STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

STATE EMPLOYEES TRADES COUNCIL UNITED, Charging Party, v. REGENTS OF THE UNIVERSITY OF CALIFORNIA, Respondent.	Case No. SF-CE-812-H PERB Decision No. 1912-H June 26, 2007

Appearances: Leonard Carder by Matthew D. Ross, Attorney, for State Employees Trades Council United; Office of the General Counsel by Leslie L. Van Houten, Attorney, for Regents of the University of California.

Before Duncan, Chairman; McKeag and Neuwald, Members.

DECISION

NEUWALD, Member: This case is before the Public Employment Relations Board (Board) on appeal by the State Employees Trades Council United (SETC) of a Board agent's dismissal (attached) of an unfair practice charge. The charge alleged that the Regents of the University of California (University or UC Merced) violated the Higher Education Employer-Employee Relations Act (HEERA)[1] by deducting union dues from three skilled crafts unit employees and recognizing International Union of Operating Engineers, Local 39 as the

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

exclusive representative of the skilled crafts unit at UC Merced.[2] SETC alleged that this conduct constituted a violation of HEERA sections 3565, 3571(a) and (d), 3573, 3574 and 3575.

The Board has reviewed the unfair practice charge, the amended unfair practice charge and attached documents, the warning and dismissal letters, the University's responses to the charges, SETC's appeal of the dismissal, and the University's response to SETC's appeal. The Board finds the Board agent's dismissal to be free of prejudicial error and adopts it as a decision of the Board itself.

ORDER

The unfair practice charge in Case No. SF-CE-812-H is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chairman Duncan and Member McKeag joined in this Decision

[2]In a January 22, 2007, phone conversation, the SETC informed the Board agent that it was withdrawing all charges in the original charge, except for the interference charge based on the improper deduction of dues. In the dismissal letter, the Board agent dealt with the interference allegations associated with the improper deduction of dues. She then deemed all the other charges as withdrawn.

PUBLIC EMPLOYMEN1' RELATIONS BOARD

San Francisco Regional Office
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Oakland, CA 94612-2514
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March 21, 2007

Patrick Hallahan, Consultant
State Employee's Trades Council
9647 Folsom Blvd. #322
Sacramento, CA 95827

Re: State Employees Trades Council United v. Regents of the University of California
Unfair Practice Charge No. SF-CE-812-H
DISMISSAL LETTER

Dear Mr. Hallahan:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on October 18, 2006. The State Employees Trades Council United (SETC) alleges that the Regents of the University of California ("University" or "UC Merced") violated sections 3565, 357l(a) & (d), 3573, 3574 and 3575 of the Higher Education Employer-Employee Relations Act (HEERA)[1] by deducting union dues from three Skilled Crafts Unit employees and recognizing IUOE Local 39 as the exclusive representative of the Skilled Crafts Unit at UC Merced. Charging Party amended the charge on January 16, 2007.

I indicated to you in my attached letter dated December 28, 2006, 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 January 5, 2007, the charge would be dismissed.

My investigation of both the original and amended charges revealed the following. DC Merced opened for students in August 2005. Around that same time, UC Merced began employing Skilled Crafts employees to handle maintenance issues at the campus. UC Merced also contracted with UCLA to run its payroll operation.

In September 2005, Jeff Slayter, Steve Garz and Manuel Corbala were each hired as Physical Plant Mechanics in their different specialties. When UC Merced transmitted the payroll information for these three employees to UCLA, UCLA payroll assigned an incorrect unit code for each of them, resulting in their being coded as members of the UCLA Skilled Crafts Unit.

[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.

Each of the three employees received a notice from the UC Payroll/Personnel System stating, "Welcome to the University of California, LOS ANGELES," and stating that their positions were covered by the Skilled Crafts Unit - UCLA. The UCLA Skilled Crafts Unit was, at the time, exclusively represented by IUOE Local 501. Bargaining unit members who were not members of Local 501 were required to pay an agency fee. Due to the incorrect payroll codes assigned to these three employees, an agency fee was deducted from their paychecks from September 2005 through December 2005, and remitted to Local 501. No other UC Merced Skilled Craft employee had agency fees deducted, as they were all properly coded at the time of hire as unrepresented.

