

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



PASADENA CITY COLLEGE FACULTY
ASSOCIATION,

Charging Party,

v.

PASADENA AREA COMMUNITY COLLEGE
DISTRICT,

Respondent.

Case No. LA-CE-5361-E

PERB Decision No. 2218

November 9, 2011

Appearances: Anderson & Associates by Michael D. Anderson and Patrick Vardapour, Attorneys, for Pasadena City College Faculty Association; Liebert Cassidy Whitmore by Mary L. Dowell and Adrianna E. Guzman, Attorneys, for Pasadena Area Community College District.

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

DECISION

DOWDIN CALVILLO, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Pasadena City College Faculty Association (Association) to a PERB administrative law judge's (ALJ) proposed decision (attached) dismissing the complaint and underlying unfair practice charge. The charge and complaint alleged that the Pasadena Area Community College District (District) violated section 3543.5(c) of the Educational Employment Relations Act (EERA)¹ by unilaterally canceling winter intersession classes without bargaining over the effects of the decision. The ALJ found that the Association failed to establish a violation of EERA.

The Board has reviewed the ALJ's proposed decision and the record in light of the Association's exceptions, the District's response thereto, and the relevant law. Based upon our

¹ EERA is codified at Government Code section 3540 et seq.

review of the record, we find the proposed decision to be well-reasoned, adequately supported by the record, and in accordance with applicable law. Accordingly, the Board adopts the ALJ's proposed decision as the decision of the Board itself with the brief discussion of the Association's exceptions.

DISCUSSION

The Association excepts to the ALJ's determination that the charge was limited to the effects of the decision, and contends that the charge included allegations that the District also failed to bargain over the decision to cancel the classes, but the General Counsel failed to include those allegations in the complaint. The Association does not except to the ALJ's determination that the decision to cancel classes was outside the scope of representation. (*Mt. San Antonio Community College District* (1983) PERB Decision No. 297.) Accordingly, this exception is without merit. Regarding the issue of effects bargaining, as the ALJ determined, no demand to bargain the negotiable effects of the District's decision was ever made. The remaining exceptions all relate to the ALJ's factual findings.² As indicated above, we find the ALJ's factual findings to be adequately supported by the record and find no basis to disturb them. (*Trustees of the California State University (San Marcos)* (2010) PERB Decision No. 2093-H; *State of California (Department of Corrections)* (2000) PERB Decision No. 1388-S; *American Federation of State, County and Municipal Employees (Owens)* (2008) PERB Decision No. 1974-H.)

² The Association also excepts to the ALJ's statement of the issue as "Did the District unlawfully fail to bargain the effects of its decision to 'reduce' the Winter Intersession?" and contends that the statement should also have encompassed the reinstatement of the Winter Intersession with a reduced number of sessions. We find that the issue is adequately framed as set forth by the ALJ.

ORDER

The unfair practice charge and complaint in Case No. LA-CE-5361-E are hereby
DISMISSED WITHOUT LEAVE TO AMEND.

Chair Martinez and Member McKeag joined in this Decision.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD



PASADENA CITY COLLEGE FACULTY
ASSOCIATION,

Charging Party,

v.

PASADENA AREA COMMUNITY COLLEGE
DISTRICT,

Respondent.

UNFAIR PRACTICE
CASE NO. LA-CE-5361-E

PROPOSED DECISION
(5/27/2011)

Appearances: Anderson & Associates by Michael D. Anderson, Attorney, for Pasadena City College Faculty Association; Liebert Cassidy Whitmore by Adrianna E. Guzman, Attorney, for Pasadena Area Community College District.

Before Thomas J. Allen, Administrative Law Judge.

PROCEDURAL HISTORY

In this case, a faculty association alleges that a community college district cancelled classes without bargaining over the effects of the decision, in violation of Educational Employment Relations Act (EERA) section 3543.5(c).¹ The district denies any violation of law.

The Pasadena City College Faculty Association (Association) filed an unfair practice charge against the Pasadena Area Community College District (District) on July 27, 2009. The Office of the General Counsel of the Public Employment Relations Board (PERB or Board) issued an unfair practice complaint (Complaint) against the District on June 30, 2010. The District filed an answer to the Complaint on July 12, 2010. PERB held an informal settlement conference on October 7, 2010, but the case was not settled. PERB held a formal hearing on

¹ EERA is codified at Government Code section 3540 et seq.

