

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



COALITION OF UNIVERSITY EMPLOYEES,

Charging Party,

v.

REGENTS OF THE UNIVERSITY OF
CALIFORNIA (DAVIS),

Respondent.

Case Nos. SA-CE-246-H;
SA-CE-247-H; SA-CE-251-H;
SF-CE-760-H; SF-CE-795-H

Request for Reconsideration
PERB Decision No. 2101-H

PERB Decision No. 2101a-H

February 24, 2011

Appearances: Davis, Cowell & Bowe by Winfred V. Kao, Attorney, for Coalition of University Employees; Hanson Bridgett by Molly A. Lee, Attorney, for Regents of the University of California (Davis).

Before Dowdin Calvillo, Chair; McKeag and Miner, Members.

DECISION

McKEAG, Member: This case comes before the Public Employment Relations Board (PERB or Board) on a request for reconsideration by Coalition of University Employees (CUE) of the Board's decision in *Regents of the University of California (Davis)* (2010) PERB Decision No. 2101-H.¹

In *Regents I*, the Board considered five consolidated cases in which CUE alleged the Regents of the University of California (Davis) (University) failed to provide notice and an opportunity to meet and confer in cases involving the University's replacement of a major portion of work performed by an employee in a CUE bargaining unit with a position outside the bargaining unit. The Board found the University committed an unlawful unilateral change in three cases (Case Nos. SA-CE-246-H, SA-CE-247-H and SF-CE-795-H), but did not

¹ For clarity, we shall refer to this decision as *Regents I*.

commit an unlawful unilateral change in one case (Case No. SF-CE-760-H). In addition, the Board found the remaining case untimely (Case No. SA-CE-251-H).

We have reviewed the entire record in light of CUE's request, the University's response to the request and the relevant law. Based on this review, the Board hereby partially grants CUE's request for reconsideration.

BACKGROUND

CUE represents a bargaining unit composed of clerical and other administrative support employees. The underlying dispute arose out of the alleged unilateral repudiation of Article 2.E of the parties' 2003-2004 memorandum of understanding (2003-04 MOU). The relevant portion of Article 2.E is as follows:

In the event the University determines that a position or title should be reclassified or designated for exclusion from the unit, or the University intends to replace a major portion of a bargaining unit position with a position in a classification outside of the unit, the University shall notify CUE in writing at least thirty (30) calendar days prior to the proposed implementation.

According to CUE, this provision required the University to give CUE notice and an opportunity to meet and confer when the University determined: (1) that a position or title should be reclassified; (2) a position or title should be designated for exclusion from the unit; or (3) when the University intended to replace a major portion of a bargaining unit position with a position in a classification outside of the unit. The University, on the other hand, contended that notice was only required when there was a formal request for reclassification that would result in an incumbent leaving the bargaining unit by virtue of the reclassification.

The Board concluded that Article 2.E obligated the University to give CUE notice and an opportunity to meet and confer when the University determined: (1) that a bargaining unit position or title should be reclassified to a non-bargaining unit position; (2) a bargaining unit position or title should be designated for exclusion from the unit; or (3) the University intended

to replace a major portion of a bargaining unit position with a position in a classification outside of the unit. Further, with regard to the third factor, the Board found the duty to provide notice and an opportunity to meet and confer was only triggered when the University intended to replace more than 50 percent of the work of a bargaining unit position with that of a non-bargaining unit position. The Board applied this standard in *Regents I* and determined the University violated Article 2.E in three of the five consolidated cases.

DISCUSSION

A. Requests for Reconsideration

Under PERB Regulation 32410(a),² the grounds for requesting reconsideration of a final Board decision are limited to claims that: “(1) the decision of the Board itself contains prejudicial errors of fact, or (2) the party has newly discovered evidence which was not previously available and could not have been discovered with the exercise of reasonable diligence.” These limited grounds preclude a party from using the reconsideration process to reargue or re-litigate issues that have already been decided. (*Chula Vista Elementary School District* (2003) PERB Decision No. 1557; *San Bernardino Teachers Association, CTA/NEA* (Cooksey) (2000) PERB Decision No. 1387.)

B. Interference

In *Regents I*, the Board found the University committed unlawful unilateral change in Case Nos. SA-CE-246-H, SA-CE-247-H and SF-CE-795-H. The Board, however, did not make an independent finding of unlawful interference. CUE asserts that the order in *Regents I* should be amended to include such a finding of interference.

² PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

Since the Board did not address interference in its decision, CUE is essentially arguing that the Board erred when it failed to find the University's conduct also constituted unlawful interference. It is noteworthy, however, that CUE failed to present any argument regarding the interference claim on appeal. Accordingly, the Board finds CUE waived this claim. Notwithstanding this waiver, requests for reconsideration will only be granted when they identify prejudicial errors of fact or present newly discovered evidence. Accordingly, the Board denies this request for reconsideration.