On September 27, 2005, SETC-United filed a decertification petition for the Skilled Crafts Unit at the UCLA campus. An election was ordered and held, and on January 5, 2006, PERB certified SETC-United as the exclusive representative. Once SETC was certified as the exclusive representative for Skilled Crafts employees at UCLA, agency fee deductions for the three UC Merced employees ceased, as SETC has not yet requested that the University deduct agency fees from UCLA Skilled Crafts employees.[2]

On July 27, 2006, Stationary Engineers, Local 39 (Local 39), petitioned for recognition of the Skilled Crafts employees at UC Merced. The Request for Recognition filed by Local 39 indicates that there are 12 employees in the proposed unit. No intervention was filed during the posting period, which was August 1, 2006 through August 25, 2006. On September 5, 2006, PERB determined that Local 39 had demonstrated majority support and requested that the University file its employer response pursuant to Regulation 51080. The University granted voluntary recognition to Local 39 on September 25, 2006, and PERB closed the case on September 26, 2006.

On September 25, 2006, John Daly posted a notice that UC Merced had recognized Local 39 as the exclusive representative for the Skilled Trades Unit. On September 28, 2006, Superintendent Scott Walling stated to Slayter and Garz that they were represented by the "same union as the secretaries," and that they should go home and check their acceptance letters. After confirming that their acceptance letters indicated that they were represented by Local 501, Slayter contacted SETC for representation and both Slayter and Garz signed representation cards. Corbala was on vacation at this time.

On September 29, 2006, Slayter was approached by Superintendent Louie Oliveira, who stated, "This really messes up things bringing in a union — You, Manuel and Steve I think are already represented by the IUOE so you might want to look into it. But this union thing means no more crossing trades." Later that day when Slayter, Corbala and Garz were in the breakroom discussing the situation, UC Merced Superintendent Scott Wallng stated to them, "so you guys (are] already represented by a union.. .see I told you so, so that means that your vote for the Local 39 is bogus - so you guys cannot unionize now." Still later that same day, Slayter and Garz went to the payroll office to discuss the issue with Robin Petsick. She confirmed that

[2] The University states in its response that the payroll codes for the three UC Merced employees have been corrected so that improper deductions will not be made in the future.

three employees had been keyed into the UC system as "K4 Skilled Crafts & Trades". She also confirmed that although dues for Local 501 had been deducted, John Daly said that the employees were not represented by a union.

On October 6, 2006, Tom Atkins[3] sent an email to John Daly and others, informing them that although Corbala, Garz and Slayter had been hired as unrepresented employees, they had been incorrectly coded in the payroll system as UCLA Skilled Crafts Unit, represented by Local 501 - a union that had not been the exclusive representative of the UCLA Skilled Crafts Unit for some months. The email requested that the error be corrected and a refund be requested by the University from the union.

Several emails follow, in which possible solutions are proposed and discussed. Ultimately, John Daly ordered UC Merced employee Robin Petsick to correct the payroll record for the employees' representation codes, but left unresolved the issue of getting a refund for the improperly deducted dues.

On October 18, 2006, the same day that the unfair practice charge was filed, SETC-United filed with PERB a request for recognition pursuant to PERB Regulation 51030 for a unit of skilled trades employees at UC Merced. (SF-RR-890-H.) On November 21, 2006, PERB issued the determination that the employees petitioned for by SETC were already represented by the Stationary Engineers, Local 39. This determination was based on the above-stated facts.

On October 25, 2006, SETC-United filed Decertification Petition number SF-DP-266-H. On December 22, 2006, PERB dismissed the petition based on the petitioner's failure to comply with Government Code section 3577(b)(2), in that, another union had been certified as the exclusive representative within 12 months of the filing of the petition.

Meanwhile, on October 31, 2006, Slayter, Garz and Corbala were issued a $1,000 signing bonus each that should have been paid only to UCLA Skilled Crafts employees. On December 16, 2006, the employees were informed by some unidentified University employee that they would be required to repay the $ 1,000 that had been improperly paid to them. On December 20, 2006, the employees sat down with "Facilities Management" to discuss the bonus payment and the method for repayment of the amount. However, the amount these employees were incorrectly charged for agency fee to Local 501 has still not been repaid to them.

In the January 16, 2007 Amended Charge, Charging Party alleges that the University's act of incorrectly deducting union dues from bargaining unit members Slayter, Garz and Corbala constitutes interference with the rights of both the employees and SETC. You also allege that certain comments that were made by various UC Merced Supervisors to these employees further constitute interference. Finally, you allege interference based on an October 31, 2006 payment of a $1,000 bonus to the three named employees.

