

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



SANTA MONICA COLLEGE FACULTY
ASSOCIATION,

Charging Party,

v.

SANTA MONICA COMMUNITY COLLEGE
DISTRICT,

Respondent.

Case No. LA-CE-5489-E

PERB Decision No. 2303

December 21, 2012

Appearances: Lawrence Rosenzweig, Attorney, for Santa Monica College Faculty Association; Fagen, Friedman & Fulfrost by Anna J. Miller, Attorney, for Santa Monica Community College District.

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

DECISION

DOWDIN CALVILLO, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Santa Monica Community College District (District) to the proposed decision (attached) of a PERB administrative law judge (ALJ) finding that the District violated the Educational Employment Relations Act (EERA)¹ by failing to provide relevant and necessary information to the Santa Monica College Faculty Association (Association) pertaining to a mandatory subject of bargaining. The ALJ determined that the District breached its duty to bargain in good faith when it refused to provide the Association with a list of part-time faculty who did not have a retirement election form in their file.

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

The Board has reviewed the proposed decision and the record in light of the District's exceptions and the relevant law. Based on this review, we find the ALJ's 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.²

DISCUSSION

In its exceptions, the District raises the same arguments it presented to the ALJ in support of its position that the information requested by the Association was not necessary or relevant to the Association's right to represent bargaining unit employees and, on that basis, objects to the remedy ordered.³ We agree with the ALJ's analysis of the merits of this case and, therefore, find the remedy appropriate.

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in the case, it is found that the Santa Monica Community College District (District) violated the Educational Employment Relations Act (EERA), Government Code section 3540 et seq. The District violated EERA by refusing to provide information that is relevant and necessary to the Santa Monica College Faculty Association's (Association) right to represent bargaining unit employees.

² However, we do not adopt the sentence on page 8 of the ALJ's proposed decision, which reads: "There is no evidence the Association is seeking to influence the operation of the [California State Teachers' Retirement System] retirement system or to represent members before CalSTRS." Because the information is relevant and necessary to the discharge of the Association's representational duties under EERA, the fact that a union may or may not also use that information to represent employees in other forums does not negate its right to obtain the information to which it is entitled under EERA.

³ The District does not except to the ALJ's determination that it waived its prior claims that the requested information was protected by the attorney-client and work product privileges and that it failed to establish that the release of the information would violate employee privacy rights. An exception not specifically urged shall be waived. (PERB Reg. 32300(c); PERB Regs. are codified at Cal. Code Regs., tit. 8, § 31001 et seq.)

Pursuant to section 3541.5(c) of the Government Code, it hereby is ORDERED that the District and its representatives shall:

A. CEASE AND DESIST FROM:

1. Refusing to provide information to the Association that is relevant and necessary to its representational duties.

2. Denying bargaining unit employees their right to be represented by the Association.

3. Denying the Association the right to represent bargaining unit employees.

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

1. Provide the Association with an updated list of part-time faculty who do not have a retirement election form in their personnel file.

2. Within ten (10) workdays of the service of a final decision in this matter, post at all work locations where notices to employees in the District customarily are posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the District, indicating that it will comply with the terms of this 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.

3. Written notification of the actions taken to comply with this Order shall be made to the General Counsel of the Public Employment Relations Board, or the General Counsel's designee. The District shall provide reports, in writing, as directed by the General

Counsel or his/her designee. All reports regarding compliance with this Order shall be concurrently served on the Association.

Chair Martinez and Member Huguenin joined in this Decision.

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



After a hearing in *Santa Monica College Faculty Association v. Santa Monica Community College District*, Unfair Practice Case No. LA-CE-5489-E, in which all parties had the right to participate, it has been found that the Santa Monica Community College District violated the Educational Employment Relations Act (EERA), Government Code section 3540 et seq.

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

A. CEASE AND DESIST FROM:

1. Refusing to provide information to the Santa Monica College Faculty Association (Association) that is relevant and necessary to its representational duties.
2. Denying bargaining unit employees their right to be represented by the Association.
3. Denying the Association the right to represent bargaining unit employees.

