

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



AFSCME LOCAL 3299,

Charging Party,

v.

REGENTS OF THE UNIVERSITY OF
CALIFORNIA,

Respondent.

Case No. SF-CE-862-H

PERB Decision No. 2109-H

May 19, 2010

Appearances: Weinberg, Roger & Rosenfeld by Kerriane R. Steele, Attorney, for AFSCME Local 3299; Littler Mendelson by Joshua D. Kienitz, Attorney, for Regents of the University of California.

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 AFSCME Local 3299 (AFSCME) of a Board agent's partial dismissal of its unfair practice charge. The charge alleged, in relevant part, that the Regents of the University of California (University) violated the Higher Education Employer-Employee Relations Act (HEERA),¹ section 3571, by unilaterally changing the sick and vacation leave policies.²

¹ HEERA is codified at Government Code section 3560 et seq. Section 3571 provides, in part, that it is unlawful for the University to:

(c) Refuse or fail to engage in meeting and conferring with an exclusive representative.

² The allegation that the University unilaterally changed the access regulations was not discussed in AFSCME's amended charge. In its appeal, AFSCME stated that this subject was addressed in a separate charge. Therefore, this allegation is deemed withdrawn from this charge.

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

BACKGROUND

AFSCME is the exclusive representative of two bargaining units: the Patient Care Technical Unit (PCT) and the Service Unit (SX). AFSCME and the University were engaged in negotiations for successor agreements in both bargaining units. The PCT/UC collective bargaining agreement (CBA) expired on September 30, 2007. The SX/UC CBA expired on January 31, 2008. PERB declared the parties were at impasse in the PCT unit on December 14, 2007, and in the SX unit on February 5, 2008.³

The parties for both units met with a mediator, but did not reach agreement. Thereafter, factfinding was conducted in both units in March and April. The factfinding panel for the PCT unit issued its findings on April 19. The factfinding report for the SX unit was issued on May 2.

On May 9, the parties met for further negotiations. The parties' positions at the bargaining session were unchanged from the positions they held prior to factfinding. Thereafter, AFSCME informed the University that it would send the University's last offers to the membership of the PCT and SX units for a vote.

Presumably the University's offers were rejected. AFSCME conducted a strike authorization vote in both units from May 17 through May 22. On May 23, AFSCME issued strike notices to the University for both the PCT and SX units.

³ Hereafter all dates refer to 2008, unless otherwise noted.

Around the time that AFSCME conducted the strike vote, the University published on its website a document titled, “Questions and Answers.”⁴ The document stated, in relevant part:

AFSCME, the union representing UC’s patient care technical employees, has announced a series of strike votes, scheduled from May 17-22, 2008. It is critical that all employees, including patient care technical employees, understand the implications of such an action so they can make an informed choice about whether to consider voting for or participating in this strike. Below are answers to some important questions.

Q. What will UC do if patient care technical employees strike?

A. If any employee does not report to work as assigned, the University will presume – absent medical certification – that her/his absence from work during a declared strike period is strike related.

Authorization for an absence from work (e.g., vacation leave) may or may not be granted, depending on operational necessity and without regard to the employee’s reason for the requested leave.

Employees who are absent from work without authorization during a strike will not be paid for the absence and may face the possibility of disciplinary action for cause depending on the facts and circumstances (e.g., applicable contract language, misconduct, prior notice(s), prior disciplinary history).

(Emphasis in original.)

The PCT/UC and SX/UC CBAs each contain substantially similar provisions for the use of accrued sick leave by employees. Article 35 of the PCT CBA states, in relevant part:

2. Documentation and Verification

a. When it appears to be justified, an employee may be required to submit satisfactory documentation of personal illness or

⁴ While the initial document addressed the PCT negotiations and strike vote, two substantially similar documents were subsequently distributed discussing both the PCT and SX units.

disability to the University in order to receive an excused absence from work and/or sick leave pay. The employee shall be given notice prior to returning to work that he/she will be required to provide such documentation.^[5]

e. An employee's repeated use of sick time may result in loss of sick leave pay, when the University has determined that such use is abusive, and provided the University has provided prior written notice to the employee that sick leave will be denied on future instances of illness irrespective of the nature or duration of illness. Additionally, an employee may not be eligible for sick leave pay in accordance with other provisions of this Article.^[6]

Both CBAs provide that, "Vacation leave is scheduled at the convenience of the University," and the operational needs of the University may be considered. The PCT CBA also states that, "Once established, the University will endeavor to adhere to the vacation schedule."

On May 13, PCT unit member Susanne Sharpe (Sharpe), submitted a written request for vacation leave on June 2. Sharpe's supervisor approved the request on May 15. On May 20, Sharpe's supervisor informed her that the vacation authorization would be rescinded if a strike was held on that day.

