

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



SAN JOAQUIN DELTA COLLEGE)
TEACHERS ASSOCIATION, CTA/NEA,)
)
Charging Party,) Case No. SA-CE-1789
)
v.) PERB Decision No. 1410
)
SAN JOAQUIN DELTA COMMUNITY)
COLLEGE DISTRICT,) October 5, 2000
)
Respondent.)
_____)

Appearances: California Teachers Association by A. Eugene Huguenin, Jr., Attorney, for San Joaquin Delta College Teachers Association, CTA/NEA; Curiale, Dellaverson, Hirschfeld, Kelly & Kraemer by Jeffrey Sloan and Alison C. Neufeld, Attorneys, for San Joaquin Delta Community College District.

Before Dyer, Amador and Baker, Members.

DECISION

AMADOR, Member: This case comes before the Public Employment Relations Board (PERB or Board) on exceptions filed by the San Joaquin Delta Community College District (District) to an administrative law judge's (ALJ) proposed decision. The ALJ found that the District violated section 3543.5(a), (b) and (c) of the Educational Employment Relations Act (EERA)¹ when it

¹EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated all statutory references are to the Government Code. Section 3543.5 states, in pertinent part:

It shall be unlawful for a public school employer to do any of the following:

- (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to

denied certain counselors' requests to move to alternate calendars.

The Board has reviewed the entire record in this case including the original and amended unfair practice charge, the complaint, the ALJ's proposed decision and the filings of the parties. The Board reverses the ALJ's decision and dismisses the unfair practice charge and complaint.

BACKGROUND

This dispute concerns the work year for counselors employed by the District. The counseling department employs counselors in three separate programs: (1) Guidance and Counseling (General Counseling); (2) Disabled Student Programs and Services (DSPS); and (3) Extended Opportunity Program and Services (EOPS). Each of these programs provides services to a distinctly different student clientele. The District's counselors are exclusively represented by the San Joaquin Delta College Teachers Association, CTA/NEA (Association). The parties disagree as to whether their newly negotiated collective bargaining agreement

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 meet and negotiate in good faith with an exclusive representative.

(CBA) grants certain counselors the right to volunteer for and receive an alternate calendar assignment.

Under the parties' 1993-1995 CBA, counselors worked a "traditional" school year calendar (i.e., from approximately mid-August through May). Pursuant to a recommendation from the chancellor's office, the District sought to better serve students' counseling needs by providing counseling services prior to the start of the fall semester, as needed. To accomplish this, the District would need to include language in the new CBA that would provide it with the flexibility to offer either a traditional or an alternate calendar for each of the three counseling programs.

Although negotiations were protracted, the parties finally executed a written agreement on January 30, 1997; the term of the new CBA was July 1, 1995 to June 30, 1998. The new CBA provides for both the "traditional" calendar and an "alternate" calendar for counselors. It guarantees that the most senior one-half of the counselors (referred to throughout this proceeding as "Category A" counselors) would continue to work the traditional school calendar. The remaining one-half less senior counselors (referred to as "Modified Category A" counselors) would work alternate calendars, often starting one month before classes began. The new CBA also permits the more senior counselors to volunteer for alternate calendars.²

²It is important to note that the new CBA does not give either the Association or individual employees the right to demand that a specific counseling program offer an alternate

Shortly after the parties reached agreement on the new CBA, on January 23, 1997, District vice-president of business services Robert Yribarren (Yribarren) sent Association representative Larry Paulsen a memo, including a proposed 1997-98 counselors' schedule. Yribarren invited the Association "to meet to discuss the calendar." The proposal assigned Category A counselors to the traditional track (approximately mid-August through May). It assigned Modified Category A counselors in the General Counseling program to an alternate schedule (approximately mid-July through May). As neither the EOPS nor the DSPS programs participated in the alternate scheduling, all counselors within those two programs were assigned to a traditional calendar. The memo was silent on whether Category A counselors who exercised their contractual right to volunteer for an alternate calendar would be limited to new positions in their current programs.

On January 31, 1997, a memo from the three program supervisors advised each counselor of his or her 1997-98 schedule. The memorandum stated, inter alia:

These assignments are made on the basis of seniority. If counselors currently listed within the Traditional Track are interested in moving to the Modified Traditional Track, openings created will be offered and filled on the basis of seniority.

calendar. The District alone has the right to determine whether a given counseling program will offer a traditional or an alternate calendar.

On February 12, 1997, EOPS Counselor Clarence Louie (Louie) requested an alternate calendar from his supervisor. Two other EOPS counselors, Janice Takahashi (Takahashi) and Tony Sedillo (Sedillo), subsequently requested alternate calendars as well.

On February 15, 1997, Mark Mekjavich (Mekjavich), the General Counseling program supervisor, received a request for an alternate calendar assignment from Gene Atwood (Atwood), a Category A counselor in the General Counseling program. Since Mekjavich had already determined that his program would offer both traditional and alternate calendars in 1997-98, he granted Atwood's request.

On February 21, 1997, Mekjavich wrote to the three most senior Modified Category A counselors in his program (General Counseling) to offer them the opportunity to move to the traditional track on the basis of seniority as a result of Atwood's shift to the alternate calendar. Eventually those three counselors declined this opportunity, and Mekjavich then offered a traditional calendar to Debra Louie, the next most senior General Counseling counselor. She accepted the offer and worked on this calendar in 1997-98.

Also in February 1997, District vice-president of student services John Williams (Williams) notified the three program supervisors that:

. . . although the contract is silent on this issue, [the District has] the right to schedule the counseling staff by program to meet specific program needs. [Emphasis added.]