C. Restoration of all Positions

The order in the *Regents I* provides:

[T]he University and its representatives shall ... [r]estore bargaining unit positions vacated or eliminated as a result of the unlawful transfer of a major portion of their duties to non-bargaining unit positions in Case Nos. SA-CE-246-H, SA-CE-247-H and SF-CE-795-H.

CUE's second issue for reconsideration is a request that the Board modify the order in *Regents I* to clarify that the University is required to restore all bargaining unit positions removed or replaced by virtue of the University's narrow interpretation of Article 2.E. According to CUE, it is "arguably" unclear whether the order is limited to the three specific positions addressed in Case Nos. SA-CE-246-H, SA-CE-247-H and SF-CE-795-H or whether the order extends to all positions vacated or eliminated due to the University's interpretation of Article 2.E.

The Board finds that both the order and the decision in *Regents I* very clearly limit the scope of the University's duty to restore bargaining unit positions to those positions considered by the Board in Case Nos. SA-CE-246-H, SA-CE-247-H and SF-CE-795-H. CUE's request to apply this ruling to cases that have not been presented to the Board would not only vastly expand the scope of the Board's order, but would also violate long-standing precedent that

prohibits the Board from issuing advisory opinions or granting declaratory relief. (*County of Orange* (2006) PERB Decision No. 1868-M.)

The instant request for reconsideration neither identifies prejudicial errors of fact, nor presents newly discovered evidence. Rather, the request seeks to significantly expand the scope of the Board's order. Accordingly, the Board denies this request for reconsideration.

D. Application of the Make-Whole Remedy

CUE notes that the make-whole remedy discussed in connection with the unilateral change violations in Case Nos. SA-CE-246-H, SA-CE-247-H and SF-CE-795-H is not reflected in the Board's order. Accordingly, CUE argues that the Board should grant reconsideration for the purpose of aligning the order with the Board's decision.

In *Desert Sands Unified School District* (2004) PERB Decision No. 1682 (*Desert Sands*), the Board granted reconsideration for the purpose of conforming an order with the Board's decision. According to the Board, reconsideration was warranted under the newly discovered evidence standard because the error did not exist and could not have been discovered until the issuance of its initial decision. (*Ibid.*)

We agree with CUE that the Board erred by not articulating the make-whole remedy in the order and find that conforming the order and decision in *Regents I* with regard to this issue is warranted. Accordingly, pursuant to *Desert Sands*, the Board grants CUE's request for reconsideration and modifies the order to conform to the decision in *Regents I*.

ORDER

The request for reconsideration of *Regents of the University of California (Davis)* (2010) PERB Decision No. 2101-H is GRANTED and the Order is hereby AMENDED to read as follows:

Based upon the foregoing findings of fact, conclusions of law, and the entire record in this matter, it has been found that the Regents of the University of California (University) violated the Higher Education Employer-Employee Relations Act (HEERA) by: (1) unilaterally implementing changes in the policy requiring notice to the Coalition of University Employees (CUE) when it reclassifies, designates a position for exclusion from the unit, or replaces a major portion of a unit position with a position in a classification outside the unit; and (2) refusing to provide information to CUE consisting of vacancies in non-bargaining unit positions which may have assumed work of since-vacated bargaining unit positions and the history of those positions as described by the job descriptions.

The unfair practice charge and complaint in Case No. SA-CE-251-H is hereby DISMISSED. The unilateral change allegation in Case No. SF-CE-760-H is also DISMISSED.

Pursuant to HEERA section 3563.3, it is hereby ordered that the University and its representatives shall:

A. CEASE AND DESIST FROM:

1. Unilaterally implementing changes in the policy requiring notice to CUE when it reclassifies, designates a position for exclusion from the unit, or replaces a major portion of a unit position with a position in a classification outside the unit.

2. Refusing to provide information to CUE regarding vacancies in non-bargaining unit positions which may have assumed work of since-vacated bargaining unit positions and the history of those positions as described through job descriptions.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF HEERA:

1. Rescind the policy limiting notice required by Article 2.E to those cases where a formal reclassification has commenced and adhere to the obligation to provide notice to CUE pursuant to the terms of the 2003-2004 memorandum of understanding. The

University shall provide notice to CUE when it intends to replace more than 50 percent of the work of a bargaining unit position with that of a non-bargaining unit position consistent with this decision.

2. Restore bargaining unit positions vacated or eliminated as a result of the unlawful transfer of a major portion of their duties to non-bargaining unit positions in Case Nos. SA-CE-246-H, SA-CE-247-H and SF-CE-795-H.

3. Make-whole all employees restored to bargaining unit positions vacated or eliminated as a result of the unlawful transfer of a major portion of their duties to non-bargaining unit positions in Case Nos. SA-CE-246-H, SA-CE-247-H and SF-CE-795-H. The University, however, shall not be required to impose a make-whole remedy upon employees who, pursuant to the University's conduct, received the benefit of movement to a higher paying position.