February 28 and March 1, 2011. At the close of the Association's case, the District moved to dismiss the Complaint. The motion was briefed and submitted for decision on May 17, 2011.

FINDINGS OF FACT

The District is a public school employer under EERA, and the Association is an exclusive representative under EERA.

Since 2004, the District has offered a Winter Intersession in January and February, providing educational opportunities for students and job opportunities for faculty. From 2004 to 2009, the number of sections offered increased from 463 to 597. During the first half of 2009, the District was planning to offer a Winter Intersession as usual in 2010.

At a District Board of Trustees meeting on July 1, 2009, however, a motion was made and passed to cancel virtually the entire 2010 Winter Intersession. At a subsequent meeting on August 5, 2009, the Board of Trustees rescinded the cancellation and reinstated the Winter Intersession but offered a reduced number of sections. Ultimately, the District offered 340 sections in 2010, less than 60 percent of those offered in 2009. As a result, many faculty members experienced a significant decrease in income and benefits.

The District gave the Association no advance notice of the motion to cancel the 2010 Winter Intersession, but Association President Roger Marheine (Marheine) and other Association officers were present at the meeting on July 1, 2009, and opposed the motion. After the motion passed, Marheine filed the unfair practice charge in this case. The District provided no advance notice to the Association of the Board of Trustees action to reinstate a reduced Winter Intersession, but the Association was again represented at the meeting of August 5, 2009. Marheine and the Association continuously opposed the reduction in the Winter Intersession. According to Marheine, the Association was "pretty much on message ...

that any kind of cancellation of Winter [Intersession] was inappropriate, both educationally and financially.”

Marheine acknowledged that the Association made no formal request to bargain over the effects of the District’s decision about Winter Intersession. He admitted that he was unfamiliar with the concept of effects bargaining at the time. The District never offered to bargain the effects of its decision. There was no evidence that there was insufficient time for effects bargaining between its decision and the intended implementation.

The Association points to the testimony of Suzanne Anderson (Anderson), an Association officer and bargaining team member, as the clearest evidence of a request for effects bargaining. Anderson testified in part that she lost sick leave and retirement benefits due to the reduction in the 2010 Winter Intersession. Her testimony was:

Q Okay, when you spoke - - Did you ever identify those issues to the District, that you wanted to negotiate those items?

A Myself or on behalf of everybody?

Q On behalf of the Association, as a member of the Faculty Association?

A Yeah, Dr. Jacobs and I had many heated conversations about all of this.

Q In negotiations?

A Yes.

Q Okay, and - -

A But that was after the fact, because we didn’t really, we weren’t informed of any of this.

Dr. Jacqueline Jacobs (Jacobs) is the District’s vice-president for instruction. She is not the District’s lead negotiator. Subpoenaed to testify by the Association, Jacobs did not testify that she received a request for effects bargaining or had the authority to accept such a request.

ISSUE

Did the District unlawfully fail to bargain the effects of its decision to reduce the Winter Intersession?

CONCLUSIONS OF LAW

In determining whether a party has violated EERA section 3543.5(c), PERB utilizes either the “per se” or “totality of the conduct” test, depending on the specific conduct involved and the effect of such conduct on the negotiating process. (*Stockton Unified School District* (1980) PERB Decision No. 143.) Unilateral changes are considered “per se” violations if certain criteria are met. Those criteria are: (1) the employer implemented a change in policy concerning a matter within the scope of representation, and (2) the change was implemented before the employer notified the exclusive representative and gave it an opportunity to request negotiations. (*Walnut Valley Unified School District* (1981) PERB Decision No. 160; *Grant Joint Union High School District* (1982) PERB Decision No. 196.)

