to a local community college or to its extension program. Please be informed that UC-AFT believes that this issue must be bargained with the Union prior to the movement of the Subject A program outside the University or its reassignment to extension.
>
> If the University elects such a course, you may consider this letter to constitute a demand to bargain.

The University responded in relevant part as follows:

> As you are well aware, you were informed by me last summer (July 20) the Letter of Understanding on this subject is simply another term and condition of employment previously agreed to and executed at the bargaining table. It, like other provisions of the MOU which are not reopened and renegotiated, simply continue in effect as part of the MOU which binds both parties for the new term of the agreement.
>
> Pursuant to the current agreement, the contract is now "locked up" until 1996. In keeping with the Waiver Article of the contract, the University is under no obligation to bargain with the Union about this matter.

In April 1994, when UC-AFT similarly demanded to bargain over a new "cooperative agreement" between the University's Davis campus and Sacramento City College, the University relied on the same response.

Based on the facts stated above, the charge does not state a prima facie violation of HEERA, for the reasons that follow.

In Los Rios Community College District (1988) PERB Decision No. 684, PERB upheld a "zipper" or "waiver" clause, like the one

in Article 38 of the agreement between UC-AFT and the University, as:

> affording both parties the right to refuse to negotiate changes in the status quo as to otherwise negotiable terms and conditions of employment for the duration of the agreement (subject to reopener provisions), whether such terms and conditions are established by contract or by past practice.

Under the waiver clause, the University could therefore legally refuse to bargain with UC-AFT, unless the University was unilaterally changing a policy within the status quo.

It appears from the charge that in 1986 the status quo was established by bilateral agreement between UC-AFT and the University: in the letter of understanding, the parties agreed that under Article XXIX, Paragraph B, of the collective bargaining agreement the University had a management right to "enter into an agreement with another entity to provide educational services." It also appears that this status quo continued, at least as a matter of University policy and practice, into 1993, when the University entered into the first "cooperative agreement" with the Sacramento City College. UC-AFT apparently contends, however, that this status quo was changed in the summer of 1993, when UC-AFT repudiated the 1986 letter of understanding.

A similar contention was before PERB in Santa Maria Joint Union High School District (1985) PERB Decision No. 507. In that case, the parties had an apparent bilateral understanding that the layoff provision in their collective bargaining agreement covered reductions in hours. During negotiations, the union gave notice that it would no longer consider reductions in hours to be covered by the layoff provision, but the employer did not agree to this change in policy. PERB held that, in the absence of bilateral agreement to change the policy, the policy remained in effect, and action consistent with the policy was not a unilateral change.

In the present case, the parties had a letter of understanding stating that the University had a management right under Article XXIX, Paragraph B, of the collective bargaining agreement to "enter into an agreement with another entity to provide educational services." Under Santa Maria Joint Union High School District, supra, UC-AFT's unilateral repudiation of the letter of understanding did not in itself change the University's policy. The University did not agree to change the policy, and the relevant Paragraph B remained unchanged in the

collective bargaining agreement. It therefore cannot be said that the University's actions in 1994, which were consistent with the established policy, represented a unilateral change about which the University had a duty to bargain.

For these reasons the charge, as presently written, does not state a prima facie case. If there are any factual inaccuracies in this letter or additional facts which 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 Second 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 12, 1994, I shall dismiss your charge. If you have any questions, please call me at (213) 736-3127.

Sincerely,

THOMAS J. ALLEN
Regional Attorney