[3] The charge does not identify this individual.

In a phone conversation on January 22, 2007, Charging Party's representative, Pat Hallahan informed me that he was withdrawing all charges in the original charge, except for the interference charge based on the improper deduction of dues. Accordingly, only the interference allegations are discussed below, as all other charges are deemed withdrawn.

Discussion

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.)

The test for whether a respondent has interfered with the rights of employees under the HEERA does not require that unlawful motive be established, only that at least slight harm to employee rights results from the conduct. The Board described the standard as follows:

> (I)n order to establish a prima facie case of unlawful interference, the charging party must establish that the respondent's conduct tends to or does result in some harm to employee rights granted under EERA. (State of California (Department of Developmental Services) (1983) PERB Decision No. 344-S, citing Carlsbad Unified School District (1979) PERB Decision No. 89; Service Employees International Union. Local 99 (Kimmett) (1979) PERB Decision No. 106.)

Under the above-described test, a violation may only be found if HEERA provides the claimed rights. In Clovis Unified School District (1984) PERB Decision No. 389, the Board held that a finding of coercion does not require evidence that the employee actually felt threatened or intimidated or was in fact discouraged from participating in protected activity.

Improper Deduction of Dues

Admittedly, the University improperly deducted agency fees from Slayter, Garz and Corbala over a period of many months. Improper deduction of agency fees for a union by which one was never represented could reasonably tend to interfere with an employee's right to join in a union of his or her own choosing. Nevertheless, the University argues in its Response that this allegation is untimely, as the last improper deduction occurred in March 2006. While the employees did not realize the deductions were being made until sometime much later, they received constructive notice of the dues deductions both in the form of the September 2005

notice from UCLA payroll, and on their monthly pay-stubs for each month in which deductions were made. Accordingly, the allegation is untimely and must be dismissed.

Improper Bonus Payment

On or around October 31, 2006, after the original charge was filed, employees Slayter, Garz and Corbala received $1,000 bonus payments each, which were intended for UCLA Local 501 bargaining unit members. On December 16, 20, and/or 22, 2006, the University convened a meeting or meetings[4] with the employees for the purpose of determining a method for repayment of the $i,000 bonus. Charging Party alleges that this meeting took place in the absence of union representation, and therefore interfered with the employees' rights to union representation. However, documents produced by the Respondent indicate that Mr. Slayter was informed by email on December 21, 2006, of his right to have a Local 39 representative present at the December 22 meeting, and the University's willingness to postpone the meeting in order to arrange representation. The email was sent by Ken Bucchi, the UC Merced Labor Relations Manager.

According to the University, a meeting took place on December 22, in which the three employees were accompanied by Greg Starr, a PCH Labor Consultant. Thus, it appears that while the University refused to recognize SETC as the employees' exclusive representative, it nevertheless permitted the employees to bring a representative of their choosing to the meeting in which repayment of the $1,000 bonus was discussed. Accordingly, Charging Party has failed to present evidence establishing that employees' rights to representation were interfered with, and the allegation must be dismissed.

Supervisors' Statements

Finally, SETC argues that statements by UC Merced Supervisors unlawfully interfered with the employees' rights to a representative of their choosing. However, no new facts were provided with regard to these allegations. Thus, for the reasons stated in my December 28, 2006 Warning Letter, this allegation must be dismissed.

For the reasons stated in this and my December 28, 2006 Warning Letter, the allegation that the University interfered with SETC's right to represent Skilled Crafts employees must be dismissed.

Right to Appeal

[4] The date or dates of these meetings is disputed. Nevertheless, it is clear that two or more meetings did occur in which the improper payment and proposed method of repayment was discussed.

