STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA STATE UNIVERSITY EMPLOYEES UNION, Charging Party, v. TRUSTEES OF THE CALIFORNIA STATE UNIVERSITY, Respondent.	Case No. LA-CE-895-H PERB Decision No. 1853-H August 29, 2006

Appearances: Brian Young, Labor Relations Representative, for California State University Employees Union.

Before Duncan, Chairman; Shek and McKeag, Members.

DECISION

McKEAG, Member: This case comes before the Public Employment Relations Board (PERB or Board) on appeal by the California State University Employees Union (CSUEU) of 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-Employees Relations Act (HEERA)[1] by retaliating against Dan Necochea (Necochea) for engaging in protected activities, denying Necochea adequate union representation in two separate meetings, making unilateral changes to the terms and conditions of Necochea's employment, and failing to provide information to CSUEU. CSUEU alleged that this conduct constituted a violation of HEERA section 3571(a), (b), (c) and (e).

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

The Board has reviewed the entire record in this matter, including but not limited to, the unfair practice charge, CSU's position statement, the warning[2] and dismissal letters, and CSUEU's 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.

ORDER

The unfair practice charge in Case No. LA-CE-895-H is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chairman Duncan and Member Shek joined in this Decision.

[2]A typographical error is corrected on page 6 of the warning letter by substituting Regents of the University of California (Los Alamos National Laboratory) (2003) PERB Decision No. **1519-H** for Regents of the University of California (Los Alamos National Laboratory) (2003) PERB Decision No. **1579**.

STATE OF CALIFORNIA ARNOLD SCHWARZENEGGER, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD

Los Angeles Regional Office
3530 Wilshire Blvd., Suite 1435
Los Angeles, CA 90010-2334
Telephone: (213) 736-2907
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August 9, 2005

Brian Young, Labor Relations Representative
California State Employees Association
175 Halsey Street
Chula Vista, CA 91910

Re: California State University Employees Union v. Trustees of the California State University
Unfair Practice Charge No. LA-CE-895-H
DISMISSAL LETTER

Dear Mr. Young:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on June 17, 2005. The California State University Employees Union ("Union" or "CSUEU") alleges that the Trustees of the California State University ("University" or "CSU") violated the Higher Education Employer-Employee Relations Act (HEERA)[1] by retaliating against Dan Necochea for engaging in protected activities, denying Mr. Necochea adequate union representation in two separate meetings, making unilateral changes to the terms and conditions of Mr. Necochea's employment, and failing to provide information to the Union.

I indicated to you in my attached letter dated July 27, 2005 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 August 5, 2005 the charge would be dismissed.

I have not received either an amended charge or a request for withdrawal. Therefore, I am dismissing the charge based on the facts and reasons contained in my warning 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

[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.

[2] 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 _____
Dennis K. Lee
Board Agent

Attachment

cc: Steven Raskovich

STATE OF CALIFORNIA ARNOLD SCHWARZENEGGER, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD

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July 27, 2005

Brian Young, Labor Relations Representative
California State University Employees Association
175 Halsey Street
Chula Vista, CA 91910

Re: California State University Employees Union v. Trustees of the California State University
Unfair Practice Charge No. LA-CE-895-H
WARNING LETTER

Dear Mr. Young:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on June 17, 2005. The California State University Employees Union ("Union" or "CSUEU") alleges that the Trustees of the California State University ("University" or "CSU") violated the Higher Education Employer-Employee Relations Act (HEERA)[1] by retaliating against Dan Necochea for engaging in protected activities, denying Mr. Necochea adequate union representation in two separate meetings, making unilateral changes to the terms and conditions of Mr. Necochea's employment, and failing to provide information to the Union.

The CSUEU represents employees of "Bargaining Unit 9" in the CSU system. San Diego State University (SDSU) is a campus of the CSU. Dan Necochea is a SDSU Bargaining Unit 9 employee with an Administrative Analyst/Specialist (AAS) classification. He is currently on medical leave from his employment. Necochea and two other SDSU employees (collectively "MSW employees") were assigned to the Materials Services Warehouse (MSW) in SDSU's Physical Plant Department. In July 2003, the University notified the Union that it intended to contract out the MSW to a private company, and as a result, the MSW employees would be reassigned to other locations of the campus. Since October 2003, the University and the Union have been meeting and conferring over the impact of the MSW contracting out and no impasse has been declared. Necochea served as a member of the bargaining team.

