STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

ACADEMIC PROFESSIONALS OF CALIFORNIA, Charging Party, v. TRUSTEES OF THE CALIFORNIA STATE UNIVERSITY, Respondent.	)	Case No. LA-CE-395-H PERB Decision No. 1094-H April 6, 1995

Appearances: Edward R. Purcell, APC Labor Relations Consultant, for Academic Professionals of California; Office of the General Counsel by James R. Lynch, Attorney, for Trustees of the California State University.

Before Carlyle, Garcia and Johnson, Members.

DECISION

CARLYLE, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the Academic Professionals of California (APC) to a Board agent's dismissal (attached hereto) of its charge that the California State University made unilateral changes in policy and interfered with APC's right to file grievances. This conduct was alleged to violate section 3571(b) and (c) of the Higher Education Employer-Employee Relations Act (HEERA).[1] After investigation, the Board

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

agent dismissed the charge for failure to state a prima facie violation of HEERA.

The Board has reviewed the Board agent's warning and dismissal letters, and finding them free of prejudicial error, adopts them as the decision of the Board itself in accordance with the discussion below.

DISCUSSION

In his warning letter, the Board agent correctly emphasized that PERB does not have authority to enforce contracts.

However, on another issue the Board agent made reference to Chula Vista City School District (1990) PERB Decision No. 834 (Chula Vista), where the Board determined that an exclusive representative's right to file a grievance in its own name "is a statutory right, and a proposal that the exclusive representative waive that right is a non-mandatory subject of bargaining." The Board agent then stated that as with any permissive or non-mandatory subject of bargaining, the union may waive or limit its right if it determines to do so. The Board agent concluded that APC did in fact agree to limit its right to file grievances to allege only violations of Article 8, (Union Rights) of the parties' Collective Bargaining Agreement (CBA).

The Board finds the Board agent's reliance on Chula Vista to be inappropriate. In Chula Vista and other related cases (South

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

Bay Union School District (1990) PERB Decision No. 791, affd. in South Bay Union School Dist, v. Public Employment Relations Bd. (1991) 228 Cal.App.3d 502 (South Bay); Mt. Diablo Unified School District (1990) PERB Decision No. 844; Inglewood Unified School District (1991) PERB Order No. Ad-222), the Board found that the exclusive representative has a statutory right[2] to file grievances in its own name under Educational Employment Relations Act section 3543.1 (a).[3]

However, the Board has never ruled on the issue of whether a statutory right exists under HEERA for a union to file a

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[2]One exception raised by APC is that if a statutory right is found, it is nonwaivable. This position relies on former Board Member Camilli's concurrence in South Bay. However, in Chula Vista, the Board adopted Member Camilli's rationale insofar that the exclusive representative's right to file a grievance in its own name is a statutory right, and that it was a nonmandatory subject of bargaining. The Board did not adopt nor has it ruled that, in finding a statutory right, it is a nonwaivable or non-negotiable right.

[3]EERA is codified at Government Code section 3540 et seq. Section 3543.1 states, in pertinent part:

> (a) Employee organizations shall have the right to represent their members in their employment relations with public school employers, except that once an employee organization is recognized or certified as the exclusive representative of an appropriate unit pursuant to Section 3544.1 or 3544.7, respectively, only that employee organization may represent that unit in their employment relations with the public school employer. Employee organizations may establish reasonable restrictions regarding who may join and may make reasonable provisions for the dismissal of individuals from membership.

grievance in its own name. We find that it is unnecessary to decide this issue since whether or not a statutory right is found, HEERA still provides that an exclusive representative's right to meet and confer and to represent its unit members is part of the bargaining process (HEERA sections 3570 and 3571(c)).[4] (Regents of the University of California (1991) PERB Decision No. 891-H.) Here, both an arbitrator and the Board agent concluded that the APC had limited its ability to file grievances in its own name to a single CBA article. The Board supports this finding and concurs that since APC has limited its rights through negotiation, it has failed to demonstrate a prima facie case because APC did not allege violations of Article 8 (Union Rights) of the CBA.

Finally, the Board also agrees with the Board agent that the allegation in APC's charge concerning the improper docking of employees' time was untimely filed. APC failed to file the

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[4]Section 3570 states:

> Higher education employers, or such representatives as they may designate, shall engage in meeting and conferring with the employee organization selected as exclusive representative of an appropriate unit on all matters within the scope of representation.