Pursuant to PERB Regulations,[5] 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 during a regular PERB business day. (Regulations 32135(a) and 32130; see also Government Code section 11020(a).) A document is also considered "filed" when received by facsimile transmission before the close of business 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
(916)322-8231
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.) The document will be considered properly "served" when personally delivered or deposited in the mail or deposited with a delivery service and properly addressed. A document may also 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

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

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,

ROBIN WESLEY
Acting General Counsel

BY~
Alicia Clement
Regional Attorney

Attachment

cc: Leslie L. Van Houten, Attorney
University of California, Office of the General Counsel

PUBLIC EMPLOYMENT RELATIONS BOARD

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December 28, 2006

Patrick Hallahan, Consultant
State Employees Trades Council (SETC) United
9647 Folsom Blvd. #322
Sacramento, CA 95827

Re: State Employees Trades Council United v. Regents of the University of California
Unfair Practice Charge No. SF-CE-812-H
WARNING LETTER

Dear Mr. Hallahan:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on October 18, 2006. The State Employees Trades Council United (SETC) alleges that the Regents of the University of California ("University" or "UC Merced") violated sections 3565, 3571(a) & (d), 3573, 3574 and 3575 of the Higher Education Employer-Employee Relations Act (HEERA)[1] by deducting union dues from three Skilled Crafts Unit employees and recognizing IUOE Local 39 as the exclusive representative of the Skilled Crafts Unit at UC Merced.

My investigation revealed the following. UC Merced opened for students in August 2005. Around that same time, DC Merced began employing Skilled Crafts employees to handle maintenance issues at the campus. In September 2005, Jeff Slayter, Steve Garz and Manual Corbala were each hired as Physical Plant Mechanics in their different specialties. Each of them received a notice from the DC Payroll/Personnel System stating, "Welcome to the University of California, LOS ANGELES," and stating that their positions were covered by the Skilled Crafts Unit - UCLA.

On September 27, 2005, SETC-United filed a decertification petition for the Skilled Crafts Unit at the UCLA campus.[2] An election was ordered and held, and on January 5, 2006, PERB certified SETC-United as the exclusive representative.

On July 27, 2006, Stationary Engineers, Local 39 (Local 39), petitioned for recognition of the Skilled Crafts employees at UC Merced. The Request for Recognition filed by Local 39 indicates that there are 12 employees in the proposed unit. No intervention was filed during

[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 ww.perb.ca.gov.

[2] At the time, Local 50i was the certified exclusive representative of the Skilled Crafts Unit at UCLA.

the posting period, which was August I, 2006 through August 25, 2006. On September 5, 2006, PERB determined that Local 39 had demonstrated majority support and requested that the University file its employer response pursuant to Regulation 51080. The University granted voluntary recognition to Local 39 on September 25, 2006, and PERB closed the case on September 26, 2006.

On September 25, 2006, John Daly posted a notice that UC Merced had recognized Local 39 as the exclusive representative for the Skilled Trades Unit. On September 28, 2006, Superintendent Scott Walling stated to Slayter and Garz that they were represented by the "same union as the secretaries," and that they should go home and check their acceptance letters. After confirming that their acceptance letters indicated that they were represented by Local 501, Slayter contacted SETC for representation and both Slayter and Garz signed representation cards. Corbala was on vacation at this time.

On September 29, 2006, Slayter was approached by Superintendent Louie Oliveira, who stated, "This really messes up things bringing in a union — You, Manuel and Steve I think are already represented by the IUOE so you might want to look into it. But this union thing means no more crossing trades." Later that day when Slayter, Corbala and Garz were in the breakroom discussing the situation, UC Merced Superintendent Scott Wallng stated to them, "so you guys (are] already represented by a union... see I told you so, so that means that your vote for the Local 39 is bogus - so you guys cannot unionize now." Still later that same day, Slayter and Garz went to the payroll office to discuss the issue with Robin Petsick. She confirmed that three employees had been keyed into the UC system as "K4 Skilled Crafts & Trades". She also confirmed that although dues for Local 501 had been deducted, John Daly said that the employees were not represented by a union.

On October 6, 2006, Tom Atkins sent an email to John Daly and others, informing them that although Corbala, Garz and Slayter had been hired as unrepresented employees, they had been incorrectly coded in the payroll system as UCLA Skilled Crafts Unit, represented by Local 501 - a union that had not been the exclusive representative of the UCLA Skilled Crafts Unit for some months. The email requested that the error be corrected and a refund be requested by the University from the union.

Several emails follow, in which possible solutions are proposed and discussed. Ultimately, John Daly ordered DC Merced employee Robin Petsick to correct the payroll record for the employees' representation codes, but left unresolved the issue of getting a refund for the improperly deducted dues.

On or about October 10, 2006, UC Merced Skilled Crafts employees signed interest cards with SETC-United.

