

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-762-H

PERB Decision No. 1654-H

June 30, 2004

Appearances: Rothner, Segall & Greenstone by Bernhard Rohrbacher, Attorney, for Academic Professionals of California; Elisabeth Sheh Walter, 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 (Board) on appeal by the Academic Professionals of California (APC) of a Board agent's dismissal (attached) of their unfair practice charge. The charge alleges that the Trustees of the California State University violated the Higher Education Employer-Employee Relations Act (HEERA)¹ by its unilateral implementation of a new fee waiver policy. APC alleged that this conduct was an unfair practice and constituted a violation of HEERA section 3571(c).

After review of the entire record in this matter including the original and amended unfair practice charge, the responses, and the warning and dismissal letters, the Board finds the unfair practice charge must be dismissed for failure to state a prima facie case. The Board adopts the warning and dismissal letters of the Board agent as its own.

¹HEERA is codified at Government Code section 3560, et seq.

ORDER

The unfair practice charge in Case No. LA-CE-762-H is hereby DISMISSED
WITHOUT LEAVE TO AMEND.

Members Whitehead and Neima joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD



San Francisco Regional Office
1330 Broadway, Suite 1532
Oakland, CA 94612-2514
Telephone: (510) 622-1023
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March 23, 2004

Lee O. Norris, Labor Consultant
8726D S. Sepulveda Blvd., #C172
Los Angeles, CA 90045

Elisabeth Sheh Walter, University Counsel
California State University
401 Golden Shore, 4th Floor
Long Beach, CA 90802-4210

Re: Academic Professionals of California v. Trustees of the California State University
Unfair Practice Charge No. LA-CE-762-H
DISMISSAL LETTER

Dear Mr. Norris:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on April 8, 2003. The Academic Professionals of California allege that the Trustees of the California State University violated the Higher Education Employer-Employee Relations Act (HEERA) by unilaterally changing the Fee Waiver program at the San Bernadino campus. The charge originally included three allegations, two of which were withdrawn prior to the issuance of the February 27, 2004 warning letter. The warning letter indicated that the third allegation, that the CSU changed the Fee Waiver program by applying the program to courses mandated by the employer, did not demonstrate a prima facie violation.

APC alleges the CSU unilaterally changed the parties' Fee Waiver program policy by indicating the program applied to courses mandated by the employer. The warning letter indicated that the original charge did not demonstrate how the inclusion of mandatory courses in the program changes the employees' benefits and noted that the employees still receive the benefit of waived fees for two courses per term. Additionally the warning letter noted that the charge did not include any reference to an actual imposition of this policy in a manner inconsistent with the parties' past practice.

As stated in the warning letter, the Fee Waiver program provides, in pertinent part:

Job-Related Courses

These are courses that directly improve skills or enhance knowledge for performing duties in an employee's current position. An employee may also take courses to acquire new skills needed to perform newly assigned duties and

responsibilities. Enrollment may be voluntary or at the direction of the employee's supervisor or manager. [emphasis added.]

The first amended charge alleges the following information to support that the CSU violated the HEERA: (a) Article 16.5 only grants the CSU the authority to "approve" employee requests to take classes using the fee waiver benefit, but does not grant the CSU the authority to mandate employees to take courses using the fee waiver benefit; (b) as the CSU has paid for other types of mandated trainings, its failure to pay for mandated courses passed those costs to employees; (c) the CSU has broadened the types of training listed in 16.12; (d) any poor performance in a mandated course effects the employee's transcript and ability to continue to participate in the fee waiver program; and (e) if an employee is mandated to use the fee waiver program the benefit of the fee waiver cannot be used for a course the employee or one of his or her dependents wants to take.

The parties' collective bargaining agreement includes a Professional Development article. Article 16.5 of the parties' CBA provides an administrator may approve an employee request for enrollment in up to two CSU courses per semester under the fee waiver program.

Article 16.12 provides:

An employee wishing to participate in training, including workshops, seminars, short courses, professional meetings, or other professional activities, may submit a written request to the appropriate administrator. Such a request may include release time with pay, flexible working hours, tuition and travel. The appropriate administrator shall respond to such requests in writing.

Article 16.13 provides:

When an employee is required by an appropriate administrator to take work-related training, the employee shall be granted release time for such training if it occurs during working hours. When an employee eligible for overtime is required by an appropriate administrator to take work-related training during non-working hours, the employee shall be granted overtime pay or compensating time off pursuant to Article 28, Hours of Work.

Article 16.21 provides:

Continuing Education Training is only that training necessary to meet degree, and licensure or certificate requirements mandated as an employee's condition of employment.

Article 16.22 provides:

An employee eligible for Continuing Education training may request to participate in such activities in accordance with campus procedures and provision 16.12 above.