He also stated, in the same memo:

If there is not a need to have any EOPS counselors on the modified calendar the request made by the three EOPS counselors [for assignment to an alternate work schedule] would not be considered.

On March 6, 1997, in another memo to the program supervisors, Williams stated that:

. . . each individual department must be expected to develop their own specific calendar based on individual program needs.

Subsequently, the EOPS and DSPS supervisors sent memoranda to their counselors stating that those programs would work exclusively on the traditional calendar. On March 11, 1997, the EOPS supervisor; by memo, denied the requests of Louie, Sedillo and Takahashi for modified schedules, stating that, "in order to effectively administer the . . . EOPS Program it is imperative that the EOPS Counselors remain on the traditional (Track A) counseling calendar."

On May 8, 1997, the Association filed an unfair practice charge against the District.

DISCUSSION

This case presents the issue of whether the District's failure to grant EOPS counselors' requests for a different work schedule (i.e., an alternate calendar) constitutes an unlawful unilateral change.

To establish a prima facie case of illegal unilateral change, the charging party must demonstrate that: (1) the employer breached or altered the parties' written agreement, or

its own established past practice;³ (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., the change has a generalized effect or continuing impact on 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 (Grant).) All elements of this test must be met before a violation will be found.

The record establishes that three EOPS counselors made a request to work an alternate calendar despite the fact that the EOPS program operated only on the traditional calendar. The District denied all three requests. In order to prevail, the Association must establish that the District had an existing policy, either in the parties' CBA or through past practice, of permitting counselors in EOPS, a "traditional-calendar-only" program, to volunteer for and obtain an alternate calendar assignment.

The Association asserts that Article XVII, section 3 of the parties' CBA contains such a policy. That section provides:

³This case does not involve past practice. There is no allegation or evidence of a contrary past practice. Moreover, the unfair practice charge challenges the first instances of the District's denying EOPS counselors' requests to change calendars. Hence, deviation from past practice is not in issue in this case.

The definition of "Modified Category A" is counselors who are assigned to work on the calendar established for faculty under Article XIII . . . except they may be assigned to work calendars which have alternate start and end dates within a continuous duty year. The District will consult with the Association on Category A calendar(s). Assignment to alternate calendars will be made by first asking for volunteers and then by assignment in reverse order of seniority. [Emphasis added.]

This language accomplishes three purposes that are important to this case: (1) it defines "Modified Category A" counselors; (2) it provides a procedure to be followed by the District in making assignments to alternate calendars; and (3) it permits counselors to volunteer for alternate calendars.

Webster's Dictionary defines a volunteer as "one who enters into or offers himself for any service of his own free will."

(Webster's 3d New Internat. Diet. (1976) p. 2564.) As commonly understood, the concept of volunteering does not carry with it a reciprocal obligation for the recipient of the offer to accept the volunteer's offer of service. This point is critical in identifying the parties' respective rights and obligations in the case at bar.

Returning to the Grant test, in order to establish a change in policy, the Association must prove what the existing policy was. As stated above, the parties' agreement contains a policy of permitting persons to volunteer for alternate calendar

assignments.⁴ It does not, however, obligate the District to honor the requests of EOPS counselors Louie, Takahashi and Sedillo to work an alternate calendar simply because they volunteered to do so. Accordingly, when the District denied those requests, it did not alter an existing policy and did not violate the EERA. As a result, all other allegations are dismissed as well.

In reaching this conclusion, we applied common sense as well as legal principles. The Association's interpretation of the contract language leads to results that are unusual, if not absurd. The EOPS program does not offer an alternate calendar, yet three EOPS counselors requested such a calendar. The only program that offers an alternate calendar is General Counseling. The meaning of the EOPS counselors' requests, given these facts, is far from clear. Logically, there are two possible interpretations: (1) the EOPS counselors sought to work an alternate calendar within their own program; or (2) the EOPS counselors sought to move to the general program, the only program that offered an alternate calendar.

⁴It is apparent from the record that during the negotiating process the parties did not contemplate that the more senior counselors who were guaranteed the right to continue to work the traditional calendar would elect to work the alternate calendar. Instead, negotiations centered on the method by which the District would make assignments to the presumably less desirable alternate calendar.

As it turned out, some of the more senior counselors did wish to work the alternate calendar, creating a situation not clearly addressed by the contract.

Under the first scenario, if the EOPS counselors seek to have PERB compel the District to offer an alternate calendar within EOPS, we cannot order such a remedy. As stated above, the CBA does not give the Association or individual employees the right to demand that a specific counseling program offer an alternate calendar. Certainly it does not give PERB any such right. The District alone has the right to determine whether a given counseling program will offer a traditional or an alternate calendar.

Under the second scenario, we assume that the EOPS counselors sought to move to the general program. This awkward result would defy common sense. First of all, the record reflects no wish on the part of these counselors to actually change programs. Secondly, if the District is compelled to grant the requests of the EOPS "volunteers", that could only occur by assigning them to slots in the general program. Further, EOPS and General Counseling programs require different qualifications of incumbents, thus precluding interchangeability of incumbents without the requisite qualifications.

As we understand it, therefore, the Association would have us believe that the parties intended to create a situation in which the District is powerless to avoid an apparent surplus of counselors in the general program and an apparent shortage of counselors in EOPS. The Board is not willing to presume from the language agreed to by the parties that the parties intended such a convoluted outcome.

ORDER

The unfair practice charge and complaint in Case No. SA-CE-1789 are hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Dyer and Baker joined in this Decision.