

**STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD**



REGENTS OF THE UNIVERSITY OF
CALIFORNIA,

Charging Party,

v.

AFSCME, LOCAL 3299,

Respondent.

Case No. SF-CO-164-H

PERB Decision No. 2105-H

April 21, 2010

Appearances: Littler Mendelson by Robert G. Hulteng, Attorney, for Regents of the University of California; Weinberg, Roger & Rosenfeld by Vincent A. Harrington, Jr., Attorney, for AFSCME, Local 3299.

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

DECISION

WESLEY, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the Regents of the University of California (University or UC) of a Board agent's dismissal of its unfair practice charge. The charge alleged that AFSCME, Local 3299 (AFSCME) violated the Higher Education Employer-Employee Relations Act (HEERA)¹ section 3571.1(c) and (d) when it unilaterally changed the access policy by leafleting in prohibited areas at the University medical centers on the Los Angeles (UCLA) and San Francisco (UCSF) campuses.

¹ HEERA is codified at Government Code section 3560 et seq. HEERA section 3571.1 states, in relevant part, that it is unlawful for an employee organization to:

(c) Refuse or fail to engage in meeting and conferring with the higher education employer.

(d) Refuse to participate in good faith in the impasse procedure set forth in Article 9 (commencing with Section 3590).

The Board has reviewed the dismissal and the record in light of the University's appeal, AFSCME's response, and the relevant law. Based on this review, the Board affirms the dismissal of the unfair practice charge for the reasons discussed below.

BACKGROUND

AFSCME is the exclusive representative of two University bargaining units: the Patient Care Technical Unit (PCT) and the Service Unit (SX). AFSCME and the University are parties to collective bargaining agreements (CBA) covering the respective units. The PCT/UC contract expired on September 30, 2007. The parties initiated negotiations for a successor contract in August 2007. PERB declared the parties were at impasse on December 14, 2007. The SX/UC contract expired on January 31, 2008. Following unsuccessful negotiations, PERB certified the parties were at impasse on February 5, 2008. Upon determination of impasse, the parties commenced impasse procedures in both units.

Beginning on or about January 15, 2008, AFSCME members and staff began leafleting outside the entrances to each of the five medical centers located on University campuses.² The University alleges that the leafleting campaigns at the UCLA and UCSF Medical Centers were conducted in areas prohibited by the access policy. The PCT/UC and SX/UC CBAs each

² The leaflets included the following statements:

UC workers believe that below-market wages, a high stress environment and increasing benefit costs cause UC to lose experienced workers and create the need to rely on temporary staff

Brought to you by the 11,000 UC Patient Care Technical Employees at UC's Medical Centers represented by AFSCME Local 3299. AFSCME is currently in contract negotiations with UC. We are fighting for wages, benefits and working conditions which would close the gap with other medical centers. Please support us!

contain substantially similar access provisions. The relevant provisions in Article I of the PCT/UC CBA provide:

A.2. AFSCME will abide by the reasonable access rules and regulations promulgated at each campus/Laboratory.

F. AFSCME officers and representatives and bargaining unit employees, including local Union officers and representatives, shall not conduct any Union activity or Union business on University premises . . . unless such activity is specifically authorized by the provisions of this Agreement and is conducted in accordance and conformance with campus procedures.

G. The University retains the right to enforce access rules and regulations in accordance with local campus procedures. . . .

Local access regulations were in place at both UCLA and UCSF prior to the negotiation of the expired CBAs, and are applicable to union and non-union employee organizations.

The UCSF *Access Guidelines* include provisions that govern the use of University facilities and union access to employees.³ The *Access Guidelines* prohibit union access to the following work areas:

- a. Patient care, clinical laboratories, and clinical areas;
- b. Academic areas while instruction, learning, counseling or research is in progress;
- c. Research areas when the health, safety, or security of individuals or the research could be adversely affected;
- d. Private residential areas of students.

The UCLA access regulations provide specific guidelines regarding the distribution of literature at the Center for Health Sciences (CHS) and the Medical Plaza. Appendix I of the

³ The *Access Guidelines* define employee organization business as “all legal activities of an employee organization, including, but not limited to meetings, dues collection, soliciting, distributing and campaigning.”

