**STATE OF CALIFORNIA**
**DECISION OF THE**
**PUBLIC EMPLOYMENT RELATIONS BOARD**

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| UNIVERSITY PROFESSIONAL AND TECHNICAL EMPLOYEES, CWA LOCAL 9119, AFL-CIO, | ) | |
| Charging Party, | ) | Case No. SF-CE-445-H |
| v. | ) | PERB Decision No. 1169-H |
| REGENTS OF THE UNIVERSITY OF CALIFORNIA, | ) | September 12, 1996 |
| Respondent. | ) | |

Appearances: Eggleston, Siegel & LeWitter by James E. Eggleston, Attorney, for University Professional and Technical Employees, CWA Local 9119, AFL-CIO; Hanson, Bridgett, Marcus, Vlahos & Rudy by Douglas H. Barton, Attorney, for the Regents of the University of California.

Before Caffrey, Chairman; Garcia and Johnson, Members.

DECISION

JOHNSON, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal of a Board agent's dismissal (attached) of an unfair practice charge filed by the University Professional and Technical Employees, CWA Local 9119, AFL-CIO (UPTE). In its charge, UPTE alleged that the Regents of the University of California (University) violated section 3571(a), (b) and (c) of the Higher Education Employer-Employee Relations Act (HEERA)[1] when it unilaterally changed the health

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

> It shall be unlawful for the higher education employer to do any of the following:

care benefits policy without giving UPTE an opportunity to bargain over the change.

The Board has reviewed the entire record in this case, including UPTE's unfair practice charge, the warning and dismissal letters, UPTE's appeal and the University's response thereto. The Board finds the Board agent's warning and dismissal letters to be without prejudicial error and adopts them as the decision of the Board itself.

UPTE'S APPEAL

On appeal, UPTE argues that the Board agent erroneously concluded that the University had a policy which permitted certain annual adjustments to health care benefits. UPTE contends that the University has a proposal on the table in their negotiations for their first contract that would permit the University to unilaterally adjust health care benefits each year. UPTE argues that health benefits are a mandatory subject of bargaining and until negotiations for a new contract are completed, the University may not alter health benefits.

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(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. For purposes of this subdivision, "employee" includes an applicant for employment or reemployment.

(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.

UPTE also asserts that it was not afforded a fair opportunity to amend its charge. On June 3, 1996, after receiving the Board agent's dismissal letter, UPTE sent a letter to the Board agent in which it requested that the dismissal be withdrawn and that it be permitted to file an amended charge. The Board agent denied the request on June 6, 1996.

In response, the University asserts that it has a long-standing practice of making certain annual adjustments to health care benefits. The University argues that proposals made to UPTE during bargaining are irrelevant to determining the parameters of the status quo. Until the parties reach agreement on a contract, an employer does not relinquish its right to act in accordance with the established past practice.

DISCUSSION

A unilateral change in terms and conditions of employment within the scope of representation is, absent a valid defense, a per se refusal to negotiate. (NLRB v. Katz (1962) 369 U.S. 736 [50 LRRM 2177]; Pajaro Valley Unified School District (1978) PERB Decision No. 51 (Pajaro Valley).) To establish an unlawful unilateral change, the charging party must demonstrate that: (1) the employer breached or altered the parties' written agreement or own established past practice; (2) such action was taken without giving the exclusive representative notice or an opportunity to bargain over the change; (3) the change is not merely an isolated breach of the contract, but amounts to a change of policy (i.e., has a generalized effect or continuing

impact upon bargaining unit members' terms and conditions of employment); and (4) the change in policy concerns a matter within the scope of representation. (Grant Joint Union High School District (1982) PERB Decision No. 196; Pajaro Valley.)

In order to determine whether a unilateral change has occurred, the charging party must establish that the employer altered the status quo by departing from the terms of the parties' contract or the established past practice. There is no contract in existence between the parties in this case because they have not completed negotiations for their initial contract. Therefore, UPTE must show that the University departed from the established past practice when it altered health care benefits and the University's contribution rate.

In Pajaro Valley, the Board recognized the "dynamic status quo" concept in federal labor law. That concept instructs that change can be a normal part of the pattern of conduct between an employer and a union. As the Board stated in Pajaro Valley:

> While Katz prohibits disturbance of the status quo during negotiations, the NLRB has held that the "status quo" against which an employer's conduct is evaluated must take into account the regular and consistent past patterns of changes in the conditions of employment. The NLRB has held that changes consistent with such a pattern are not violations of the "status quo." [Citation, p. 6.]

