STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA FACULTY ASSOCIATION, Charging Party, v. TRUSTEES OF THE CALIFORNIA STATE UNIVERSITY, Respondent.	Case No. LA-CE-726-H PERB Decision No. 1672-H August 6, 2004

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

Before Duncan, Chairman; Whitehead and Neima, Members.

DECISION

WHITEHEAD, Member: This case is before the Public Employment Relations Board (Board) on appeal by California Faculty Association (CFA) of a Board agent's dismissal (attached). The unfair practice charge alleged that the Trustees of the California State University (CSU) violated the Higher Education Employer-Employee Relations Act (HEERA)[1] by unilaterally promulgating policies regarding the investigation of improper government activities without providing CFA with prior notice or opportunity to bargain. CFA alleged that this conduct constituted a violation of HEERA section 3571(a), (b) and (c).

The Board has reviewed the entire record in this matter, including the unfair practice charge, the warning and dismissal letter, CFA's appeal and CSU's responses. In light of the Board's decision in Trustees of the California State University (2004) PERB Decision No. 1658

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

(CSU), the Board finds the Board agent's warning and dismissal letters to comport with the analysis in CSU and to be free of prejudicial error and so affirms the Board agent's decision.

DISCUSSION

The Board recently issued CSU. That case was released after the Board agent issued the dismissal in the instant matter and addresses nearly identical facts. In CSU, Academic Professionals of California (APC) alleged that CSU unilaterally changed policies when it implemented EO 821 and EO 822 without providing APC prior notice or opportunity to bargain. The Board held that the executive orders on their face did not exhibit a change in policy and that APC failed to provide specific instances showing a change in the policies concerning employee privacy rights and the right to union representation and so failed to state a prima facie case. The Board finds CSU to be dispositive of the instant matter and thus concludes that CFA has failed to state a prima facie violation of HEERA.

With respect to EO 664, that executive order has been superceded by EO 822 and is no longer in effect. CFA has further not provided any examples of its unlawful implementation. Under the analysis in CSU, CFA has failed to state a prima facie violation of HEERA.

ORDER

The unfair practice charge in Case No. LA-CE-726-H is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chairman Duncan and Member Neima joined in this Decision.

STATE OF CALIFORNIA GRAY DAVIS, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
1031 18th Street
Sacramento, CA 95814-4174
Telephone: (916) 327-8386
Fax: (916) 327-6377

September 24, 2003

Edward R. Purcell, Labor Consultant
912 S. 4th Avenue
Venice, CA 90291

Re: California Faculty Association v. Trustees of the California State University
Unfair Practice Charge No. LA-CE-726-H
DISMISSAL LETTER

Dear Mr. Purcell:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on November 18, 2002. The California Faculty Association (CFA) alleges that the Trustees of the California State University (CSU) violated the Higher Education Employer-Employee Relations Act (HEERA)[1] by making unilateral changes in the reporting of improper governmental activities.

I indicated to you in my attached letter dated September 12, 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 September 19, 2003, the charge would be dismissed.

I have not received either an amended charge or a request for withdrawal. However, I received a telephone message from you on September 19. I returned your call later that day. You were not in and I left a message that if you wanted to reduce your telephone comments to writing you should send it by facsimile by the end of the day on September 22. I received no written comments and therefore will respond here to your telephone message.

In your message you referred to that part of my September 12 letter which stated

> 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.)

[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.

> 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.)
>
> Without information setting forth the employer's past practice or policy it cannot be determined that a change has occurred. Accordingly, this allegation must be dismissed.
>
> EO 822 relates to investigations into "whistleblower" complaints and states that employees are required to cooperate and be honest in providing information to investigators. EO 664 has a similar requirement. You state that the employer did not negotiate over this requirement. Again, you have provided no information regarding the employer's past policy in such an investigation. Thus, you have not demonstrated a change. These allegations must also be dismissed.

In your message you assert that the employer's past practice is irrelevant. You contend that when EO 664 and EO 822 were adopted they were new policies that included matters within the scope of bargaining.

However, even assuming that both documents set forth policies within the scope of bargaining, you have not set forth a prima facie case of an illegal unilateral change. That certain policies are within scope and are part of a new executive order does not establish that they reflect a change from the policies of the past. I know of no legal authority that requires the presumption of a change when an employer sets forth its policy. Without facts setting forth the past employer practice on the matters within the scope of bargaining, it is not clear there has been a change when reviewing the new document. As stated in my prior letter a charging party must demonstrate that "the employer implemented a change in policy concerning a matter within the scope of representation." (Walnut Valley Unified School District (1981) PERB Decision No. 160; Grant Joint Union High School District (1982) PERB Decision No. 196.)

You also contend that the employer had an obligation to bargain over its "whistleblower" investigative procedure and particularly the employee representation rights contained therein. As discussed, there are no facts demonstrating a change in the employer's procedure or policies regarding union representation.

