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-667-H PERB Decision No. 1642-H June 15, 2004

Appearances: Rothner, Segall & Greenstone by Bernhard Rohrbacher, Attorney, for Academic Professionals of California; Janette Redd Williams, University Counsel, for Trustees of the California State University.

Before Duncan Chairman; Whitehead and Neima, Members.

DECISION

DUNCAN, Chairman: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the Academic Professionals of California (APC) from a Board agent's dismissal (attached) of its unfair practice charge. The charge alleged that the Trustees of the California State University (CSU) violated the Higher Education Employer-Employee Relations Act (HEERA)[1] by unilaterally implementing Employee Assistance Programs (EAP) at Sonoma State University (SSU) and CSU Long Beach (CSULB).

The Board has reviewed the entire record in this case, including the original and amended charge, APC's appeal and CSU's response to the appeal. The Board finds the warning and dismissal letters to be free from prejudicial error and adopts them as the decision of the Board itself, subject to the discussion below.

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

DISCUSSION

The original and amended charges filed by APC do not state a prima facie case as the EAP at both campuses are voluntary, confidential and offered at no cost to the participants. There also is no penalty for participation or not participating. As there is no direct impact on wages and hours, is voluntary and not held during school hours, it is outside the scope of representation.

Under HEERA sections 3562(q) and (r) and 3562.2 the scope of representation is generally limited to wages, hours and other terms and conditions of employment. PERB has not created a specific test to determine whether matters not specifically described in these statutory provisions are within the scope of representation under HEERA. However, PERB indicated a matter is outside the scope of bargaining if "imposing a bargaining obligation would significantly abridge the employer's managerial prerogatives." (University of California (1987) PERB Decision No. 640-H.)

In Anaheim Union High School District (1981) PERB Decision No. 177 (Anaheim), PERB reviewed similar language in section 3543.2 of the Educational Employment Relations Act (EERA)[2] and set forth the following test for determining whether a subject is within the scope of representation. A non-enumerated subject is negotiable if: (1) it is logically and reasonably related to wages, hours, or an enumerated term and condition of employment; (2) the subject is of such concern to management and employees that conflict is likely to occur, and the mediatory influence of collective negotiations is the appropriate means of resolving the conflict; and (3) the employer's obligation to negotiate would not significantly abridge its freedom to exercise those managerial prerogatives essential to the achievement of the district's mission.

[2]EERA is codified at Government Code section 3540, et seq.

The regional attorney dismissed the charges based on San Diego Unified School District (1982) PERB Decision No. 234 (San Diego). He found that to be directly on point and we agree. In San Diego, the Board followed the Anaheim test, set forth supra, and found the EAP to be outside the scope of representation.

In the amended charge, APC raised a concern about confidentiality. In San Diego, the Board found the impacts of the EAP program on the confidentiality of program participants in existing health and welfare benefits to be items within the scope of representation. This fact does not, however, affect our conclusion in this case that there was no unilateral change.

Article 24 of the CSU-APC collective bargaining agreement includes provision of an EAP program and SSU was free to implement it because of the contractual agreement.

The allegations as to CSULB are untimely.

HEERA section 3563.2(a) prohibits PERB from issuing a complaint with respect to "any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge." The limitations period begins to run once the charging party knows, or should have known, of the conduct underlying the charge. (Gavilan Joint Community College District (1996) PERB Decision No. 1177.) The statute of limitations is an affirmative defense which has been raised by the respondent in this case. (Long Beach Community College District (2003) PERB Decision No. 1564.) Therefore, charging party now bears the burden of demonstrating that the charge is timely filed. (Cf., Tehachapi Unified School District (1993) PERB Decision No. 1024; State of California (Department of Insurance) (1997) PERB Decision No. 1197-S.)

Although APC alleges that what it believes is unilateral action was discovered in February 2002, the regional attorney documented APC's knowledge of the EAP program (changed to the Faculty and Staff Assistance Program in 1998) predated the information

received in 2002. The regional attorney investigation discovered that APC had knowledge of the program in l996, the program had existed for over twenty years and was known to APC at the time the 2000-2003 collective bargaining agreement was negotiated which included Article 24 providing for the university to offer the EAP program. The filing of the amended charge to include CSULB occurred in May 2002, more than six months after APC knew or should have known about the program.