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

Provide the Association with an updated list of part-time faculty who do not have a retirement election form in their personnel file.

Dated: _____

SANTA MONICA COMMUNITY COLLEGE
DISTRICT

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.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD



SANTA MONICA COLLEGE FACULTY
ASSOCIATION,

Charging Party,

v.

SANTA MONICA COMMUNITY COLLEGE
DISTRICT,

Respondent.

UNFAIR PRACTICE
CASE NO. LA-CE-5489-E

PROPOSED DECISION
(June 27, 2012)

Appearances: Lawrence Rosenzweig, Attorney, for Santa Monica College Faculty Association; Fagen, Friedman & Fulfrost by Howard A. Friedman, Attorney, for Santa Monica Community College District.

Before Robin W. Wesley, Administrative Law Judge.

PROCEDURAL HISTORY

In this case, a union alleges that an employer refused to provide information that is relevant and necessary to its right to represent its members. The employer denies committing any unfair practices.

On September 14, 2010, the Santa Monica College Faculty Association (Association), filed an unfair practice charge against the Santa Monica Community College District (District).

On April 18, 2011, the Office of the General Counsel of the Public Employment Relations Board (PERB or Board) issued a complaint that alleged the District breached its duty to bargain in good faith when it refused to provide the requested information. By this conduct, the District is alleged to have violated the Educational Employment Relations Act (EERA), section 3543.5(a), (b) and (c).¹

¹ EERA is codified at Government Code section 3540 et seq. Unless otherwise noted, all statutory references are to the Government Code.

The District answered the complaint on May 12, 2011, denying the substantive allegations and asserting affirmative defenses.

The parties met with a Board agent in June 2011 to discuss settlement, but the matter was not resolved.

A formal hearing was held in PERB's Glendale Office on January 26, 2012. On February 17, 2012, the case was transferred to the undersigned for proposed decision pursuant to PERB Regulation 32168(b).² Following the filing of briefs, the case was submitted for decision on March 16, 2012.

FINDINGS OF FACT

The District is a public school employer within the meaning of EERA section 3540.1(k). The Association is the exclusive representative of full-time and part-time faculty instructors at Santa Monica College pursuant to the EERA.

Mitra Moassessi (Moassessi) is a faculty member and serves as President of the Association. Marcia Wade (Wade) is the District's Vice President for Human Resources.

The Association and the District are parties to a collective bargaining agreement (CBA) effective August 21, 2007 through August 23, 2010. Article 25 of the CBA addresses retirement benefits for part-time faculty, stating, in part:

25.1 For part-time faculty who do not belong to a public retirement system, enrollment in one of the following retirement programs is mandatory.

25.1.1 STRS (State Teacher's Retirement System) Defined Benefits plan: . . .

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

25.1.2 STRS (State Teacher's Retirement System) Cash Balance Plan: . . .

25.1.3 LARISA: The District sponsored alternative retirement plan. . . .

25.2 Since a part-time faculty is subject to OBRA 90 (Omnibus Budget Reconciliation Act of 1990) upon employment, a new part-time faculty shall select among the retirement plan options prior to or upon the beginning date of employment.

25.2.1 After the initial selection, the part-time faculty may make a change to another available plan subject to existing statute [*sic*] and government regulations. The office of Human Resources will provide the part-time faculty member with information as to each of the retirement options.

(Emphasis added.)

The provisions of the State Teachers Retirement Law are contained in the California Education Code.³ Education Code section 22455.5(b) provides:

Employers shall make available criteria for membership, including optional membership, in a timely manner to all persons employed to perform creditable service subject to coverage by the Defined Benefit Program, and shall inform part-time and substitute employees, within 30 days of the date of hire, or by March 1, 1995, whichever is later, that they may elect membership in the plan's Defined Benefit Program at any time while employed. Written acknowledgment by the employee shall be maintained in employer files on a form provided by this system.

(Emphasis added.)