In the health benefit plan open enrollment information distributed to employees, the University explained that the University's contribution toward an employee's selected health plan is adjusted each year to reflect health plan changes and

costs assessed by the health carriers. To state a prima facie case, UPTE must allege facts which demonstrate that the University departed from the established practice when it made the adjustments in health care benefits for the November 1995 open enrollment.

The basis of UPTE's argument is that the University did not have a policy concerning health benefits because the parties had not completed negotiations for their first contract. UPTE argues that, in fact, the University made a proposal at the bargaining table to permit it to make these annual adjustments to the health benefits. UPTE contends that health benefits are a mandatory subject of bargaining and until negotiations for a new contract are completed, the University may not alter health benefits.

The Board has held, however, that an employer, by its negotiating conduct, does not relinquish its right to act in accordance with the established past practice. (Modesto City Schools (1983) PERB Decision No. 347.) While the University must continue to negotiate with UPTE over the mandatory subject of health benefits, it may act in accordance with its past practice of adjusting health benefits until the parties have completed negotiations for their first contract or they have completed impasse procedures. UPTE has failed to allege facts which demonstrate that the University's actions in adjusting health care benefits and the University's contribution rate were

contrary to the established past practice. Accordingly, this argument is without merit.

UPTE also complains that it was not afforded a fair opportunity to amend its charge. After receiving the Board agent's dismissal letter, it wrote to the Board agent asking her to withdraw the dismissal of the charge and permit it to file an amended charge.

The warning letter sent to UPTE prior to the issuance of the dismissal letter clearly states that if the charging party notes any deficiencies, it must file an amended charge by a specified date. UPTE responded by sending a letter to the Board agent prior to the specified deadline which stated in part, "we do not believe an amended charge is warranted or necessary and we ask that you proceed immediately with the issuance of a Complaint."

UPTE provides no explanation on appeal for its assertion that it did not have a fair opportunity to amend its charge. Accordingly, this argument is rejected.

ORDER

The unfair practice charge in Case No. SF-CE-445-H is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chairman Caffrey and Member Garcia joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD

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

May 28, 1996

James E. Eggleston
Eggleston, Siegel & LeWitter
1330 Broadway, Suite 1700
Oakland, CA 94612

Re: **DISMISSAL OF UNFAIR PRACTICE CHARGE/REFUSAL TO ISSUE COMPLAINT**
University and Professional Employees, CWA Local 9119 v. The Regents of the University of California
Unfair Practice Charge No. SF-CE-445-H

Dear Mr. Eggleston:

The above-referenced unfair practice charge, filed February 27, 1996, alleges that The Regents of the University of California (University) unilaterally changed the health care benefits policy without giving the University and Professional Employees (UPTE) an opportunity to bargain over the changes. This conduct is alleged to violate Government Code sections 3571(a), (b) and (c) of the Higher Education Employer-Employee Relations Act (HEERA).

I indicated to you, in my attached letter dated May 14, 1996, 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 21, 1996, the charge would be dismissed.

I did not receive either an amended charge or a request for withdrawal. I am, however, in receipt of your letter dated May 20, 1996, which states in part, "we do not believe an amended charge is warranted or necessary and we ask that you proceed immediately with the issuance of a Complaint . . ."

The May 20, 1996 letter asserts that pending the outcome of negotiations, the University may not alter the health care benefits provided by any of its contracted insurance carriers, nor may the University alter the cost of each health plan it provides. UPTE contends that such Open Enrollment modifications are unilateral changes in violation of the EERA.

The mere changing of benefits or cost does not establish a unilateral change. Whether a unilateral change has occurred is measured by comparing the action taken to the status quo established by a contract or past practice. (California State University (1995) PERB Decision. No. 1093.) As no contract exists, Charging Party must demonstrate that the University has altered its past practice with regard to health care benefits and costs.

In Pajaro Valley Unified School District (1978) PERB Decision No. 51, PERB recognized the "dynamic status quo" concept in federal labor law. That concept instructs that change can be a normal part of the pattern of conduct between an employer and a union. As the Board noted in Pajaro:

> While Katz prohibits disturbance of the status quo during negotiations, the NLRB has held that the "status quo" against which an employer's conduct is evaluated must take into account the regular and consistent past patterns of changes in the conditions of employment. The NLRB has held that changes consistent with such a pattern are not violations of the "status quo."

