STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

COALITION OF UNIVERSITY EMPLOYEES, Charging Party, v. REGENTS OF THE UNIVERSITY OF CALIFORNIA (IRVINE), Respondent.	Case No. SF-CE-931-H PERB Decision No. 2177-H March 29, 2011

Appearance: Beeson, Tayer & Bodine by Dusty L. Collier, Attorney, for Coalition of University Employees.

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

DECISION

DOWDIN CALVILLO, Chair: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the Coalition of University Employees (CUE) of a Board agent's dismissal of its unfair practice charge. The charge, as amended, alleged that the Regents of the University of California (Irvine) (University) violated the Higher Education Employer-Employee Relations Act (HEERA)[1] when it: (1) granted a bonus to non-represented employees at its Irvine campus without offering the same bonus to CUE-represented employees, and (2) announced the bonus to employees via email and the campus website. The Board agent dismissed the charge on the basis that it did not state a prima facie case of discrimination or interference.

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

The Board has reviewed the dismissal and the record in light of CUE's appeal and the relevant law.[2] Based on this review, the Board affirms the dismissal of the charge for the reasons discussed below.

BACKGROUND

CUE represents approximately 14,000 employees in the University's clerical and allied services (CX) bargaining unit. The collective bargaining agreement (CBA) between CUE and the University expired on October 30, 2008. The parties bargained over a successor agreement from August 2008 until December 7, 2009, when PERB certified that the parties were at impasse. The parties then proceeded to mediation pursuant to HEERA section 3590.

In the spring of 2009, the University began formulating plans for bridging an anticipated budget gap for the 2009-2010 fiscal year. On July 16, 2009, the University approved a salary reduction/furlough program to be implemented on September 1, 2009. Soon after, the University began negotiating with employee organizations over the program. When CUE and the University failed to reach agreement on the furloughs by September 1, the University unilaterally implemented "temporary layoffs" of CUE-represented employees.[3] In December, CUE and the University reached agreement regarding the effects of the furlough program. The negotiations over the furloughs occurred concurrently with the bargaining between CUE and the University for a successor CBA.

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[2] Attached to CUE's appeal is a declaration from Mary Higgins (Higgins), chief steward for CUE at the University's San Francisco campus. "Unless good cause is shown, a charging party may not present on appeal new charge allegations or new supporting evidence." (PERB Reg. 32635(b).*) CUE claims that the Board should accept the declaration because CUE did not have an opportunity to respond to the Board agent's conclusion in the dismissal letter that the Staff Recognition and Development Program (SRDP) had been in existence since 2007. However, the Board agent also stated this conclusion in the warning letter; therefore CUE could have addressed the conclusion in its amended charge. We thus find no good cause to accept Higgins' declaration or the allegations based on it in the appeal itself. (*PERB regs. are codified at Cal. Code Regs., tit. 8, § 31001 et seq.)

[3] This action is the subject of PERB Case No. SF-CE-905-H.

On November 20, 2009, Paige Macias (Macias), Interim Assistant Vice Chancellor of Human Resources at the University's Irvine campus, sent the following email to campus "Officers and Administrators":

> UC Irvine will soon be distributing funds allocated for the 2008-09 Staff Recognition and Development Program [SRDP]. To show appreciation for the significant challenges that non-represented staff have met, the campus is pleased to provide **$600** (subject to normal income tax withholding) to eligible staff on Monday, December 7, 2009. Eligible employees include all regular status (non-probationary as of December 1, 2009), non-represented, campus career staff employees whose annual base salary is less than $100,000. Contract and represented employees are not eligible.
>
> The Staff Recognition and Development Program is administered locally by the campus and is based on UC Office of the President guidelines. Program funds are derived from departmental benefit assessments, not individual employee contributions. In previous years, program funds were allocated for incentive awards or professional development. This year, campus leadership decided to distribute program funds – in uniform amounts – to all eligible staff employees to show the University's appreciation for their service during these challenging times.[4]

(Emphasis in original.)