During a 2009-2010 internal audit, the District discovered that some part-time faculty did not have the California State Teachers' Retirement System (CalSTRS) retirement election

³ Education Code section 22000 et seq.

form in their personnel file. The District subsequently contacted CalSTRS and CalSTRS initiated an audit pursuant to Education Code section 22206.⁴

In July 2010, the District Office of Human Resources sent a letter to certain part-time faculty. The letter stated, in part:

The Office of Human Resources has conducted an audit of the personnel records for all adjunct faculty members. Our records indicate that you are a member of an alternative retirement system and have NOT completed a CalSTRS Retirement System Election Form (ES 350) declining membership in the CalSTRS Defined Benefit Program.

At this time you are a member of STRS Cash Balance. It is critical to our records that you complete the enclosed CalSTRS Retirement System Election Form (ES 350) to acknowledge that at the time of hire you declined membership to the defined benefit program and elected membership to an alternative plan.

(Emphasis in original.)

Thereafter, Moassessi began receiving phone calls from part-time faculty, reporting that when they were hired they were not informed of the option to enroll in the STRS Defined Benefit plan. Moassessi contacted the Human Resources office and requested a list of the individuals who received the letter. The District provided the list via email two days later.

On August 23, 2010, Moassessi sent an email to Wade checking on the status of the CalSTRS audit. Wade replied on August 24, 2010, stating the District did not yet have the results of the CalSTRS audit. Wade continued:

We did, however, conduct an internal audit of all part time faculty personnel files in the HR Office. All active part-time faculty members for Spring 2010 and Fall 2010, who did not have

⁴ Education Code section 22206(a) provides:

As often as the [State Retirement] board determines necessary, it may audit or cause to be audited the records of any public agency.

proper documentation in their files, will be contacted by HR personnel for completion of the CalSTRS election form. . . .

Moassessi and Wade exchanged several more email messages on the subject. On September 2, 2010, Moassessi wrote:

The Faculty Association hereby requests an updated list of the part time faculty who, based on the HR audit, do not have a CalSTRS Retirement System Election Form (ES 350) in their file. . . .

Wade replied on September 2, 2010:

The list of faculty members was assembled for legal counsel and is protected by Attorney-Client and Work Product Privileges. Therefore, I am unable to provide you with a copy of the list at this time. The College is conducting a thorough review of this matter to ensure a just and legally compliant resolution. In addition we are cooperating with STRS as it conducts an audit of District records.

The Association filed this unfair practice charge on September 14, 2010.

On January 12, 2012, just prior to the hearing in this case, the District sent a letter to certain part-time faculty advising them to complete the CalSTRS retirement election form.

The letter concluded:

Failure to return the Permissive Election Form (ES350) will result in future assignments not being assigned to you, commencing with the Spring 2012 semester.^[5]

⁵ The District asserts this letter is inadmissible because it was issued nearly a year and a half after the Association filed its charge. Even if admissible, the District contends it does not demonstrate the requested information is relevant and necessary because Article 6.7 of the parties' CBA authorizes the District to determine whether a part-time faculty member will receive an assignment for a particular semester. The ALJ presiding at the hearing admitted the letter into evidence, and I find the letter relevant.

ISSUE

Did the District breach its duty to bargain in good faith when it refused to provide the requested information?

CONCLUSIONS OF LAW

An exclusive representative is entitled to all information that is relevant and necessary to the discharge of its duty of representation. (*Stockton Unified School District* (1980) PERB Decision No. 143). PERB uses a liberal standard, similar to a discovery-type standard, to determine the relevance of the requested information. (*Trustees of the California State University* (1987) PERB Decision No. 613-H.) Information pertaining to mandatory subjects of bargaining is so intrinsic to the employer-employee relationship that it is presumptively relevant. (*Ventura County Community College District* (1999) PERB Decision No. 1340.) Failure to provide such information is a per se violation of the duty to bargain in good faith.

If the information does not pertain to a mandatory subject of bargaining, it is not deemed presumptively relevant, and the union has the burden of demonstrating that the information is otherwise relevant and necessary to its right to represent its members. (*State of California (Departments of Personnel Administration and Transportation)* (1997) PERB Decision No. 1227-S.)