Following the MSW contracting out, Necochea was assigned to SDSU's "Quonset hut" in January 2005[2]. He was placed on administrative leave shortly after he complained of health

[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.

[2] According to the University, the contracting out was officially implemented in June 2005

problems. Responding to Union concerns that the University had unilaterally altered work assignments for the three MSW employees, Christine Delgado, Associate Director of Human Resources at SDSU, provided the Union with the MSW employees' position descriptions in March 2005. These position descriptions showed no changes from prior MSW assignments. However, the Union argues that all three MSW employees have been reassigned to other areas of the campus to perform different duties. The Union emphasizes that Necochea's new duties and working conditions were especially different from his old position at MSW.

On April 19, 2005 Necochea met with John Eaddy, Assistant Director of Physical Plant at SDSU. Necochea was told that he was being reassigned to the basement of a campus parking structure "to count discarded supplies." Displeased with his new assignment, Necochea told Eaddy that the new assignment was "horse shit" after the conversation became heated.

On April 20, 2005, Necochea was asked to report to Eaddy at 6:00 a.m. on the following day. According to the Union, Union representative Brain Young contacted Delgado to express concerns that the meeting could be disciplinary and the early meeting time could make it difficult to get a Union steward there. Delgado assured Young that the purpose of the meeting was to discuss work assignments, not disciplinary. On April 21, Necochea met with Eaddy as instructed and was given a letter of reprimand for comments he made in the April 19 meeting.

After being reassigned to the basement of the parking structure, Necochea again experienced respiratory problems. He has been on administrative medical leave since.

In an effort to determine possible disparate treatment for Nechchea and to evaluate other disability accommodation issues, the Union requested the following information from the University on April 27, 2005:

> 1) Up-to-date description of the actual assignment of Necochea, Brazwell and Vargas (MSW employees)
>
> 2) A copy of all records and documents associated with the reprimand of Necochea, including any department reports, notes to the file, correspondence and email, and the names of witnesses to the events described in the reprimand
>
> 3) A list of employees in Physical Plant who have been either reasonably accommodated or disability retired over the past 36 months
>
> 4) Provide a copy of any reports and associated correspondence regarding the health and safety of work areas for Physical Plant personnel, including reports and correspondence from Environmental Health and Safety on campus, State Fire Marshall and Cal-OSHA

The Union had requested items 1 and 4 in an earlier correspondence dated March 3, 2005. The University did provide position descriptions showing no changes in job description for the

MSW employees (as referenced in the previous page) on March 30. The charge does not expressly address the status of requested items 2 through 4.

On June 13, Necochea was asked to attend a meeting by SDSU Human Resources to discuss his employment status. The meeting involved Delgado, Eaddy and the Worker's Compensation Manager for SDSU. Necochea wanted Young to attend the meeting, but Young was told that union representation was not permitted because the meeting did not involve grievance or discipline. Instead, the purpose of the meeting was to discuss Necochea's injured worker status and reasonable accommodation. On the other hand, Young believed his presence was warranted because the outcome of the meeting could affect Necochea's employment status. During the meeting, Necochea was presented with a Level III grievance response granting a number of demands set forth in the initial grievance[3]. Necochea believed that the meeting was an indication that he was being set up for medical retirement and wished he had union representation to help him understand his choices.

The Union claims that CSU has violated Government Code 3571 (a)(b)(c) and (e) by

1) Retaliating against Necochea through written reprimand and "unsafe work assignments" for his protected activities,

2) Denying union representation to Necochea in the April 21 and June 16, 2005 meetings with management,

3) Unilaterally changing Necochea's work assignments before the conclusion of negotiations on the impact of MSW contracting out.