Section 3571 states, in pertinent part:

> It shall be unlawful for the higher education employer to do any of the following:
>
> (c) Refuse or fail to engage in meeting and conferring with an exclusive representative.

docking charge within six months of when the alleged docking took place. (California State Employees Association (Darzin) (1985) PERB Decision No. 546-S; Fairfield-Suisun Unified School District (1985) PERB Decision No. 547.)

ORDER

The unfair practice charge in Case No. LA-CE-395-H is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Garcia and Johnson joined in this Decision.

STATE OF CALIFORNIA PETE WILSON, *Governor*

PUBLIC EMPLOYMENT RELATIONS BOARD

Los Angeles Regional Office
3530 Wilshire Blvd., Suite 650
Los Angeles, CA 90010-2334
(213)736-3127

October 31, 1994

Edward R. Purcell, Consultant
Academic Professionals of California
419 Carroll Canal
Venice, California 90291

Re: DISMISSAL AND REFUSAL TO ISSUE COMPLAINT, Unfair Practice Charge No. LA-CE-395-H, Academic Professionals of California v. Trustees of the California State University

Dear Mr. Purcell:

In the above-referenced charge, which was filed on May 12, 1994, and amended on June 29, 1994, and August 17, 1994, the Academic Professionals of California (APC) alleged that the California State University (CSU) made unilateral changes in policy and interfered with APC's right to file grievances. 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 September 29, 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 October 6, 1994, the charge would be dismissed.

On October 5, 1994, you filed a third amended charge. This amended charge had one significant new attachment: a copy of a letter dated July 15, 1993, from CSU Vice Chancellor June M. Cooper to the CSU Presidents, on the subject "Fair Labor Standards Act (FLSA) Policies and Procedures Clarification." This letter stated in relevant part that "CSU will continue its present policy of not 'docking' an [FLSA-]exempt employee's pay for absences of less than a day." The charge alleges that CSU later violated this policy at the Pomona campus.

My further investigation of this allegation revealed the following relevant facts.

In our conversation of October 13, 1994, you identified three employees at the Pomona campus who had been docked for absences of less than a day. One had been docked as early as 1991 and as recently as July 22, 1993. Another had also been docked as early

as 1991 and as recently as July 1993. A third had been docked several times from July 15, 1993, to July 29, 1993. You told me that APC had been aware that the employees had been docked but was unaware of CSU's FLSA policy letter (dated July 15, 1993) until mid-February 1994.

Based on the facts stated above, the allegation that CSU violated its FLSA policy does not state a prima facie violation of the HEERA within PERB's jurisdiction, for the reasons that follow.

As noted in my letter of September 29, Government Code section 3563.2(a) states that PERB "shall not issue a complaint in respect of any charge occurring more than six months prior to the filing of the charge." The docking of employees occurred, and was known to APC, more than six months prior to the filing of the present charge (on May 12, 1994). All that occurred during the six months prior to the filing of the charge was that APC became aware of CSU's FLSA policy letter (dated July 15, 1993), which allegedly revealed the legal significance of the docking of employees. The six-month period, however, runs from the occurrence or discovery of the conduct allegedly constituting the unfair practice (in this case, the docking of employees), not from the discovery of the legal significance of that conduct. (California State Employees Association (Darzins) (1985) PERB Decision No. 546-S; Fairfield-Suisun Unified School District (1985) PERB Decision No. 547.)

Furthermore, even if the allegation were timely, it would not state a prima facie case of unilateral change. It appears from the charge and the undisputed facts that both before and after June 15, 1993, CSU's official policy was not to dock FLSA-exempt employees for absences of less than one day.[1] It also appears that both before and after June 15, 1993, there were failures to comply with this official policy.[2] In the absence of a change in policy, mere failures to comply with policy do not violate the duty to bargain. (Grant Joint Union School District (1982) PERB Decision No. 196.)

On the issue of APC's right to file grievances, the third amended charge argues that Article 10.1 of the collective bargaining agreement, which limits APC to "alleging a violation of Union Rights as provided for in this Agreement," does not limit APC to

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[1]In our conversation of October 13, 1994, you specifically told me that APC was not alleging that the letter of June 15, 1993, represented a change in policy.

[2]In fact, one employee was actually docked on June 15, 1993, the very day the FLSA policy letter was issued.

alleging violations of the "Union Rights" article (Article 8). This argument is persuasive, however, only to the extent that other articles actually say something about Union Rights. If the entire agreement were understood to describe Union Rights, then the limiting language of Article 10.1 would be meaningless.[3] It does not appear that any of the grievances filed by APC alleges a violation of any contractual language that actually describes Union Rights.