An employer can refuse to release information that is otherwise relevant and necessary if it has a valid defense, such as legal privileges, or the release will compromise employee privacy rights. (*Los Rios Community College District* (1988) PERB Decision No. 670; *Modesto City Schools and High School District* (1985) PERB Decision No. 479.) The employer cannot, however, simply ignore a union's request for information. (*State of*

California (Departments of Personnel Administration and Transportation), supra, PERB Decision No. 1227-S.)

The Association contends the requested list of part-time faculty is relevant and necessary, claiming that an accurate list would enable it to advise its members about available benefits and allow the Association to craft bargaining proposals. The Association notes the District provided a preliminary list of affected employees, and disputes any legal privileges preclude release of an updated list.

The District argues the list is not relevant and necessary to the Association's duty of representation as CalSTRS has the sole authority to determine whether an employer has adequately administered the program. Furthermore, the District asserts the Association's duty of fair representation does not extend to information pertaining to outside forums such as CalSTRS. The District also raises defenses that include attorney-client and attorney work product privileges, and employee privacy rights.

The Association requested a list of part-time faculty who did not have a retirement election form in their file. The District had previously informed the Association that it had completed an internal audit and determined which employees were missing the form. The information is related to an employee's option to select retirement plans as set forth in the parties' CBA. The Board has concluded that retirement benefits for current employees is a mandatory subject of bargaining. (*County of San Joaquin* (2003) PERB Decision No. 1570-M; *Temple City Unified School District* (1989) PERB Decision No. 782.) Thus, it is clear the information pertaining to retirement benefit options for current employees is presumptively relevant, and is also necessary to the Association's representation of its members.

The District argues the information is not relevant and necessary because CalSTRS controls the administration of the retirement program and because the Association has no duty under EERA to represent members before CalSTRS. The District's claims are without merit. The information is relevant to the matter of retirement benefit options for current employees. There is no evidence the Association is seeking to influence the operation of the CalSTRS retirement system or to represent members before CalSTRS. Thus, the information is relevant and necessary to the Association's right to represent bargaining unit employees.

The District raised several defenses to its refusal to provide the requested information, including attorney-client and attorney work product privileges.⁶ The attorney-client privilege provides that a client has a privilege to refuse to disclose confidential communications between the client and his or her lawyer.⁷ The attorney work product privilege affords the privacy necessary to permit an attorney to prepare cases for trial, allowing for the investigation of both favorable and unfavorable aspects of the case, and prevents opposing counsel from taking unfair advantage of their adversary's efforts.⁸

The party claiming the privilege has the burden to provide the preliminary facts necessary to show the information sought to be disclosed falls within the privilege. (*Wellpoint Health Networks v. Superior Court* (1997) 59 Cal.App.4th 110, 123.) Documents prepared independently by a party do not become privileged communications or work product simply

⁶ At the time the Association requested an updated list, the District denied the request asserting attorney-client and work product privileges. In its post-hearing brief, the District addresses only employee privacy rights.

⁷ Evidence Code section 954.

⁸ Code of Civil Procedure section 2018.030.

because they are turned over to counsel. (*Id.* at p. 119.) Disclosure of a significant part of a privileged communication by the client or attorney, without coercion, waives the attorney-client privilege. (Evidence Code, § 912; *OXY Resources California LLC v. Superior Court* (2004) 115 Cal.App.4th 874, 888.) Further, the work product privilege may be waived by conduct that is inconsistent with such claim. (*BP Alaska Exploration, Inc. v. Superior Court* (1988) 199 Cal.App.3d 1240, 1261.)

When the Association first learned the District had asked certain part-time faculty to submit the retirement election form, it requested a list of the affected employees. The District provided the list within two days. After the District informed the Association it had completed its internal audit, the Association requested an updated list. At that time, the District's Human Resources Office claimed attorney-client and work product privileges. Other than this initial statement, the District has made no assertion or showing that the information falls within the stated privileges. The District does not cite the privileges in its post-hearing brief, and makes no argument that privileges excuse it from providing the requested information. Further, the District's release of a preliminary list of affected part-time faculty demonstrates that the District has waived any privilege.