The above-stated information fails to state a prima facie unilateral change 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.)

Although Article 16.5 indicates that the CSU may approve employees' requests to take courses using the fee waiver program, that provision does not set forth the parties' entire policy on professional development. Article 16.13 indicates the CSU may require employees to take work-related training. Although the CSU may pay for other types of mandated training, the charge does not demonstrate that applying the Fee Waiver program to mandated courses changes any policy on CSU courses. The charge does not present facts demonstrating the CSU mandated an employee to take a course using the Fee Waiver program in a manner inconsistent with the parties' practice. The charge does not demonstrate that CSU broadened Article 16.12's definition of trainings that the employees could request by including mandated courses in the Fee Waiver program. It does not appear that Article 16.12's limits apply to mandated courses as that provision addresses only employee-requested training. Even if it is applicable, the provision lists short courses as one of the types of training. Regardless of whether the CSU applies the Fee Waiver program to mandated courses, the CSU has the right to require employees to take work-related courses and the employee's performance will be reflected on his or her transcript. Finally, the benefit of two courses per semester is allocated to each employee. The employee does not lose that benefit for himself or herself or his or her family members by the application of the Fee Waiver program to mandated courses. Thus, the charge fails to demonstrate a prima facie violation and must be dismissed.

Right to Appeal

Pursuant to PERB Regulations,¹ 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

¹ PERB's Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

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. (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

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



Tammy Samsel
Regional Attorney

Attachment

cc: Elizabeth Sheh Walter

PUBLIC EMPLOYMENT RELATIONS BOARD



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February 27, 2004

Lee O. Norris, Labor Consultant
8726D 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-762-H
WARNING LETTER

Dear Mr. Norris:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on April 8, 2003. The Academic Professionals of California alleges that the Trustees of the California State University violated the Higher Education Employer-Employee Relations Act (HEERA)¹ by unilaterally changing the Fee Waiver program at the San Bernardino campus.²

On January 27, 2003, APC Campus Steward Bob Sperry received an email from the University indicating the University posted a Fee Waiver policy on its website. The program allows the waiver of certain fees for unit employees enrolled in courses at the CSU. The program allows the waiver of fees for two courses per term. The policy indicates, in pertinent part:

Job-Related Courses

These are courses that directly improve skills or enhance knowledge for performing duties in an employee's current position. An employee may also take courses to acquire new skills needed to perform newly assigned duties and responsibilities. Enrollment may be voluntary or at the direction of the employee's supervisor or manager. [emphasis added.]

APC alleges that prior to January 27, 2003, the Fee Waiver program did not apply to courses mandated by the employer. Since the Fee Waiver program is limited to two courses per term, APC alleges this change limits the benefits available to employees.

¹HEERA 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.

²The charge originally included three allegations. As the Charging Party withdrew two of the charge's three allegations, this letter addresses only the remaining allegation.

The CSU issued two brochures, one in 1997 and one in 2001, which include the same statement regarding mandatory courses.

On February 24, 2004, I spoke with APC Representative Lee Norris regarding the 1997 and 2001 brochures. Norris indicated that CSU did not provide APC with notice of those documents before issuing them and that APC did not have any knowledge of those documents prior to the filing of this charge. Norris alleges the brochures were not distributed to the employees or to APC and that the only way APC could have discovered these brochures would have been to inspect the racks of brochures within the Human Resources Department. Norris also contends that no APC-represented employee has been required to use the fee waiver program for a mandatory course and that therefore APC had no reason to know of the change prior to the January 2004 email.

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

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.)

On January 27, 2003, APC first learned that the Fee Waiver program included courses deemed mandatory by the CSU. Although the Respondent provided brochures from 1997 and 2001 which also included the mandatory course provision, the APC provided facts explaining why it did not have knowledge of the policy outlined in those brochures. At this level of the investigation the Charging Party's facts are taken as true. (Mark West Union School District (1993) PERB Decision No. 1011.) Therefore the charge is timely filed.

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.)

The Fee Waiver policy describes those courses which qualify for the fee waiver program. The description, quoted above, indicates that courses that employees take at the direction of their supervisors qualify for the Fee Waiver program. The charge does not provide facts demonstrating how the inclusion of mandatory courses in the program changes the employees' benefits. The employees continue to receive the benefit of waived fees for two courses per term. The charge does not include any reference to an actual imposition of this policy in a manner inconsistent with the parties' past practice. Thus, the charge must be dismissed.

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 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 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 representative and the original proof of service must be filed with PERB. If I do not receive an amended charge or withdrawal from you before March 8, 2004, I shall dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,



Tammy Samsel
Regional Attorney

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