On the issue of the timeliness of the charge with respect to the conduct underlying the grievance filed on November 11, 1993, the third amended charge argues that the charge was timely because it was filed within six months of CSU's denial of APC's grievance. In Regents of the University of California (1990) PERB Decision No. 826-H, however, PERB held that under HEERA the six-month statute of limitations is not tolled by the pursuit of a grievance concerning the same dispute. With respect to the conduct underlying both the charge and the grievance, the charge should therefore have been filed within six months of the conduct, not within six months of the denial of the grievance.

I am therefore dismissing the charge, based on the facts and reasons contained in this letter and in my September 29 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

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[3]Also, if APC had the right to file a grievance about everything in the agreement, then Article 10.21 (stating that "[n]o representative or agent of the exclusive representative [APC] may solicit complaints or grievances") would serve no purpose.

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

cc: William G. Knight

PUBLIC EMPLOYMENT RELATIONS BOARD

Los Angeles Regional Office
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September 29, 1994

Edward R. Purcell, Consultant
Academic Professionals of California
419 Carroll Canal
Venice, California 90291

Re: WARNING LETTER, Unfair Practice Charge No. LA-CE-395-H, Academic Professionals of California v. Trustees of the California State University

Dear Mr. Purcell:

In the above-referenced charge, which was filed on May 12, 1994, and amended on June 29, 1994, and August 17, 1994, the Academic Professionals of California (APC) alleges that the California State University (CSU) made unilateral changes in policy and interfered with APC's right to file grievances. 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 the charge reveals the following relevant facts.

APC is the exclusive representative of a unit of CSU's Academic Support employees. The collective bargaining agreement between APC and CSU includes a grievance procedure which defines "grievant" as follows in Article 10.1:

> Grievant - The term "grievant" as used in this Article refers to a:
>
> a. permanent employee(s);
>
> b. probationary employee(s);
>
> c. temporary employee(s) employed at thirty (30) consecutive days immediately prior to the event giving rise to the grievance
>
> who alleges in a grievance that he/she has been directly wronged by a violation of a specific term of this Agreement.
>
> The term "grievant" as used in this Article may refer to the Union when alleging a violation of Union Rights as provided for in

> this Agreement. A grievance alleging such a violation may be filed at Level II - Presidential Review.

On August 2, 1993, an arbitrator held as follows:

> Under Article 10.1 union grievances must allege a violation of APC's "union rights" under Article 8, Union Rights, and be filed at Level II of the grievance procedure. [Emphasis in original.]

The arbitrator concluded that a grievance filed by APC that did not allege a violation of Article 8 was not arbitrable.

On November 11, 1993, APC filed a grievance alleging that CSU violated Articles 1, 13 and 33 and Appendix A of the collective bargaining agreement as follows:

> At least one and up to four Clerical Assistants (Unit 7, CSEA) were "promoted" through internal department programs to Evaluator Trainees (Unit 4, APC) in violation of the APC articles and appendix.

Article 1 deals with Recognition, Article 13 with Appointment, and Article 33 with layoff; Appendix A lists the classifications in the unit. The charge acknowledges that the grievance raises issues of "first impression" based on articles "not previously interpreted."

On March 17, 1994, CSU made its Level III response to this grievance. CSU asserted that the grievance was "fatally Procedurally defective" because it did not allege that Article 8 (Union Rights) had been violated. CSU responded to the substance of the grievance in part as follows:

> No provision of Article 13 requires that the University create a vacancy in a position for the purpose of recruitment or recall. Article 17 recognizes in provisions 17.3 and 17.4 that the President may assign employees to perform the work of a higher classification and that the President may make reassignments for the purposes of training. Finally, the re-employment rights of provision 33.27 are applicable only at the campus from which an employee on a recall list was laid off. This is distinct from the job clearinghouse rights under provision

> 33.29, which only requires that employees on a recall list be granted an interview for positions at another campus if they make application for employment at that campus.

CSU therefore denied the grievance.

On April 15, 1994, APC filed another grievance, this one alleging that CSU violated Articles 2, 14 and 28 and Appendix D as follows:

> Ed. Equity has posted a 0.9 SSP III position. Full-time work will be expected of the position without any full-time rights. The work of an exempt employee cannot be accounted for by the hour.