After thoroughly reviewing the original and amended charge and the entire record, the Board agrees with the regional attorney that APC has failed to state a prima facie case and the charges must be dismissed.

ORDER

The unfair practice charge in Case No. LA-CE-667-H is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Whitehead and Neima joined in this Decision.

STATE OF CALIFORNIA GRAY DAVIS, Governor
PUBLIC EMPLOYMENT RELATIONS BOARD
Los Angeles Regional Office
3530 Wilshire Blvd., Suite 1435
Los Angeles, CA 90010-2334
Telephone: (213) 736-3543
Fax: (213) 736-4901

October 30, 2003

Lee O. Norris, Labor Relations Representative
Academic Professionals Of California
8726-D S. Sepulveda Blvd. #C172
Los Angeles, CA 90045

Re: Academic Professionals of California v. Trustees of the California State University
Unfair Practice Charge No. LA-CE-667-H
DISMISSAL LETTER

Dear Mr. Norris:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on March 7, 2002. The Academic Professionals of California (APC Unit 4)) alleges that the Trustees of the California State University violated section 3571(a) , (b) and (c) of the Higher Education Employer-Employee Relations Act (HEERA)[1] by making a unilateral change by implementing an Employee Assistance Program (EAP) at Sonoma State University (SSU). On May 2, 2002, an Amendment was filed alleging the unilateral implementation of a "Faculty and Staff Assistance Program" (FSAP) at Cal State University, Long Beach (CSULB).

I indicated to you in my attached letter dated October 1, 2003, 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 8, 2003, the charge would be dismissed.

On October 7, 2003, I received APC's Amended Charge which discusses SSU and CSULB.

Sonoma State University - The Amended Charge reiterates the allegations in the initial charge filed March 7, 2002. It points out that prior to July 1997, the University contracted the EAP program to Mr. Al Weirs, an off-campus provider. Due to budgetary constraints beginning in July 1997, the EAP was provided until June 30, 2001 in-house by the campus based "Counseling and Psychological Services." On July 1, 2001, SSU once again contracted the EAP program to Mr. Weirs, the off-campus provider. The original unfair practice charge asserts that in October 2001, APC received notice that on July 1, 2001, SSU unilaterally implemented an EAP program.

[1]HEERA is codified at Government Code section 3560 et seq. The text of the HEERA and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

The main points raised in the October 2003 Amended Charge are that the EAP is not voluntary, that if a Supervisor recommends treatment for an employee, the employee has no right to keep confidential information regarding the use or non-use of the EAP services, that the SSU may release confidential documents without obtaining the employee's consent, that after the free visits have been exhausted, the employee bears the costs for more visits, and that employees working less that half time may not participate in the EAP.

The above-stated information fails to state a prima facie violation for the reasons that follow.

In determining whether a party has violated HEERA section 3571(c), 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 Decision 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 Decision No. 160; Grant Joint Union High School District (1982) PERB Decision No. 196.)

Under the HEERA sections 3562(q) and (r) and 3562.2 the scope of representation is generally limited to wages, hours and other terms and conditions of employment. PERB has not created a specific test to determine whether matters not specifically described in these statutory provisions are within the scope of representation under HEERA. However, PERB indicated a matter is outside the scope of bargaining if "imposing a bargaining obligation would significantly abridge the employer's managerial prerogatives." (University of California (1987) PERB Decision No. 640-H.)

In Anaheim Union High School District (1981) PERB Decision No. 177, PERB reviewed similar language in section 3543.2 of the Educational Employment Relations Act and set forth the following test for determining whether a subject is within the scope of representation. A non-enumerated subject is negotiable if: (1) it is logically and reasonably related to wages, hours, or an enumerated term and condition of employment; (2) the subject is of such concern to management and employees that conflict is likely to occur, and the mediatory influence of collective negotiations is the appropriate means of resolving the conflict; and (3) the employer's obligation to negotiate would not significantly abridge its freedom to exercise those managerial prerogatives essential to the achievement of the district's mission.