The District also argues the information sought by the Association "potentially invades individuals' privacy rights." The District contends that because employees have options through CalSTRS to address their retirement benefit concerns, distribution of the list would violate employee privacy rights because the Association has no authority to address these concerns.

Personal privacy rights may limit requests for confidential information. (*Modesto City Schools and High School District, supra*, PERB Decision No. 479.) Where a union has established that the requested information is relevant and necessary, the burden is on the party holding the information to show that disclosure would compromise the right of privacy. (*Id.* at p. 10; *Golden Empire Transit District* (2004) PERB Decision No. 1704-M.) The Board has stated, “The exclusive representative’s ability to communicate with its members is fundamental to its role as bargaining representative. Disclosure is mandated absent a compelling need for privacy.” (*Golden Empire Transit District, supra*, PERB Decision No. 1704-M, p. 8.)

The District claims that release of the names of the part-time faculty who do not have the retirement election form in their personnel files “potentially invades” their privacy rights. The District’s asserts that because there are avenues through CalSTRS for employees to address retirement concerns, release of the names to the Association would infringe on their privacy rights.

The Association seeks the information to determine whether the employees have been fully informed of their retirement benefit options. The disclosure of the names of the affected employees would allow the Association to fulfill its fundamental role to communicate with and assist the part-time faculty in obtaining benefits under the contract. The District has not demonstrated how the release of the names would infringe on the employees’ privacy rights, especially in light of the District’s earlier release of the preliminary list of employees.

REMEDY

PERB has broad remedial powers to effectuate the purposes of EERA. EERA section 3541.5(c) provides:

The board shall have the power to issue a decision and order directing an offending party to cease and desist from the unfair practice and to take such affirmative action, including but not limited to the reinstatement of employees with or without back pay, as will effectuate the policies of this chapter.

In this case, the District has been found to have violated EERA section 3543.5(c) by refusing to provide information that is relevant and necessary to the Association's duty to represent bargaining unit employees. By the same conduct, the District has interfered with employee rights to be represented by the Association, and interfered with the Association's right to represent bargaining unit employees, in violation of EERA section 3543.5(a) and (b). It is appropriate therefore to order the District to cease and desist from this conduct. The District is also ordered to provide the Association with an updated list of part-time faculty who do not have a retirement election form in their personnel file. Finally, it is appropriate that the District be required to post a notice that the District violated the EERA when it failed to provide the requested information. (*Placerville Union School District (1978) PERB Decision No. 69.*)

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in the case, it is found that the Santa Monica Community College District (District) violated the Educational Employment Relations Act (EERA), Government Code section 3540 et seq. The District violated the EERA by refusing to provide information that is relevant and necessary to the Santa Monica College Faculty Association's (Association) right to represent bargaining unit employees.

Pursuant to section 3541.5(c) of the Government Code, it hereby is ORDERED that the District and its representatives shall:

A. CEASE AND DESIST FROM:

1. Refusing to provide information to the Association that is relevant and necessary to its representational duties.

2. Denying bargaining unit employees their right to be represented by the Association.

3. Denying the Association the right to represent bargaining unit employees.

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

1. Provide the Association an updated list of part-time faculty who do not have a retirement election form in their personnel file.

2. Within ten (10) workdays of the service of a final decision in this matter, post at all work locations where notices to employees in the District customarily are posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the District, indicating that it will comply with the terms of this 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.

3. Written notification of the actions taken to comply with this Order shall be made to the General Counsel of the Public Employment Relations Board (PERB or Board), or the General Counsel's designee. The District shall provide reports, in writing, as directed

by the General Counsel or his/her designee. All reports regarding compliance with this Order shall be concurrently served on the Association.

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 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 California Code of Regulations, title 8, section 32135, subdivision (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).)