UCLA Regulations on Activities, Registered Organizations and Use of Properties contains the following provisions:

B. LITERATURE DISTRIBUTION

1. External Accesses to CHS and Medical Plaza

Literature may be distributed only at the following areas and within the time limits specified:

- a. Entrance to School of Public Health, north side of CHS.
- b. Northeast entrance to CHS off Circle Drive South across from Life Sciences Building.
- c. East entrance to CHS near Biomedical library off Tiverton Drive.
- d. Arcade entrance on east side of CHS adjacent to School of Dentistry.
- e. Northwest "B" floor entrance to CHS adjacent to parking lot "F."
- f. Main entrance to NPI off Westwood Boulevard before 8:30 a.m. and after 4:30 p.m.

On February 5, 2008, the human resources director for the UCSF Medical Center ordered the AFSCME representatives handing out leaflets at the entrance of the medical center to cease doing so and directed them to move to the public street, approximately 90 feet from the entrance of the facility.

On February 6, 2008, at the direction of the UCLA Medical Center chief executive officer, campus security guards ordered AFSCME leafleters away from the entrance of the medical center and away from the plaza area located outside the entrance.⁴

⁴ The charge alleges that, "AFSCME began to refuse to comply with directions of Medical Center officials issued pursuant to the [access] Regulations." The charge does not describe AFSCME's conduct in refusing to comply with the regulations. There are no facts alleged that leafleters returned to the prohibited areas after being directed to leave.

On February 14, 2008, AFSCME applied to the Alameda County Superior Court for a temporary restraining order (TRO). AFSCME sought a court order that prohibited the University from enforcing the campus access policies at UCLA and UCSF. AFSCME argued to the superior court that the campus regulations violated the constitutional right to free speech. The court granted the TRO and ordered the University to permit leafleting at the entrances of the UCLA and UCSF medical centers, in accordance with instructions set by the court.⁵

On February 15, 2008, the University filed the instant unfair practice charge alleging that by seeking the TRO, AFSCME repudiated the contract and effected a unilateral change in the access policy.

On March 12, 2008, the court conducted a hearing on AFSCME's request for a preliminary injunction to determine whether to continue the order allowing AFSCME to leaflet at the entrances of the UCLA and UCSF medical centers. The court denied the preliminary injunction on jurisdictional grounds and dissolved the TRO, stating that proper jurisdiction over the dispute rests with PERB.

On March 18, 2008, the University filed an amended charge alleging that AFSCME's initiation of the leafleting campaign in January 2008, amounted to a repudiation of the access provisions of the CBA. The University alleged that by initiating the leafleting campaign without first seeking a determination pursuant to the grievance procedure that the regulations

⁵ The court's order allowed: (1) one handbiller to distribute literature in front of the main entrance of the UCLA Medical Center, and two handbillers to distribute literature inside the CHS Plaza adjacent to the UCLA Medical Center; (2) two handbillers to distribute literature 10 feet from the parking entrance to the UCLA Medical Center; (3) one handbiller each to distribute literature at both the entrances on the east and west sides of Building 200 of the Morton Medical Center at UCLA; (4) two handbillers to distribute literature at the Jules Stein entrance to the CHS Parking Complex at the UCLA Medical Center; and (5) one handbiller to distribute literature at the alcove entrance at 505 Parnassus at the UCSF Medical Center.

were unreasonable, or without first negotiating to impasse with the University over the access policy, AFSCME unilaterally changed the access policy.

The Board agent dismissed the charge finding that AFSCME's lawsuit against the University did not constitute an unfair labor practice.

On appeal, the University asserts that AFSCME's attempt to obtain an injunction is not relevant to its prior refusal to comply with the access policy. The University contends that by refusing to follow the access policies beginning on January 15, 2008, AFSCME repudiated the contract and effected a unilateral change in policy.

DISCUSSION

In essence, the University alleges that AFSCME unilaterally changed the access policy without providing notice and an opportunity to bargain when AFSCME members and staff began leafleting on January 15, 2008, in areas prohibited by the policy. The PCT unit was at impasse prior to January 15. Thus, the University alleges a violation of HEERA section 3571.1(d). Impasse was certified in the SX unit on February 5, 2008, after leafleting began. Leafleting continued until at least February 6. The University, therefore, alleges a violation of HEERA section 3571.1(c) and (d).

A unilateral change in a negotiable subject prior to the completion of bargaining or the completion of impasse procedures is a "per se" violation. (*Grant Joint Union High School District* (1982) PERB Decision No. 196 (*Grant*); *Redwoods Community College District* (1996) PERB Decision No. 1141.) The same standard for unilateral change violations by employers applies to allegations of unlawful unilateral changes by unions. (*The Regents of the University of California* (1992) PERB Decision No. 922-H (*Regents*.)