In its original charge, AFSCME alleged a unilateral change in the CBA sick and vacation leave policies. As amended, AFSCME alleged there was a "well established" practice that the University would enforce the sick leave verification requirement only when employees had previously abused the sick leave policy. AFSCME further alleged there was a "well

⁵ The relevant section of the SX CBA essentially mirrors the PCT contract provision, except for minor differences as noted:

When it appears to be justified, an employee may be required to submit satisfactory documentation of personal *or family illness, disability, or death* to the University in order to receive an excused absence from work *and* sick leave pay.

(Emphasis added.)

⁶ The SX CBA contains substantially similar language.

established” policy that the University would not rescind scheduled vacation leave once a request was granted.

DISCUSSION

AFSCME alleges that in posting the “Questions and Answers” document, the University unilaterally changed the sick and vacation leave policies without providing notice and an opportunity to bargain. The criteria to establish a “per se” unilateral change in violation of HEERA section 3571 are: (1) the employer breached or altered the parties’ written agreement or its own 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 Joint Union High School District* (1982) PERB Decision No. 196.)

Sick Leave Policy

The sick leave policy set forth in both the PCT and the SX CBAs allows the University to require employees to provide verification of illness “[w]hen it appears to be justified.” In the event an employee is required to produce verification of illness, the contract requires the University to inform the employee of this requirement prior to returning to work. While sick leave is within the scope of representation, the charge does not demonstrate that the University changed this policy when it provided employees with advance notice that sick leave will be

granted on the dates corresponding with a strike, if employees produce medical verification of illness.

AFSCME contends there is an established practice of enforcing the medical verification requirement only for employees who have exhibited an abusive pattern of absence. AFSCME asserts the contract contemplates continued application of existing practices. AFSCME cites Article 25 of the PCT CBA, which states, in relevant part:

Practices and policies relating to wages, hours, and terms and conditions of employment in effect but not contemplated during negotiations over the UC-AFSCME Agreement may remain in effect insofar as they are not in conflict with the intent of the Agreement.

To constitute a valid, established past practice, a practice must be: (1) unequivocal; (2) clearly enunciated and acted upon; and (3) readily ascertainable over a period of time as a fixed and established practice. (*Hacienda La Puente Unified School District* (1997) PERB Decision No. 1186 (*Hacienda La Puente*)). Pleading or raising a bare allegation without sufficient supporting facts is insufficient for purposes of stating a prima facie case. (*United Teachers-Los Angeles (Ragsdale)* (1992) PERB Decision No. 944.)

There are no facts alleged in the charge to demonstrate an unequivocal, fixed and long-standing practice of limiting the medical verification requirement only to employees who have previously abused their sick leave. In fact, there is a separate contract provision that details the denial of paid sick leave in the event of employee abuse. This provision does not address verification of illness. Furthermore, AFSCME's reliance on Article 25 is unavailing as the CBA addresses the use and verification of sick leave and does not leave the subject to prior practices.

Moreover, it is not an unlawful unilateral change for the employer to enforce the written terms of the contract. (*Marysville Joint Unified School District* (1983) PERB Decision

No. 314.) Even assuming there was a past practice of requiring medical verification only in cases of abuse, the University is not precluded from enforcing the terms of the contract. Accordingly, the charge does not demonstrate a prima facie case of an unlawful unilateral change in the sick leave policy.

Vacation Leave Policy

With respect to the vacation policy, the “Questions and Answers” document states that the University may or may not authorize vacation leave absences, depending on operational necessity. Both CBAs permit the University to consider its operational needs in approving vacation leave, and affirm that, “Vacation leave is scheduled at the convenience of the University.” Further, the PCT CBA states that once vacation leave is approved, “the University will endeavor to adhere to the vacation schedule.” The contract language clearly permits the University to consider its operational needs, such as when facing employee strike activity, when approving vacation requests. Thus, while vacations are also within the scope of representation, the charge does not demonstrate a change in the vacation leave policy.

AFSCME also asserts that there is a well established policy that the University will not rescind scheduled vacation leave once a request is granted. AFSCME alleges that the University informed Sharpe that her vacation request may be rescinded in the event of a strike. These facts do not support AFSCME’s past practice claim and there are no other facts alleged that satisfy the standard to demonstrate a valid, established past practice. (*Hacienda La Puente.*)

Accordingly, the charge does not establish a prima facie case that the University unilaterally changed its sick and vacation leave policies in violation of HEERA, and dismissal of these allegations is proper.

ORDER

The partial dismissal of unfair practice charge in Case No. SF-CE-862-H is hereby
AFFIRMED.

Chair Dowdin Calvillo and Member McKeag joined in this Decision.