Based on the above facts, the allegations fail to state a prima facie case for these violations for the reasons stated below:

Retaliation

To demonstrate a violation of HEERA section 3571(a), the charging party must show that: (1) the employee exercised rights under HEERA; (2) the employer had knowledge of the exercise of those rights; and (3) the employer imposed or threatened to impose reprisals, discriminated or threatened to discriminate, or otherwise interfered with, restrained or coerced the employees because of the exercise of those rights. (Novato Unified School District (1982) PERB Decision No. 210 (Novato); Carlsbad Unified School District (1979) PERB Decision No. 89.)

[3] On October 2004, the Union filed a grievance on behalf of Necochea based on incorrect administration of his injured work status, dock in pay and failure to meet his health and safety needs

Although the timing of the employer's adverse action in close temporal proximity to the employee's protected conduct is an important factor (North Sacramento School District (1982) PERB Decision No. 264), it does not, without more, demonstrate the necessary connection or "nexus" between the adverse action and the protected conduct. (Moreland Elementary School District (1982) PERB Decision No. 227.) Facts establishing one or more of the following additional factors must also be present: (1) the employer's disparate treatment of the employee (State of California (Department of Transportation) (1984) PERB Decision No. 459-S); (2) the employer's departure from established procedures and standards when dealing with the employee (Santa Clara Unified School District (1979) PERB Decision No. 104.); (3) the employer's inconsistent or contradictory justifications for its actions (State of California (Department of Parks and Recreation) (1983) PERB Decision No. 328-S; (4) the employer's cursory investigation of the employee's misconduct; (5) the employer's failure to offer the employee justification at the time it took action or the offering of exaggerated, vague, or ambiguous reasons; (6) employer animosity towards union activists (Cupertino Union Elementary School District) (1986) PERB Decision No. 572.); or (7) any other facts which might demonstrate the employer's unlawful motive. (Novato; North Sacramento School District, supra, PERB Decision No. 264.)

Evidence of adverse action is also required to support a claim of discrimination or reprisal under the Novato standard. (Palo Verde Unified School District (1988) PERB Decision No. 689.) In determining whether such evidence is established, the Board uses an objective test and will not rely upon the subjective reactions of the employee. (Ibid.) In a later decision, the Board further explained that:

> The test which must be satisfied is not whether the employee found the employer's action to be adverse, but whether a reasonable person under the same circumstances would consider the action to have an adverse impact on the employee's employment. [Newark Unified School District (1991) PERB Decision No. 864; emphasis added; footnote omitted.]

It is well established that involuntary transfer to positions with less favorable working condition and the issuance of written reprimands constitute adverse actions. (see Fresno County Office of Education (2004) PERB Decision 1674). Here, the Union alleges that Necochea suffered these adverse actions because he had engaged in the protected activities of 1) serving as a Union bargaining team member in the MSW negotiation and 2) filing a grievance against the University in 2004.

With respect to the three elements needed to establish a discrimination/retaliation claim under HERRA, the first two elements appear to be present. Necochea was a member of the Union bargaining team and the University has been actively meeting and conferring with the Union bargaining team for the past two years. However, the Union failed to sufficiently allege and provide support for the third "nexus" element.

Even assuming that there was close temporal proximity between the protected activities and the adverse actions, the Union did not allege or identify any other additional factors that would support a nexus between the protected activities and the adverse actions.

With respect to Necochea's work assignment, there is no evidence of disparate treatment because all three MSW employees were reassigned to other areas of the campus. Although it could be argued that Necochea's new job duties in the parking structure did not match his Administrative Analyst/ Specialist designation and/or his original job duties at MSW, the Union did not allege that the University departed from its established procedure when making Necochea's job assignments. In fact, there is evidence that the University's options were limited because Necochea had a number of medical/health restrictions that would prevent him from occupying certain positions. Even assuming Union's assertions that Necochea's work area in the parking structure was "isolated and without normal facilities" and the assignment was "make-work without value to the campus" as true, that alone does not create an inference of nexus between Necochea's protected activities and work assignment.

As for the issuance of Necochea's written reprimand on April 21, the reprimand appeared to be a direct response to the comments made by Necochea two days prior. One cannot readily characterize University's justification as pretextual or contradictory without other evidence. Again, there's no allegation that other employees received different treatment under similar circumstances. The mere fact that an employee is or was participating in union activities does not give him immunity from routine employment decisions or insulate him from disciplinary action for misconduct. (See Los Angeles USD (Kaady) (1992) PERB Decision No. 957 citing Martori Brothers Distributors v. Agricultural Labor Relations Board (1981) 29 Cal.3d 721).