On October 18, 2006, the same day that the unfair practice charge was filed, SETC-United filed with PERB a request for recognition pursuant to PERB Regulation 51030 for a unit of skilled trades employees at UC Merced. (SF-RR-890-H.) On November 21, 2006, PERB

issued the determination that the employees petitioned for by SETC were already represented by the Stationary Engineers, Local 39. This determination was based on the above-stated facts.

On October 25, 2006, SETC-United filed Decertification Petition number SF-DP-266-H. On December 22, 2006, PERB dismissed the petition based on the petitioner's failure to comply with Government Code section 3577(b)(2), in that, another union had been certified as the exclusive representative within 12 months of the filing of the petition.

Discussion

Alleged Violation of section 3565

Section 3565 states:

> Higher education employees shall have the right to form, join and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations and for the purpose of meeting and conferring. Higher education employees shall also have the right to refuse to join employee organizations or to participate in the activities of these organizations subject to the organizational security provision permissible under this chapter.

As written, the charge states that the University granted voluntary recognition to Local 39 for the Skilled Crafts Unit at UC Merced at a time when Local 39 was able to demonstrate adequate proof of majority support. There are no facts demonstrating that any employee was denied the right to refuse to join Local 39 after it was certified by PERB as the exclusive representative. The fact that SETC-United may have been prevented from petitioning for certification a few days after Local 39's certification does not demonstrate a violation of this section.

Alleged Violation of 3573

Section 3573 states:

> An employee organization may become the exclusive representative for the employees of an appropriate unit for purposes of meeting and conferring by filing a request with a higher education employer alleging that a majority of the employees in an appropriate unit wish to be represented by such organization and asking the employer to recognize it as the exclusive representative. The request shall describe the grouping of jobs or positions which constitute the unit claimed to be appropriate and shall certify that proof of majority support has been submitted to either the board or to a mutually agreed upon

> third party. Notice of any such request shall immediately be posted conspicuously on all employee bulletin boards in each facility of the employer in which members of the unit claimed to be appropriate are employed.

As written, the charge does not establish any facts demonstrating that the University violated this section. According to the facts presented, on August 1, 2006, a majority of employees in the Skilled Crafts Unit had signed representation cards for Local 39; the proposed unit was not objected to; there were no intervening unions within the posting period; and the employer properly posted notice of Local 39's Request for Recognition. Accordingly, there are no facts establishing that the University failed to comply with section 3573.

Alleged Violation of 3574

Section 3574 states:

> The higher education employer shall grant a request for recognition filed pursuant to Section 3573 unless any of the following occurs:
>
> (a) The employer reasonably doubts that the employee organization has majority support or reasonably doubts the appropriateness of the requested unit. In that case, the employer shall notify the board, which shall conduct a representation election or verify proof of majority support pursuant to Section 3577 unless subdivision (c) or (d) applies.
>
> (b) Another employee organization either files with the employer a challenge to the appropriateness of the unit or submits a competing claim of representation within 15 workdays of the posting of notice of the written request. (Emphasis added.) If the claim is evidenced by the support of at least 30 percent of the members of the proposed unit, a question of representation shall be deemed to exist and the board shall conduct a representation election pursuant to Section 3577. Proof of that support shall be submitted to either the board or to a mutually agreed upon third party.
>
> (c) There is currently in effect a lawful written memorandum of understanding between the employer and another employee organization recognized or certified as the exclusive representative of any employees included in the unit described in the request for recognition, unless the request for recognition is filed not more than 120 days and not less than 90 days prior to the expiration date of the memorandum of understanding, provided

> that, if the memorandum of understanding has been in effect for three years or more, there shall be no restriction as to the time of filing the request. The existence of a memorandum of understanding, or current certification as the exclusive representative, shall be the proof of support necessary to trigger a representation election pursuant to Section 3577 to determine majority support when a request for recognition is made by another employee organization.
>
> (d) Within the previous 12 months, either another employee organization has been lawfully recognized or certified as the exclusive representative of any employees included in the unit described in the request for recognition, or a majority of the votes cast in a representation election held pursuant to Section 3577 were cast for "no representation."

As written, the charge does not contain any facts establishing the presence of any circumstances which would justify the University withholding recognition of Local 39 as the exclusive representative on September 25, 2006.