On December 3, 2009, the University posted "2009 Staff Recognition and Development Program – Guidelines" on the "Simple Navigational Administrative Portal" (SNAP) webpage for the Irvine campus. The posting contained the same information as Macias' November 20 email, with the language "Contract and represented staff and SMG members are not eligible" in bold type.

DISCUSSION

The amended charge alleged that the University discriminated against CUE-represented employees and interfered with their protected rights when it paid the $600 SRDP bonus to non-

[4] The only portion of the email omitted is contact information and a website address where more information can be found.

represented employees; CUE further alleged that the email and website postings about the SRDP bonus were coercive. The Board agent concluded that the charge failed to state a prima facie case of discrimination or interference. For the following reasons, we agree.

1. Discrimination

In analyzing whether the University discriminated against CUE-represented employees, the Board agent applied the standard set forth in *Novato Unified School District* (1982) PERB Decision No. 210. The Board has recently held, however, that when a charge alleges discrimination between groups of employees based on one group's protected activity, it is appropriate to apply the standard from *Campbell Municipal Employees Association v. City of Campbell* (1982) 131 Cal.App.3d 416 (*Campbell*). (*State of California (Department of Personnel Administration)* (2011) PERB Decision No. 2106a-S.) Because CUE's charge alleged that the University paid non-represented employees a $600 bonus it did not pay or offer to CUE-represented employees, we analyze CUE's allegations under the *Campbell* standard.

To establish a prima facie case under the *Campbell* standard, the charging party must show that the employer engaged in conduct which could have harmed employee rights to some extent. In *State of California (Department of Personnel Administration)*, *supra*, PERB Decision No. 2106a-S, the Board addressed whether the State's provision of lower-cost dental benefits to bargaining unit employees who were not union members discriminated against unit employees who had exercised their right to join the union. Finding that the difference in dental benefit costs could influence an employee's choice to join the union or remain a union member, the Board held that the disparate treatment of union members and non-union members within the same bargaining unit established a prima facie case of discrimination under *Campbell*.

This case differs from *State of California (Department of Personnel Administration)*, *supra*, in one crucial respect: unlike the employees in that case, mere resignation of union membership would not make a CUE-represented employee eligible for the SRDP bonus. This is so because the SRDP program excludes all represented employees, whether or not they are members of the employee organization that represents their bargaining unit. Thus, to be eligible for the SRDP program, a represented employee would have to either: (1) move to a non-represented position; or (2) convince a majority of other employees to decertify the exclusive representative. Accordingly, we find that an employer's grant of a benefit exclusively to non-represented employees does not constitute discrimination per se under the *Campbell* standard.[5]

Nor does the charge allege any other facts which suggest that payment of the SRDP bonus to non-represented employees could harm the rights of CUE-represented employees to some extent. This case is thus distinguishable from *The Regents of the University of California* (1997) PERB Decision No. 1188-H, and *San Leandro Police Officers Association v. City of San Leandro* (1976) 55 Cal.App.3d 553 (*San Leandro*), both of which CUE relies on in its appeal. In *The Regents of the University of California*, *supra*, the University told non-represented employees that they would not receive a planned salary increase if they chose union representation in an upcoming election. The Board held that this statement interfered with employee rights because it suggested employees would lose a benefit if they exercised their right to select union representation. Here, represented employees currently are not

[5] In reaching the same conclusion, the National Labor Relations Board noted that if it were to hold that an employer's grant of a benefit exclusively to non-represented employees was a per se violation, "an employer would effectively be required to grant its unionized employees any benefit that the nonunit employees possessed." (*Dallas Morning News* (1987) 285 NLRB 807, 808-809.)

eligible for the SRDP bonus and thus there can be no suggestion by the University that represented employees will lose that benefit if they engage in protected activity.