In sum, there is insufficient evidence to support the Union's allegation that the University retaliated against Necochea for engaging in protected activities.

Denial of Representation (Weingarten Right)

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[4] 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.)

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

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 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.

The Union alleges that the University violated Necochea's Weingarten rights when it denied him proper union representation on the April 21 and June 16 meetings. Based on facts proffered by the Union, neither meeting warranted mandatory union representation under the Weingarten standard.

Beyond the discussion of work assignments, the April 21 meeting with Eaddy was not investigatory in nature. Instead, Necochea was simply given a written reprimand prepared by Eaddy. PERB has made it clear that if the purpose of the meeting is just to present a final disciplinary memo, the employee has no right to union representation. (Regents of University of California (Los Alamos National Laboratory) (2003) PERB Decision No. 1579).

The June 13 meeting also did not meet the Weingarten requirements. The main purpose of the meeting was to discuss reasonable accommodation and other job-related issues, not disciplinary. While there was concern that the meeting could affect Necochea's employment status because of the re-evaluation of his medical status, there was no indication that Necochea objectively believed (or had reason to believe) that the meeting could result in disciplinary action against him. In fact, Necochea was given a Level III grievance response in which many of his initial grievance requests were granted by the University. Without the discipline and investigatory components, the right to union representation only exists under "highly unusual circumstances". (Redwood Community College District, Id). Considering the factors set forth in Redwood and other PERB decisions, the June 21 meeting was not a meeting marked with

"highly unusual circumstances." The only allegation that could remotely be construed as University's hostility toward Necochea was that "Eaddy looked at him strangely."

In sum, Mr. Necochea was not entitled to union representation in either the April 21 or June 13 meeting. Hence, the University did not violate Mr. Necochea's Weingarten rights by expressly or implicitly denying him union representation.

Unilateral Change

The Union alleges that the University committed a unilateral change violation when it reassigned Necochea to the parking structure following the MSW contracting out. First, section 3.2 of the CBA between the parties states that "*when the employer deems it necessary in order to carry out the mission and operations of the campus, the employer may contract out work provided that the contracting out does not displace bargaining unit employees.* Here, the Union does not challenge the propriety of the University's decision to contract out MSW.

CBA section 3.3 further states that "*the union may request to meet and confer on the impact of contracting out work when such contracting out is to be on a long term basis.*" The meeting and conferring process did take place and the Union does not allege that the University failed to negotiate in good faith. Instead, the Union is accusing the University of assigning Necochea to a new location before the completion of impact negotiation. Since the CBA is silent on the University's ability to implement decisions related to the impact negotiation, the issue here turns on whether the "reassignment" of Necochea was a negotiable decision (i.e. one that is within the scope of representation) or a managerial prerogative.

HEERA provides that the scope of representation for non-supervisory employees "is limited to wages, hours, and other terms and conditions of employment" (See Gov. Code Section 3562 (q), (r)). PERB has generally recognized that direction of work force and determination of what work is to be performed by employees is a managerial prerogative, at the core of managerial control, and not subject to bargaining. (Davis Joint Unified School District (1984) PERB Decision No. 393). Of course, managerial control is not unlimited. The employer's discretion applies only to those tasks that are reasonably understood to be among the duties of the classification as established in the job description. (Id.). Here, the University did not change Necochea's job classification in contravention of the CBA. Moreover, the Union has not shown that Necochea's new duties were not "reasonably comprehended to be within the scope" of his job description and/or his Administrative Analyst/Specialist classification.

In sum, because the University is not obligated to negotiate over work assignments that are reasonably comprehended within the scope of existing duties (Rio Hondo Community College District (1982) PERB Decision No. 279), there is no prima facie case for a unilateral change violation.

For these reasons the charges discussed above, 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 August 5, 2005 I shall dismiss the above-described allegation from your charge. If you have any questions, please call me at the telephone number listed above.

Sincerely,

Dennis K. Lee
Board Agent

DKL