Alleged Violation of 3575

Section 3575 states:

> A petition may be filed with the board, in accordance with its rules and regulations, requesting it to investigate and decide the question of whether employees have selected or wish to select an exclusive representative or to determine the appropriateness of a unit, by:
>
> (a) An employee organization alleging that it has filed a request for recognition as an exclusive representative with an employer and that the request has been denied or has not been acted upon within 30 days after the filing of the request; or
>
> (b) An employee organization alleging that it has filed a competing claim of representation pursuant to subdivision (b) of Section 3574; or
>
> (c) An employee organization wishing to be certified by the board as the exclusive representative. Such petition for certification as the exclusive representative in an appropriate unit shall include proof of a 30 percent showing of interest designating the organization as the exclusive representative of the employees.

PERB Regulation 51140 states:

> (a) Whenever a petition filed pursuant to Government Code Section 3575 regarding a representation matter is filed with the Board, the Board shall investigate and, where appropriate, conduct a hearing and/or a representation election, or take such other action as deemed necessary to decide the questions raised by the petition.
>
> (b) A petition shall be dismissed in part or in whole whenever the Board determines that:
>
> (1) The petitioner has no standing to petition for the action requested; or
>
> (2) There is currently in effect a memorandum of understanding between the employer and another employee organization recognized or certified as the exclusive representative of any employees included in the unit described in the request for recognition, unless the request for recognition is filed not more than 120 days and not less than 90 days prior to the expiration date of such memorandum of understanding, provided that if such memorandum of understanding has been in effect for three years or more, there shall be no such restriction as to the time of filing the request. A petition filed not more than 120 days and not less than 90 days prior to the expiration date of a memorandum of understanding must actually be received in the manner set out in Section 32135 during the "window period" as defined by Section 51025; or
>
> (3) The employer has, within the previous 12 months, lawfully recognized an employee organization other than the petitioner as the exclusive representative of any employees included in the unit described in the petition; or
>
> (4) A valid election result has been certified affecting the described unit or a subdivision thereof within the 12 months immediately preceding the date of filing of the petition.
>
> (5) The petition for Board investigation pursuant to this section or the petition for certification pursuant to Section 51100 was filed either after a notice of hearing or, where no hearing has been held, notice of intent to conduct election covering any of the

employees in the unit proposed by the petitioner has been issued by the Board.

As stated above, Charging Party filed two petitions: a Representation Petition on October 18, and a Decertification Petition on October 25. A dismissal of one or both of these petitions based on a finding that another union has been certified as the exclusive representative of the same unit within the last 12 months, does not establish a violation of either Government Code section 3575 or PERB Regulation section 51140.

Alleged Violation of 3571 (a) and *(d)*

The Charge presents two basic theories of a 3571 violation: I) the University interfered with the protected rights of unit members and SETC-United and/or provided unlawful support to Local 501 and/or Local 39, thereby violating sections 3571 (a), (b) and (d); and 2) the conduct of the University, when considered as a whole, sufficiently interfered with the certification process that the result should be set aside. There is a great deal of overlap in both the evidence and rules of law which establish interference and unlawful employer support, such that it is unlikely that a situation involving unlawful employer support of one union over another would not also constitute interference with an employee's protected rights.

Under Section 3571(d), it is an unfair practice for the Higher Education employer to "contribute financial or other support" to an employee organization or to "in any way encourage employees to join any organization in preference to another." PERB has interpreted this language as imposing on employers "an unqualified requirement of strict neutrality." (Santa Monica Community College District (1979) PERB Decision No. 103.) There is no requirement that the employee organization show that the employer intended its actions to impact on employee free choice. "The simple threshold test. ..is whether the employer's conduct tends to influence that choice or provide stimulus in one direction or the other." (Santa Monica Community College District, supra, State of California (Departments of Personnel Administration, Mental Health and Developmental Services) (1985) PERB Decision No. 542.)

In a case involving an allegation of unlawful support, "each individual factual assertion need not stand alone as conduct violative of the Act, but, rather, the totality of circumstances must be considered." (State of California, supra, PERB Decision No. 542.) Where, for example, various employer communications are under attack, they are to be viewed "together, with each capable of lending support to the underlying claim." (Id.)