Accordingly, the criteria to establish a "per se" unilateral change violation are: (1) the exclusive representative breached or altered the parties' written agreement or an established

past practice; (2) such action was taken without giving the other party notice or an opportunity to bargain over the change; (3) the change was not merely an isolated breach of the contract, but amounts to a change in policy (i.e., it has a generalized effect or continuing impact upon bargaining unit members' terms and conditions of employment); and (4) the change in policy concerns a matter within the scope of representation. (*Vernon Fire Fighters v. City of Vernon* (1980) 107 Cal.App.3d 802; *Walnut Valley Unified School District* (1981) PERB Decision No. 160; *San Joaquin County Employees Assn. v. City of Stockton* (1984) 161 Cal.App.3d 813; *Grant*.)

PERB is prohibited from enforcement of agreements between the parties and may only issue a complaint where the breach of the agreement also constitutes an unfair practice in violation of HEERA.⁶ Therefore, where, as in this case, the University alleges that a violation of the CBA between the parties effectuated a repudiation of the agreement and an illegal unilateral change, the Board must determine if the conduct amounted to an unfair practice in violation of HEERA, or was an isolated breach of the agreement.

The Board has held that in order for the breach of a collective bargaining agreement to constitute an independent violation, the breach must also amount to a change of policy. Where there is a unilateral breach of an agreement without institution of a new policy of general application, the conduct does not violate the act. (*Grant*.) Therefore, demonstration of a change in policy is crucial to finding a repudiation of the agreement as opposed to a mere default in the agreement. As such, to establish a prima facie case for an illegal unilateral

⁶ HEERA section 3563.2(b) states:

The board shall not have the authority to enforce agreements between the parties, and shall not issue a complaint on any charge based on alleged violation of such an agreement that would not also constitute an unfair practice under this chapter.

change based on a breach of a collective bargaining agreement, the charging party must allege facts that show that the breach “amounts to a change in policy having a generalized effect or continuing impact upon the terms and conditions of employment of bargaining unit members.” (*Regents; Clovis Unified School District* (1986) PERB Decision No. 597; *Grant*.)⁷

As amended, the University’s charge alleges that AFSCME repudiated the CBA in violation of HEERA and thereby unilaterally changed the access policy when it leafleted in areas prohibited by the policy.

Applying these facts to the test for a unilateral change violation, we find the University’s charge does not state a prima facie case.

There is no dispute that the access policy is a matter within the scope of representation (*Regents of the University of California* (2004) PERB Decision No. 1700-H), or that AFSCME began their leafleting campaign without providing the University with notice and an opportunity to bargain. Thus, the second and fourth factors have been met. We next consider whether the University provided facts to establish a breach of the access policies as referenced in the parties’ CBAs.

The parties’ CBAs specifically provide that AFSCME will abide by local access regulations at each University campuses. Thus, a breach of the campus access regulations could amount to a breach of the CBA.

With respect to UCSF, the local regulations prohibit union access to work areas involving patient care, clinical laboratories and clinical areas. While the record contains much discussion by both parties regarding whether or not AFSCME’s leafleting was disruptive, or

⁷ The University erroneously cites the standard as whether AFSCME’s conduct had an effect on existing terms and conditions of employment. This ignores the critical part of the test that serves to establish the difference between a change in policy and an isolated breach of the agreement.

appropriate for the locations where it was conducted, the record does not contain facts that clearly show that leafleting at the entrance of the UCSF Medical Center violated the campus regulations.

With respect to UCLA, the campus regulations detail six specific locations around the medical center as being the only locations where leafleting (and other related activity) is allowed. The charge alleges, and AFSCME does not dispute, that leafleters were located in areas other than those allowed by the local regulations. Therefore, AFSCME arguably was in breach of the CBA when it began the leafleting campaign on the UCLA campus.

However, even if the leafleting at both campuses was in violation of campus access regulations, the charge indicates the leafleters complied with University directives to move away from prohibited areas. These facts do not demonstrate that AFSCME's conduct amounted to anything more than an isolated breach of the CBA. There are no facts to show that AFSCME continued to leaflet after the University informed the leafleters they were in prohibited areas. Consequently, the charge does not establish that AFSCME's conduct demonstrated a generalized effect or continuing impact on terms and conditions of employment. Accordingly, the charge does not establish a prima facie case of an unlawful unilateral change in policy.

ORDER

The unfair practice charge in Case No. SF-CO-164-H is hereby DISMISSED
WITHOUT LEAVE TO AMEND.

Chair Dowdin Calvillo and Member McKeag joined in this Decision.