After a review of the entire EAP program, I still conclude that the program is fully voluntary, confidential and that participating in the program is at no cost to the participants. If a participant chooses to have visits beyond those covered by the program, this is voluntary and may be covered by the employee's own health insurance or the employee may wish to pay. There is no penalty for not participating.

As noted in my October 1, 2003 letter, in San Diego Unified School District (1982) PERB Decision No 234, the Board considered the Anaheim test and held that instituting this type of EAP and making the program available to employees is not within the scope of bargaining. Also see Poway unified School District (1988) PERB Decision No. 680 [in service training not negotiable per Anaheim as no direct impact on wages and hours since it was voluntary and not held during duty hours.].

As I pointed out in my letter dated October 1, 2003, even if the EAP is within the scope of representation, SSU's conduct does not constitute a change in policy. The CSU-APC collective bargaining agreement at Article 24, Benefits, section 24.12, Employee Assistance Program – Referral Service provides,

> The CSU shall attempt to assist employees' voluntary efforts to correct job performance problems by endeavoring to provide a referral service to employees concerning drug, alcohol, or personal problems. An employee undergoing alcohol, drug, or mental health treatment, upon approval, may use accrued sick leave, CTO and/or vacation for such a purpose. Leaves of absence without pay may be granted pursuant to Article 22.

This demonstrates that the policy through the collective bargaining agreement was to have an EAP program. As the EAP is contractually favored, I conclude that it has not been established that there has been a change in policy. Also, since the parties agreed contractually that there would be an EAP program, SSU had the power to implement such a program. (See Marysville Joint Unified School District (1983) PERB Decision No. 314.) In addition, the alleged change in July 2001 in contracting out the EAP to Mr. Weirs was a return to the EAP model in effect prior to July 1997.

Therefore, I am dismissing the charge and October Amended Charge based on the facts and reasons contained above and in my October 1, 2003 letter.

California State University, Long Beach - Regarding CSULB, the October 2003 Amended Charge raises allegations quite similar to those made in the original charge. You contend the FSAP commenced operation in June 1999. Citing a February 19, 2002 CSULB letter, responding to your request for information, CSU indicated, "Before the FSAP program was initiated, we had a very small program staffed half-time by an SSP II/A who mainly provided services to students." From this you conclude that the FSAP is a new program and not a continuation of the preexisting EAP. You contend that the recommendation by a supervisor that an employee seek treatment alters the program since the employee "may feel coerced into seeking treatment from the FSAP." You also assert that when an employee's supervisor recommends that the employee seek counseling through the FSAP, after the program's free visits have been exhausted, if the supervisor instructs the employee to attend, the employee is responsible for the cost of the additional sessions.

CSULB's EAP program has existed for at least twenty years without any substantive changes. In the mid-1990's APC was aware of the EAP program and participated in discussions concerning the expansion of the EAP program. In October 1996, Denise Davis, the Unit 4, APC Representative and all Staff Union Representatives were informed that CSULB was considering expanding the EAP. The union representatives participated in the discussions. During September 1998 CSULB released the new name of the EAP, the FSAP. The program received a permanent allocation of $75,000 for short term counseling referral, mediation and consultation services for employees. The expanded FSAP commenced in or about June 1999.

In a letter to you dated April 10, 2002, CSULB responded to your March 3, 2002 request for information. You were provided the FSAP Statement of Understanding, the client information form, the FSAP brochure, the FSAP Mission Statement, the FSAP Policies and Procedures Manual, the 1998-99 Resource Planning Process Proposal for the FSAP, the 1998-99 General Fund Support Budget, and the costs associated with the program. You were advised that the present FSAP coordinator/counselor (SSP III), Toni Aquino was hired in June 1999 and that the prior coordinator, SSP II Judith Phillips was half-time and was hired in 1987. You were also advised that "Union representatives were notified of the recruitment for the [FSAP] coordinator/counselor, of the hiring of Toni Aquino, and the availability of the FSAP program. No requests to meet and discuss the program were received from any of the unions."