Article 2 deals with Definitions, Article 14 with Probation and Permanency/Tenure, and Article 28 with Hours of Work; Appendix D lists the classifications not eligible for overtime compensation. On May 10, 1994, and again on June 8, 1994, CSU denied the grievance on the sole ground that it did not allege a violation of Article 8 (Union Rights).

On March 4, 1994, APC filed yet another grievance, this one alleging that CSU violated Articles 3, 19, 26 and 28 and Appendices D and E as follows:

> The CSU has not restored to FLSA-exempt members of Unit 4 even when requested, the vacation and sick hours which were deducted in increments of less than eight hours. This practice is incompatible with the employees classification as FLSA-exempt employees. In addition, the CSU has docked the pay of FLSA-exempt employees who were absent for partial days.

Article 3 deals with Effect of Agreement, Article 19 with Sick Leave, Article 26 with Vacation, and Article 28 with Hours of Work; Appendices D and E list the classifications eligible and not eligible for overtime compensation. On April 14, 1994, CSU allegedly took the position that APC had no contractual standing to file the grievance.

The charge alleges that the three alleged contract violations cited in the three grievances represented CSU's "repudiation" of the collective bargaining agreement. The charge alleges that the alleged violations were "unilateral changes" that:

> a -- breached both the Parties' written agreement and past practice;
> b -- were undertaken without prior notice to APC and without giving the Union the opportunity to bargain;
> c -- are not mere isolated breaches of the MOU, but entail system-wide contract interpretations upheld and annunciated by the CSU's central administration thus having generalized affect [sic] and continuing impact on unit members' terms and conditions of employment; and
> d -- are within the scope of representation.

The charge does not specifically allege how the alleged violations breached the agreement and past practice and represented "repudiation" of the agreement.

Based on the facts stated above, the charge does not state a prima facie violation of the HEERA within the jurisdiction of the Public Employment Relations Board (PERB or Board), for the reasons that follow.

In Chula Vista City School District (1990) PERB Decision No. 834, the Board determined that an exclusive representative's right to file grievances in its own name "is a statutory right, and a proposal that the exclusive representative waive that right is a non-mandatory subject of bargaining." The Board determined that the failure to drop a demand that a union waive its right to file grievances, after the union communicates its refusal to include the subject in bargaining, may violate Government Code section 3543.5(c). However, as with any permissive or non-mandatory subject of bargaining, the union may waive or limit its right if it determines to do so.

As the arbitrator found on August 2, 1993, APC did agree to limit its right to file grievances to those grievances that allege violations of APC's contractual Union Rights. CSU was therefore under no obligation to process APC grievances that did not allege violations of APC's contractual Union Rights.

Government Code section 3563.2(a) states that PERB "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." The present charge was filed on May 12, 1994, and amended on June 29, 1994, and August 17, 1994. The grievance filed on November 11, 1993, was filed more than six months before the charge was filed or amended. Any unfair practice cited in that grievance must have occurred more than six

months prior to the filing of the charge and must therefore be outside PERB's jurisdiction.

Government Code section 3563.2(b) states that PERB "shall not have authority to enforce agreements between the parties, and shall not issue a complaint on any charge based on an alleged violation of such an agreement that would not also constitute an unfair practice under this chapter." In order to constitute an unfair practice, an alleged violation must amount to a change of policy, that is, it must alter an established policy and institute a new policy of general application or continuing effect. (Grant Joint Union School District (1982) PERB Decision No. 196.) To show a change in policy, a charging party must first show what the established policy was, either by contract language or past practice. (Eureka City School District (1985) PERB Decision No. 528.) A change in policy is not shown where the respondent has merely interpreted contract language in a reasonable way, although different from the charging party's way, and has not repudiated a prior understanding, agreement or practice. (Id.)

The present charge alleges that CSU has engaged in "unilateral changes" and "repudiation" of the collective bargaining agreement, but these legal conclusions need not be accepted as true where, as here, they are not supported by factual allegations. (Charter Oak Unified School District (1991) PERB Decision No. 873.) The present charge does not specifically allege what the established policies were and how they were established by specific contract language or past practice. The charge also does not allege how CSU ever repudiated the collective bargaining agreement. It appears from the charge that CSU and APC interpret the agreement differently, but this is not enough to demonstrate the existence of any unfair practice within PERB's jurisdiction.

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 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 October 6, 1994, I shall dismiss your charge. If you have any questions, please call me at (213) 736-3127.

Sincerely,

Thomas J. Allen
Regional Attorney