The University has a long standing policy on contributions to health care premiums. That policy clearly provides for open enrollment on a yearly basis and states that the University's contributions will be near or equal to the premiums of the lowest-costing HMO. Charging Party fails to provide any evidence of a contrary written policy or past practice. Any changes made in the health benefits provided to University employees and any modifications in costs, are consistent with the University's past practice of reevaluating health care costs and benefits on a yearly basis.

I am therefore dismissing the charge based on the facts and reasons contained herein and in my May 14, 1996 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
Kristin L. Rosi
Regional Attorney

Attachment

cc:

PUBLIC EMPLOYMENT RELATIONS BOARD

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

May 14, 199 6

James E. Eggleston
1330 Broadway, Suite 1700
Oakland, CA 94612

Re: **WARNING LETTER**
University and Professional Employees, CWA Local 9119 v. The Regents of the University of California
Unfair Practice Charge No. SF-CE-445-H

Dear Mr. Eggleston:

The above-referenced unfair practice charge, filed February 27, 1996, alleges that The Regents of the University of California (University) unilaterally changed the health care benefits policy without giving the University and Professional Employees (UPTE) an opportunity to bargain over the changes. This conduct is alleged to violate Government Code sections 3571(a), (b) and (c) of the Higher Education Employer-Employee Relations Act (HEERA).

Investigation of the charge revealed the following. The University offers a comprehensive health benefits package to its employees. The University's health benefits package offers, on an annual basis, the opportunity to choose between health maintenance organizations (HMO's), fee-for-service plans, and point-of-service plans. During 1995, employees could choose from among six HMO's, two fee-for-service plans, and one point-of-service plan.

Each November, the University holds an open enrollment period, during which time employees have the option to choose which health care plan to participate in. Employees may select a new plan or remain with their current coverage.

On or about October 24, 1995, UPTE was informed by the University of the upcoming November open enrollment period. This letter noted the proposed health benefit programs available to employees during this enrollment period.

On or about October 27, 1995, UPTE made a written demand on the University to bargain over the proposed changes in health benefits and the increased cost to employees.

On or about November 1, 1995, the University opened enrollment for health care benefit programs. Each employee was provided a packet of information that described the open enrollment period and process, and outlined the cost and benefit changes in each of the programs provided. On page 6 of this packet, under the heading "Employee's Monthly Cost," the University explained its contribution to the health care premiums, as follows:

> The maximum UC contributions are set close to the price of the lowest cost HMO plan, which varies from year to year. Your monthly cost is based on the difference between the cost of your plan and UC's maximum contributions. Your medical plan cost will go up, down, or remain the same as a result of these two changing factors. . . . Generally, UC contributions are set so that there is at least one HMO plan at each major UC location with no cost to employees. If you want one of the more expensive plans you will need to pay the difference in premium. The amount UC contributes is also subject to state appropriation, which may change or be discontinued in future years.

On or about November 30, 1995, the University responded to UPTE's demand for bargaining with a written refusal to bargain over health care benefits changes. The University stated that it considered the changes in health benefits and cost to be a matter of the status quo, thus not requiring negotiations prior to implementation. Additionally, the University noted that it does not offer different health plans to different employee groups or organizations.

Based on the facts stated above, the charge as presently written, fails to state a prima facie violation of HEERA, for the reasons stated below.

In determining whether a party has violated section 3571(c) of HEERA, the PERB utilizes either the "per se" or "totality of the conduct" test, depending on the specific conduct involved and the effect of such conduct on the negotiating process. (Stockton Unified School District (1980) PERB Dec. No. 143.) Unilateral changes are considered "per se" violations if certain criteria are met. Those criteria are: (1) the employer implemented a change in policy concerning a matter within the scope of representation, and (2) the change was implemented before the employer notified the exclusive representative and gave it an opportunity to request negotiations. (Walnut Valley Unified

School District (1981) PERB Dec. No. 160; Grant Unified High School District (1982) PERB Dec. No. 196.)

On page 6 of the packet provided to UPTE and all employees, the University outlines its policy on contributions to health care premiums. The University clearly states that its contribution will be near or equal to, the premiums of the lowest-costing HMO. No evidence has been provided by UPTE to demonstrate that this is a new policy or the revision of a prior policy. Nor has evidence been provided that the University is failing to adhere to its stated policy. Without such evidence, UPTE cannot establish that the University has changed a policy within the scope of representation.

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 May 21. 1996. I shall dismiss your charge. If you have any questions, please call me at (213) 736-3008.

Sincerely,

Kristin L. Rosi
Regional Attorney