As written, there are no facts establishing that any misconduct occurred at the critical time - immediately preceding and during the pendency of the Local 39 petition for recognition. In this case, the certification process began sometime in the late summer, early fall of 2006, when Local 39 obtained signature cards from the Skilled Crafts employees at UC Merced. The evidence of misconduct presented by Charging Party dates from September 28, three days after the University recognized Local 39 as the exclusive representative. It is not clear how these events, after the fact, could have interfered with the employees' free choice of Local 39.

Accordingly, there are no facts from which PERB could make a determination that the voluntary recognition of Local 39 should be set aside.

Deduction of Union Dues

The test for whether a respondent has interfered with the rights of employees under the HEERA does not require that unlawful motive be established, only that at least slight harm to employee rights results from the conduct. The Board described the standard as follows:

> (I)n order to establish a prima facie case of unlawful interference, the charging party must establish that the respondent's conduct tends to or does result in some harm to employee rights granted under EERA. (State of California (Department of Developmental Services) (1983) PERB Decision No. 344-S, citing Carlsbad Unified School District (1979) PERB Decision No. 89; Service Employees International Union, Local 99 (Kimmett) (1979) PERB Decision No. 106.)

Under the above-described test, a violation may only be found if HEERA provides the claimed rights. In Clovis Unified School District (1984) PERB Decision No. 389, the Board held that a finding of coercion does not require evidence that the employee actually felt threatened or intimidated or was in fact discouraged from participating in protected activity.

The allegation is essentially that, by improperly deducting Local 501 dues from employees Garz, Corbala and Slayter, the employer intentionally interfered with the rights of these employees to form and join the union of their choice. The charge also presupposes that these employees would have chosen SETC-United as their representative if Local 501 dues had not been improperly deducted. However, Charging Party provides no evidence that this was the case. In fact, Charging Party's evidence tends to establish that these employees were unaware of the improper deduction of dues until after Local 39 had been certified as the exclusive representative. Furthermore, during the period when the University was improperly deducting Local 501 dues from these employees, a majority of the bargaining unit signed representation cards for Local 39.

Even assuming these employees did not sign cards in support of Local 39, there are no facts in the charge that establish that the improper deduction of dues by the University influenced the employee's choice away from SETC-United and toward Local 39. Rather, the facts indicate that the employees discovered the improper deduction of Local 501 dues on or after September 28, 2006, after Local 39 had been recognized as their exclusive representative. Thus, while it is clear that the employees were confused about the status of their representation and payment of union dues upon learning of the improperly deducted dues, there are no facts indicating that this confusion was a factor in the certification of Local 39 as the exclusive representative.

Voluntary Recognition

In a representation proceeding, voluntary recognition may be defeated if an intervening employee organization triggers a question concerning representation and an election by making a 30% showing of support; voluntary recognition by the employer is required if the party initially seeking recognition is able to show that an intervenor did not meet the required 30% proof of support. (Government Code section 3574.) In an unfair practice proceeding, however, the voluntary recognition of a union may be defeated on a showing that the recognized employee organization lacked majority support at the time of recognition. (San Juan Unified School District (1977) PERB Decision No. 12.)

The charge does not contain any facts establishing that, at the time the University granted voluntary recognition to Local 39, Local 39 lacked a majority support in the bargaining unit. Even assuming employees Garz, Corbala and Slayter did not support Local 39 at the time the University granted voluntary recognition, three employees in a bargaining unit of 12, does not establish a majority. Furthermore, you state in the charge: "As of October 10, 2006, UC Merced Skilled Crafts Employees have signed interest cards with SETC-United and rescinded their previous support for IUOE Local 39 because of this problem." These facts fail to establish that at the time the University granted voluntary recognition, Local 39 lacked a majority of support in the bargaining unit. That the employees may have later changed their minds and retracted their earlier statements of support is immaterial to the above-stated analysis. Thus, you have failed to establish the prima facie elements of interference with the employees' right to participate in the activities of the union of their choice.

Statements by Supervisors

The charge also alleges that several inappropriate comments were made by University Supervisors on September 28 and 29, 2006. The first comment was made by Superintendent Scott Walling to Slayter, Garz and Corbala. Wallng is quoted as saying that these individuals were represented by the "same union as the secretaries," and to go home and check their acceptance letters. The next comment was made by Superintendent Louie Oliviera who stated, "this really messes up things bringing in a union - you, Manuel and Steve I think are already represented by the IUOE so you might want to look into it. But this union thing means no more crossing trades." Later that same day, Walling interrupted a conversation between Corbala and Slayter with the remarks, "so you guys (are] already represented by a union.. .see I told you so, so that means that your vote for the Local 39 is bogus - so you guys cannot unionize now."