My investigation has revealed that the original EAP and subsequent FSAP have always been available to all CSULB employees. APC was advised in the 1990's of CSU's intent to expand the program and to hire a full-time person to staff it. APC received documents from CSU in 2002 regarding the FSAP program at CSULB. Based on the above information, APC had knowledge of the EAP as early as 1996 and was also aware of Article 24, section 24.12

The above information fails to state a prima facie case for the following reasons.

As noted in my October 1, 2003 letter, HEERA section 3563.2(a) prohibits PERB from issuing a complaint regarding "any charge based upon an alleged unfair practice occurring more that six months prior to the filing of the charge." The EAP has been in existence at CSULB for more than twenty years with no real substantive changes other than being expanded in the late 1990's. APC's union representative had knowledge of the EAP as early as 1996[2] and APC knew of the policy of having an EAP pursuant to Article 24 of the parties' 2000-2003 collective bargaining agreement. Since the First Amended Charge concerning this alleged unilateral change at CSULB was not filed until May 2002, this allegation is untimely and will be dismissed.

Assuming the alleged unilateral is timely, based on San Diego Unified School District and Poway Unified School District, supra, instituting the EAP is not a matter within scope. I find

[2]It was not until January 2001 when APC notified CSULB in writing that notice to APC regarding proposed changes in Unit 4 terms and conditions of employment need to be made by CSU in writing to the APC statewide office.

that the EAP/FSAP program benefits are voluntary and that participating in programs is at no cost to the employee. Even if recommended by the supervisor, the FSAP is still voluntary; and if the number of free visits is exceeded, the employee's health benefits may cover the cost, or the employee has the choice of paying or not going. Also the privacy of the participants is guaranteed and there is no penalty for not participating. In addition, a prima facie unilateral change has not been alleged since Article 24 of the parties agreement authorized CSULB to implement the EAP program. (See Marysville Joint Unified School District (1983) PERB Decision No. 314.)

Therefore, I am dismissing the charge and October 2003 Amended Charge based on the facts and reasons contained above and in my October 1, 2003 letter.

Right to Appeal

Pursuant to PERB Regulations,[3] 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. (Regulation 32635(a).) Any document filed with the Board must contain the case name and number, and the original and five (5) copies of all documents must be provided to the Board.

A document is considered "filed" when actually received before the close of business (5 p.m.) on the last day set for filing or when mailed by certified or Express United States mail, as shown on the postal receipt or postmark, or delivered to a common carrier promising overnight delivery, as shown on the carrier's receipt, not later than the last day set for filing. (Regulations 32135(a) and 32130.)

A document is also considered "filed" when received by facsimile transmission before the close of business on the last day for filing together with a Facsimile Transmission Cover Sheet which meets the requirements of Regulation 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Regulations 32135(b), (c) and (d); see also Regulations 32090 and 32130.)

The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95814-4174
FAX: (916) 327-7960

[3] PERB's Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

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. (Regulation 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 Regulation 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. A document filed by facsimile transmission may be concurrently served via facsimile transmission on all parties to the proceeding. (Regulation 32135(c).)

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. (Regulation 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
General Counsel

By _____
Marc S. Hurwitz
Regional Attorney

Attachment

cc: Gale Baker and Kevin Jeter, Attorneys for CSU

STATE OF CALIFORNIA GRAY DAVIS, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD

Los Angeles Regional Office
3530 Wilshire Blvd., Suite 1435
Los Angeles, CA 90010-2334
Telephone: (213) 736-3543
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October 1, 2003

Lee O. Norris, Labor Relations Representative
Academic Professionals of California
8726-D S. Sepulveda Blvd. #C172
Los Angeles, CA 90045

Re: Academic Professionals of California v. Trustees of the California State University
Unfair Practice Charge No. LA-CE-667-H
WARNING LETTER

Dear Mr Norris:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on March 7, 2002. The Academic Professionals of California (APC Unit 4)) alleges that the Trustees of the California State University violated section 3571(a) , (b) and (c) of the Higher Education Employer-Employee Relations Act (HEERA)[1] by making a unilateral change by implementing an Employee Assistance Program (EAP) at Sonoma State University (SSU). On May 2, 2002, an Amendment was filed alleging the unilateral implementation of a "Faculty and Staff Assistance Program" (FSAP) at Cal State University, Long Beach (CSULB).