Additionally, the omission of their discussion does not infer that employee representation rights will be violated or that any representation rights/procedures previously negotiated with the union will not be honored.

Therefore, I am dismissing the charge based on the facts and reasons contained herein and in my September 12 letter.

Right to Appeal

Pursuant to PERB Regulations,[2] 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

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

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

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 B L McMonigle
Bernard McMonigle
Regional Attorney

Attachment

cc: Janette Redd Williams

STATE OF CALIFORNIA GRAY DAVIS, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
1031 18th Street
Sacramento, CA 95814-4174
Telephone: (916) 327-8386
Fax: (916) 327-6377

September 12, 2003

Edward R. Purcell, Labor Consultant
912 S. 4th Avenue
Venice, CA 90291

Re: California Faculty Association v. Trustees of the California State University
Unfair Practice Charge No. LA-CE-726-H
WARNING LETTER

Dear Mr. Purcell:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on November 18, 2002. The California Faculty Association (CFA) alleges that the Trustees of the California State University (CSU) violated the Higher Education Employer-Employee Relations Act (HEERA)[1] by making unilateral changes in the reporting of improper governmental activities.

Your charge states the following. On May 23, 2002, CFA received notice that CSU was implementing Executive Orders (EO) 821 and 822. While investigating these documents, CFA became aware of EO 664 which was implemented in 1997.

EO 821 permits the employer to release to a "whistleblower" complainant "what, if any, actions were taken " by the employer against someone found to have violated the policy. You allege that this would include personnel actions and is a unilateral change by the employer. You have provided no information on the past practice regarding privacy of personnel actions in such cases.

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.)

[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.

Without information setting forth the employer's past practice or policy it cannot be determined that a change has occurred. Accordingly, this allegation must be dismissed.

EO 822 relates to investigations into "whistleblower" complaints and states that employees are required to cooperate and be honest in providing information to investigators. EO 664 has a similar requirement. You state that the employer did not negotiate over this requirement. Again, you have provided no information regarding the employer's past policy in such an investigation. Thus, you have not demonstrated a change. These allegations must also be dismissed.

You also allege that the investigative procedure of EO 822 does not provide a guarantee of Union representation for employees subject to investigation.

An employee required to attend an investigatory interview with the employer is entitled to union representation where the employee has a reasonable basis to believe discipline may result from the meeting. PERB adopted the Weingarten[2] rule in Rio Hondo Community College District (1982) PERB Decision No. 260. In order to establish a violation of this right, the charging party must demonstrate: (a) the employee requested representation, (b) for an investigatory meeting, (c) which the employee reasonably believed might result in disciplinary action; and (d) the employer denied the request. (See Redwoods Community College District v. Public Employment Relations Board (1984) 159 Cal.App.3d 617.; Fremont Union High School District (1983) PERB Decision No. 301.)

In Rio Hondo Community College District (1982) PERB Decision No. 260, the Board cited with approval Baton Rouge Water Works Company (1979) 246 NLRB 995, which provided:

> the right to representation applies to a disciplinary interview, whether labeled as investigatory or not, so long as the interview in question is not merely for the purpose of informing the employee that he or she is being disciplined.

In approving the Weingarten rule, the U.S. Supreme Court noted with approval that the National Labor Relations Board would not apply it to "such run-of-the-mill shop-floor conversations as, for example, the giving of instructions or training or needed corrections of work techniques." (Weingarten, quoting Quality Manufacturing Co. (1972) 195 NLRB 197, 199 [79 LRRM 1269, 1271].)

A right to union representation may be held to exist, in the absence of an objectively reasonable fear of discipline, only under "highly unusual circumstances." (Redwoods Community College District v. PERB (1984) 159 Cal.App.3d 617 [205 Cal.Rptr. 523].) The finding of "highly unusual circumstances" in the Redwoods case was based on the requirement

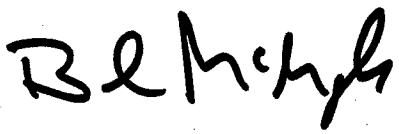
[2]In National Labor Relations Board v. Weingarten (1975) 420 U.S. 251 (Weingarten), the Court granted employees the right to representation during disciplinary interviews.

that the employee attend a meeting which she no longer sought over her appeal of a negative performance rating; the fact that the interview was investigatory and formal; the interview was held by a high-ranking official of the employer; and the hostile attitude of the official toward the employee.

You have not set forth facts which demonstrate that employee rights to representation will necessarily be violated by the procedures of EO 822. It cannot be assumed that the employer will refuse a valid request for representation in a "whistleblower" investigation. Additionally, I am aware of no legal authority which mandates that an employer must set forth representational rights when establishing an investigatory procedure. Accordingly, this allegation must also 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 September 19, 2003, I shall dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,



Bernard McMonigle
Regional Attorney

BMC