To demonstrate a prima facie case of interference, the charging party must show that the respondent's conduct tends to or does result in some harm to employee rights guaranteed by the HEERA. (Carlsbad Unified School District (1979) PERB Decision No. 89 at p. 10.; California State University (Sacramento) (1982) PERB Decision No. 211.)

HEERA section 3571.3 states:

> The expression of any views, arguments, or opinions, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute, or be evidence of, an unfair labor practice under any provision of this chapter, unless such expression contains a threat of reprisal, force, or promise of benefit; provided, however, that the employer shall not express a preference for one employee organization over another employee organization.

In Chula Vista City School District (1990) PERB Decision No. 834, at pp. 10-13, the Board reviewed and quoted from its decision in Rio Hondo Community College District (1980) PERB Decision No. 128, stating:

> that "a public school employer is entitled to express its views on employment-related matters over which it has legitimate concerns in order to facilitate full and knowledgeable debate" and set forth the test to be applied as follows:
>
> > (T)he Board finds that an employer's speech which contains a threat of reprisal or force or promise of benefit will be perceived as a means of violating the Act and will, therefore, lose its protection and constitute strong evidence of conduct which is prohibited by section 3543.5 of the EERA. (Id. at p. 20.)
>
> Whether the employer's speech is protected or constitutes a proscribed threat or promise is determined by applying an objective rather than a subjective standard. (California State University (1989) PERB Decision No. 777-H, P.D., p. 8.) Thus, "the charging party must show that the employer's communications would tend to coerce or interfere with a reasonable employee in the exercise of protected rights." The fact, "That (sic) employees may interpret statements, which are otherwise protected, as coercive does not necessarily render those statements unlawful." (Regents of the University of California (1983) PERB Decision No. 366-H, fn. 9, pp. 15-16; BMC Manufacturing Corporation (1955) 113 NLRB 823 (36 LRRM 1397).)
>
> The Board has also held that statements made by an employer are to be viewed in their overall context (i.e., in light of surrounding circumstances) to determine if they have a coercive meaning. (Los Angeles Unified School District (1988) PERB Decision No. 659, p. 9, and cases cited therein.)

> Additionally, the Board has placed considerable weight on the accuracy of the content of the speech in determining whether the communication constitutes an unfair labor practice. (Alhambra City and High School Districts (1986) PERB Decision No. 560, p. i6; Muroc Unified School District (1978) PERB Decision No. 80, pp. 19-20.) Thus, where employer speech accurately describes an event, and does not on its face carry the threat of reprisal or force, or promise of benefit, the Board will not find the speech unlawful.

It is conceivable that some of the statements by Superintendents, quoted above, may be inaccurate. The first statement by Superintendent Oliveira on September 29 appears to have been the stating of opinion: "I think (you) are already represented...you might want to look into it." Finally, the statement by Walling on the afternoon of September 29 to the effect that their earlier "vote" was bogus and they were unable to unionize, appears to be based on faulty information and therefore, factually incorrect. Nevertheless, the statement does not contain a threat of reprisal or force or promise of benefit. Nor can the context in which the statement was made be fairly characterized as coercive: the first two comments appear to have been in response to inquiry by the three bargaining unit members as to their representational status; the third comment appears to have been a follow-up from the earlier discussion that morning. Thus, while the Superintendents' comments appear to have been inaccurate when made, it is not clear how these statements interfered with employees' choice of representative, a decision that had already been made some days earlier.

To the extent that Charging Party's argument is that the bargaining unit members would have chosen representation by SETC-United over Local 39, if not for the complained-of conduct cited above, that argument must be rejected. The facts presented indicate that Slayter, Garz and Corbala signed representation cards for Local 39 before there was any confusion over whether they were already represented by Local 50i. Through no demonstrated fault of Respondent's, the bargaining unit members had only Local 39 to choose as their representative. If Charging Party desired to exclusively represent Slayter, Garz, Corbala and other members of the UC Merced Skilled Crafts unit, the proper method was for SETC-United to file an intervention petition during the posting period. Failing this, the University was bound by the statute to grant voluntary recognition to the unopposed Local 39.

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 January 5, 2006,I shall dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Alicia Clement
Regional Attorney

AC