APC and CSU are parties to a collective bargaining agreement effective July 1, 2000 through June 30, 2003.

Sonoma State University –In October 2001, APC received notice that on July 1, 2001, SSU unilaterally implemented an EAP program which may subject employees to disciplinary action and where the University controls the release of information regarding EAP usage. It is alleged that after the free visits are used, the costs are the responsibility of the employee, that employees working less than half time may not participate in the EAP, and that CSU may unilaterally terminate the program.

On January 22, 2002, APC demanded that SSU rescind the EAP as to Unit 4-APC unit members at that University and return to the "status quo ante." On February 13, 2002, SSU responded that prior to July 1997, the SSU EAP was contracted to Mr. Al Weirs, an off-campus provider, but this contract ended due to budgetary constraints. SSU claimed that its action effective July 1, 2001 of contracting the EAP program to Mr. Weirs, was a return to the EAP practice prior to July 1997.

[1]HEERA is codified at Government Code section 3560 et seq. The text of the HEERA and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

The above-stated information fails to state a prima facie violation for the reasons that follow.

In determining whether a party has violated HEERA section 3571(c), 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 Decision 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 Decision No. 160; Grant Joint Union High School District (1982) PERB Decision No. 196.)

Under the HEERA sections 3562(r) and 3562.2, the scope of representation is generally limited to wages, hours and other terms and conditions of employment. PERB has not created a specific test to determine whether matters not specifically described in these statutory provisions are within the scope of representation under HEERA. However, PERB indicated a matter is outside the scope of bargaining if "imposing a bargaining obligation would significantly abridge the employer's managerial prerogatives." (University of California (1987) PERB Decision No. 640-H.)

In Anaheim Union High School District (1981) PERB Decision No. 177, PERB reviewed similar language in section 3543.2 of the Educational Employment Relations Act and set forth the following test for determining whether a subject is within the scope of representation. A non-enumerated subject is negotiable if: (1) it is logically and reasonably related to wages, hours, or an enumerated term and condition of employment; (2) the subject is of such concern to management and employees that conflict is likely to occur, and the mediatory influence of collective negotiations is the appropriate means of resolving the conflict; and (3) the employer's obligation to negotiate would not significantly abridge its freedom to exercise those managerial prerogatives essential to the achievement of the district's mission.

My review of the EAP reveals that it is voluntary, confidential, and participating is at no cost to the participants. There is no penalty for not participating. In a similar case right on point, San Diego Unified School District (1982) PERB Decision No. 234, the Board used the Anaheim test and held that instituting this type of EAP and making the program available to employees is not within the scope of bargaining. Also see Poway Unified School District (1988) PERB Decision No. 680 where the Board held that in-service training was not negotiable within the meaning of Anaheim as there was no direct impact on wages and hours since it was purely voluntary and was not held during duty hours.

You have cited City of Stockton (1988) 13 PERC 20021 to establish that employee assistance plans are within scope. I disagree. In that MMBA case, the City agreed that the program was within scope and thus, this was not an issue decided by the court. The City gave the union advance notice of the proposed action and the union failed to make a request to bargain. Thus, no violation was found. This case is not on point as to the negotiability of EAP programs.

Even if the EAP is within the scope of representation, CSU's conduct does not constitute a change in policy. CSU-APC's collective bargaining agreement at Article 24, Benefits, section 24.12, Employee Assistance Program – Referral Service provides,

> The CSU shall attempt to assist employees' voluntary efforts to correct job performance problems by endeavoring to provide a referral service to employees concerning drug, alcohol, or personal problems. An employee undergoing alcohol, drug, or mental health treatment, upon approval, may use accrued sick leave, CTO and/or vacation for such a purpose. Leaves of absence without pay may be granted pursuant to Article 22.