4. Upon request, provide lists of Berkeley campus administrative specialist and assistant administrative analyst positions posted for recruitment in the years 2003 and 2004, as well as the "classification history" for each of the positions including before and after job descriptions if a bargaining unit position became vacant (or was eliminated) as a result.

5. Upon request, provide the job titles of all positions filled since March 12, 2002 where the new position replaced, in large part, a clerical bargaining unit position, as well as the job descriptions for both positions.

6. With regard to the provision of information described in Sections B.4 and B.5, above, the University is not required to provide information that is contained on the University's website and is otherwise equally accessible to both parties or information the University is not able to obtain through the exercise of reasonable diligence. In circumstances

involving information that is equally available to both parties on the University's website, the University shall provide CUE with the location where the information resides on the website.

7. Within ten (10) workdays of service of a final decision in this matter, post at all work locations at the campuses, medical centers and laboratories of the University of California where notices to employees are customarily posted, copies of the Notice attached hereto as the Appendix. The Notice must be signed by an authorized agent of the University, indicating that the University will comply with the terms of the Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced or covered with any other material.

8. Within thirty (30) workdays of service of a final decision in this matter, notify the General Counsel of the Public Employment Relations Board, or her designee, in writing, of the steps the employer has taken to comply with the terms of this Order. Continue to report in writing to the Regional Director periodically thereafter as directed. All reports to the Regional Director shall be served concurrently on the charging parties.

This order shall become effective immediately upon service of a true copy thereof on the parties.

Chair Dowdin Calvillo and Member Miner joined in this Decision.



APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE PUBLIC EMPLOYMENT RELATIONS BOARD An Agency of the State of California

After a hearing in Unfair Practice Case Nos. SA-CE-246-H, SA-CE-247-H, SA-CE-251-H, SF-CE-760-H and SF-CE-795-H, consolidated for hearing and decision under the title *Coalition of University Employees v. Regents of the University of California*, in which the parties had the right to participate, it has been found that the Regents of the University of California (University) violated the Higher Education Employer-Employee Relations Act (HEERA), Government Code section 3571(a) and (c), by: (1) unilaterally implementing changes in the policy requiring notice to the Coalition of University Employees (CUE) when it reclassifies, designates a position for exclusion from the unit, or replaces a major portion of a unit position with a position in a classification outside the unit; and (2) refusing to provide information to CUE consisting of vacancies in non-bargaining unit positions which may have assumed work of since-vacated bargaining unit positions and the history of those positions as described through job descriptions.

As a result of this conduct, we have been ordered to post this Notice and we will:

A. CEASE AND DESIST FROM:

1. Unilaterally implementing changes in the policy requiring notice to CUE when it reclassifies, designates a position for exclusion from the unit, or replaces a major portion of a unit position with a position in a classification outside the unit.
2. Refusing to provide information to CUE consisting of vacancies in non-bargaining unit positions which may have assumed work of since-vacated bargaining unit positions and the history of those positions as described through job descriptions.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF HEERA:

1. Rescind the policy limiting notice required by Article 2, section E to those cases where a formal reclassification has commenced and adhere to the obligation to provide notice to CUE pursuant to the terms of the 2003-2004 memorandum of understanding. The University shall provide notice to CUE when it intends to replace more than 50 percent of the work of a bargaining unit position with that of a non-bargaining unit position.
2. Restore bargaining unit positions vacated or eliminated as a result of the unlawful transfer of a major portion of their duties to non-bargaining unit positions in Case Nos. SA-CE-246-H, SA-CE-247-H and SF-CE-795-H.
3. Make-whole all employees restored to bargaining unit positions vacated or eliminated as a result of the unlawful transfer of a major portion of their duties to non-

bargaining unit positions in Case Nos. SA-CE-246-H, SA-CE-247-H and SF-CE-795-H. The University shall not be required to impose a make-whole remedy upon employees who, pursuant to the University's conduct, received the benefit of movement to a higher paying position.

4. Upon request, provide lists of Berkeley campus administrative specialist and assistant administrative analyst positions posted for recruitment in the years 2003 and 2004, as well as the "classification history" for each of the positions including before and after job descriptions if a bargaining unit position became vacant (or was eliminated) as a result.

5. Upon request, provide the job titles of all positions filled since March 12, 2002 where the new position replaced, in large part, a clerical bargaining unit position, as well as the job descriptions for both positions.

6. With regard to the provision of information described in sections B.4 and B.5, above, the University is not required to provide information that is contained on the University's website and is otherwise equally accessible to both parties or information the University is not able to obtain through the exercise of reasonable diligence. In circumstances involving information that is equally available to both parties on the University's website, the University shall provide CUE with the location where the information resides on the website.

Dated: _____

REGENTS OF THE UNIVERSITY OF
CALIFORNIA

By: _____
Authorized Agent

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR AT LEAST THIRTY (30) CONSECUTIVE WORKDAYS FROM THE DATE OF POSTING AND MUST NOT BE REDUCED IN SIZE, DEFACED, ALTERED OR COVERED WITH ANY OTHER MATERIAL.