PERB has long held that a community college district’s decision to cancel classes, including an entire session of classes, is outside of the scope of representation under EERA. (*Mt. San Antonio Community College District* (1983) PERB Decision No. 297.) A district may still have a duty to bargain the effects of such a decision, however. (*Ibid.*)

The law governing effects bargaining was recently summarized in *County of Riverside* (2010) PERB Decision No. 2097-M (*Riverside*), in which PERB stated:

Where a change is made to a matter that is not within the scope of representation, or where the right to demand bargaining over the decision to change has been waived by the employee organization, the employer is obligated to provide notice and an opportunity to bargain over the negotiable effects of the decision, but not the decision itself. (*Sylvan Union Elementary School District* (1992) PERB Decision No. 919 (*Sylvan*), citing *Mt. Diablo Unified School District* (1984) PERB Decision No. 373b; *Newman-Crows Landing Unified School District* (1982) PERB Decision No. 223 (*Newman-Crows Landing*)).

PERB further stated:

In dealing with effects bargaining, the employee organization is entitled to reasonable notice and an opportunity to bargain over the negotiable effects of a non-negotiable decision. (*Trustees of the California State University* (2007) PERB Decision No. 1926-H; *Newman-Crows Landing*.) Failure by the employee organization to make a valid request to bargain the negotiable effects of the decision constitutes a waiver of the right to bargain regarding those effects. (*Ibid.*)

Moreover, where formal notice is not given, but the “[a]ssociation receives actual notice of a decision, the effects of which it believes to be negotiable, the employer’s ‘failure to give formal notice is of no legal import’” and the burden is on the employee organization to request bargaining. (*Sylvan*, citing *Regents of the University of California* (1987) PERB Decision No. 640-H (*Regents*)). Therefore, in order to make a prima facie case for violation of the duty to bargain in good faith over effects, the employee organization must demonstrate that it made a valid request to bargain the negotiable effects of the employer’s decision. (See *Sylvan*; *Regents*; *State of California (Department of Corrections)* (2006) PERB Decision No. 1848-S.)

In the present case, the Association had no advance notice of the District’s decision to cancel Winter Intersession classes, but it received actual notice at the Board of Trustees meeting where the decision was made. There is no evidence that there was insufficient time for effects bargaining between the decision in July 2009 and its intended implementation in January 2010.

The question in this case is whether the Association made a valid request for effects bargaining. In *Riverside, supra*, PERB stated:

A valid request to bargain need not consist of specific verbiage, “where there is a clear demand to meet and discuss a matter.” (*Calistoga Joint Unified School District* (1989) PERB Decision No. 744 (*Calistoga*); *Newman-Crows Landing*.) However, it must clearly identify negotiable areas of impact, and clearly indicate the employee organization’s desire to bargain over the effects of the decision as opposed to the decision itself. (*Sylvan*; *Allan Hancock Community College District* (1989) PERB Decision No. 768 (*Allan Hancock CCD*); *Newman-Crows Landing*.) A request that clearly demands to meet and discuss a

matter, but fails to indicate a desire to bargain effects as opposed to the decision itself, is not valid.

In the present case, the Association points to Anderson's testimony as the clearest evidence of a request for effects bargaining.

I do not find Anderson's testimony to be that clear, however. It is not clear what Anderson said to Jacobs, when she said it, or what authority Jacobs might have had to act on it. The Association has not met its burden of proving a valid request for effects bargaining. The case must therefore be dismissed.

PROPOSED ORDER

Based upon the foregoing findings of fact and conclusions of law and the entire record in this matter, the complaint and the underlying unfair practice charge in Case No.

LA-CE-5361-E, *Pasadena City College Faculty Association v. Pasadena Area Community College District*, are hereby DISMISSED.

Pursuant to California Code of Regulations, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the Public Employment Relations Board (PERB or Board) itself within 20 days of service of this Decision. The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95811-4124
(916) 322-8231
FAX: (916) 327-7960

In accordance with PERB regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. (Cal. Code Regs., tit. 8, § 32300.)

A document is considered "filed" when actually received during a regular PERB business day. (Cal. Code Regs., tit. 8, §§ 32135, subd. (a) and 32130; see also Gov. Code, § 11020, subd. (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 PERB 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. (Cal. Code Regs., tit. 8, § 32135, subds. (b), (c) and (d); see also Cal. Code Regs., tit. 8, §§ 32090 and 32130.)

Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, §§ 32300, 32305, 32140, and 32135, subd. (c).)

Thomas J. Allen
Administrative Law Judge