The parties' policy through the collective bargaining agreement was to have an EAP program. Since the EAP is contractually favored, I find that it has not been established that there has been a change in policy. In addition, as the parties agreed contractually that there would be an EAP program, SSU had the power to implement such a program. (See Marysville Joint Unified School District (1983) PERB Decision No. 314.) Also, as no information has been provided as to the workings and elements of the prior EAP at SSU, it cannot be determined that a change in policy has occurred.

Cal State University, Long Beach - In the Amendment concerning Cal State University, Long Beach (CSULB), it is alleged that in February 2002, APC became aware that the University unilaterally instituted the FSAP for APC bargaining unit members. The program was to help in "expanding the employee assistance effort" giving psychological counseling for alcohol and drug abuse, and work and stress related matters. You assert that employees may be subject to discipline, however, you do not provide any details to support this allegation. You also assert that the University has denied APC the right to bargain over standards of confidentiality. Finally, the Amendment indicates that employees must pay the cost if they go beyond five free visits and CSU may terminate the program at any time without bargaining. On April 26, 2002, APC demanded that CSULB rescind the program as to members of APC's Unit 4. On May 10, 2002, CSULB responded, in part, that the EAP program has been in existence for more than ten years, that the University has increased publicity about the availability of the program, but that neither the program nor the method of providing the program had changed.

My investigation has revealed that CSULB's EAP program has been in existence for at least twenty years without any substantive changes. In the mid-1990's there were discussions concerning the expansion of the EAP program. APC was aware of the EAP program and participated in these discussions. In October 1996, all Staff Union Representatives including Denise Davis, the Unit 4, APC Representative, were advised that CSULB was contemplating expanding the existing EAP and the union representatives participated in the discussions. In September 1998, CSULB announced the program's new name, the FSAP with a permanent allocation of $75,000 for short-term counseling, referral, mediation and consultation services for employees. The expanded FSAP program began in or about June 1999.

Although APC received documents from CSU in early 2002 concerning the FSAP program at CSULB, it appears from the above information that APC was aware of this EAP as early as 1996 and was also aware of Article 24, section 24.12.

The above information fails to state a prima facie case for the following reasons.

HEERA section 3563.2(a) prohibits PERB from issuing a complaint with respect to "any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge." The limitations period begins to run once the charging party knows, or should have known, of the conduct underlying the charge. (Gavilan Joint Community College District (1996) PERB Decision No. 1177.) The charging party bears the burden of demonstrating that the charge is timely filed. (Tehachapi Unified School District (1993) PERB Decision No. 1024; State of California (Department of Insurance) (1997) PERB Decision No. 1197-S.)

The EAP program has been active at CSULB for over twenty years with no real substantive changes. APC has been the exclusive bargaining representative for Unit 4 since 1982. The union representative for APC had knowledge of the EAP in 1996[2] and APC was aware of the policy of having an EAP pursuant to Article 24 of the parties' 2000-2003 collective bargaining agreement. As the Amendment concerning the alleged unilateral change at CSULB was not filed until May 2002, it is untimely and will be dismissed.

Even assuming the alleged unilateral is timely, as noted in San Diego Unified School District and Poway Unified School District, supra, instituting the EAP is not a matter within scope. A review of the EAP/FSAP programs reveals that the benefits are voluntary, participating in the programs does not entail any cost, and the privacy of the participants is guaranteed. There is no penalty for not participating. Another reason a prima facie unilateral change has not been alleged is because Article 24 of the parties' contract authorized CSULB to implement the EAP program. (See Marysville Joint Unified School District (1983) PERB Decision No. 314.)

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 that 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 have the case number written on the top right hand corner of the charge form. The amended charge must be served on the respondent's representatives[3] and the original proof of service must be filed with PERB. If I do not receive

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[2]It was not until January 2001 when APC advised CSULB in writing that notice to APC concerning proposed changes in Unit 4 terms and conditions of employment need to be made by CSU in writing to the APC statewide office.

[3]CSU's legal representatives in this case are William G. Knight, University Counsel and Gale S. Baker, University Counsel.

an amended charge or withdrawal from you before October 8, 2003, I shall dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Marc S. Hurwitz
Regional Attorney

MSH