Further, the charge does not establish that the University indicated the SRDP bonus cannot be gained through collective bargaining. In *San Leandro*, the city granted a "deferred management compensation" benefit equal to three percent of base salary to all management employees who were not members of a bargaining unit. (*Id.* at p. 556.) When the management employees who did not receive the benefit protested, the city manager responded in writing: "The City Council feels it was made clear to you that in your choosing to be represented by your respective associations, you would not additionally be eligible for salary and benefit programs developed for management personnel not represented by formally recognized employee organizations." (*Ibid.*) The unions representing the affected employees then requested that the city meet and confer with them over providing the benefit to the employees, but the city refused to meet with them. (*Id.* at p. 557.) The court held that the city's refusal to grant the benefit to represented management employees constituted discrimination and interference in violation of the Meyers-Milias-Brown Act (MMBA).[6] (*Id.* at p. 558.)

CUE's charge in this case alleged, "The University refused to entertain any proposal from CUE that included bonuses or salary increases." However, the charge did not allege that CUE made a proposal including bonuses that was rejected by the University. Nor do the allegations establish that CUE requested to bargain over including CX unit employees in the SRDP plan. Thus, the charge failed to allege facts showing that the University refused to bargain over providing the SRDP bonus, or a comparable bonus, to CX unit employees, or that it in any way indicated that such a bonus could not be obtained through collective bargaining. Because the charge did not show that payment of the SRDP bonus could harm CX unit

[6] The MMBA is codified at Government Code section 3500 et seq.

employees' rights to some extent, it failed to establish a prima facie case of discrimination under the *Campbell* standard.

2. Interference

To establish a prima facie case of interference with employee rights under HEERA, the charging party must establish that the respondent's conduct tends to or does result in some harm to employee rights granted under the statute. (*The Regents of the University of California*, *supra*, PERB Decision No. 1188-H, citing *Carlsbad Unified School District* (1979) PERB Decision No. 89.) 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. (*Clovis Unified School District* (1984) PERB Decision No. 389.)

a. Bonus Payment

CUE alleged that the $600 SRDP bonus payment to non-represented employees interfered with the rights of CUE-represented employees. In *State of California (Department of Personnel Administration)*, *supra*, PERB Decision No. 2106a-S, the Board observed that "the *Carlsbad* and *Campbell* standards are nearly identical and will in most cases lead to the same result." This is one of those cases. Thus, for the reasons discussed above, we find that the charge failed to establish a prima facie case of interference based on the bonus payment.

b. Email and Website Posting

CUE also alleged that the email from Macias to non-represented employees and the University's posting of information about the $600 SRDP on SNAP interfered with employee rights because they suggested that employees who do not exercise their right to union representation will receive benefits not granted to represented employees.

Employer speech causes no cognizable harm to employee rights unless it contains "threats of reprisal or force or promise of a benefit." (*Chula Vista City School District* (1990)

PERB Decision No. 834.) 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.) 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." (*Regents of the University of California* (1983) PERB Decision No. 366-H.) Further, 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.)

On its face, neither Macias' email nor the SNAP posting contains a threat of reprisal or force, or promise of benefit. CUE argues nonetheless that the email and posting have a coercive effect when viewed in the context of the parties' inability to agree on furloughs and a successor CBA. CUE focuses in particular on the language that the bonus is being provided to "show appreciation for the significant challenges that non-represented staff have met." CUE asks us to infer that the true meaning of this statement is that the University values its non-represented employees more than its represented employees and is subtly communicating to represented employees that they will not receive benefits if they continue to use union representation. However, even when the statements are viewed in the context of the parties' inability to reach agreement at the bargaining table, there is no basis for drawing such an inference. Accordingly, the charge failed to establish a prima facie case of interference based on the Macias email and SNAP posting.

ORDER

The unfair practice charge in Case No. SF-CE-931-H is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members McKeag and Miner joined in this Decision.