

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



TRUSTEES OF THE CALIFORNIA STATE
UNIVERSITY,

, Employer,

and

CALIFORNIA FACULTY ASSOCIATION,

June 9, 2005
Exclusive Representative.

Case No. LA-UM-738-H

Administrative Appeal

PERB Order No. Ad-347-H

Appearances: Rothner, Segall & Greenstone by Bernhard Rohrbacher, Attorney, for California Faculty Association; Schwartz, Steinsapir, Dohrmann & Sommers by Margo A. Feinberg, Attorney, for California Alliance of Academic Student Employees/International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO.

Before Duncan, Chairman; Whitehead and Shek, Members.

DECISION

DUNCAN, Chairman: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the California Faculty Association (CFA) of the Regional Director's dismissal (attached) of its unit modification petition seeking inclusion of the Instructional Student Assistant (ISA) classification in its instructional faculty unit (Unit 3) at California State University. The petition here seeks to add the classification of ISA to Unit 3 Faculty of the California State University (Unit 3). Opposition to the petition was filed by the Trustees of the California State University (CSU) and the California Alliance of Academic Student Employees/International Union, United Aerospace and Agricultural Implement Workers of America, AFL-CIO (UAW).

UAW alleges that the CFA petition is barred by the Higher Education Employer-Employee Relations Act (HEERA).¹ UAW states that under HEERA section 3577(b)(2) a petition should be dismissed if "[w]ithin the previous 12 months, either an employee organization other than petitioner has been lawfully . . . described in the petition, or a majority of the votes cast in a representation election held under subdivision (a) were cast for 'no representation.'" UAW was certified to represent the unit that includes the ISAs in PERB Case No. LA-RR-1099-H on August 23, 2004.

The Board has reviewed the entire record in this matter, including, but not limited to, the unit modification petition filed by CFA, the responses to the petition from CSU and UAW, the Regional Director's Order to Show Cause, responses to the order, the Regional Director's dismissal letter, CFA's appeal, and the response to the appeal from UAW. We find the dismissal to be free of prejudicial error and adopt it as the decision of the Board itself.

ORDER

The unit modification petition in Case No. LA-UM-738-H is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Whitehead and Shek joined in this Decision.

¹HEERA is codified at Government Code section 3560, et seq.

PUBLIC EMPLOYMENT RELATIONS BOARD



Sacramento Regional Office
1031 18th Street
Sacramento, CA 95814-4174
Telephone: (916) 327-8383
Fax: (916) 327-6377



December 3, 2004

Bernhard Rohrbacher, Attorney
Rothner, Segall & Greenstone
510 South Marengo Avenue
Pasadena, CA 91101-3115

Re: California State University
Case No. LA-UM-738-H

Dear Mr. Rohrbacher:

The above-referenced unit modification petition was filed with the Public Employment Relations Board (PERB or Board) on October 19, 2004, by California Faculty Association (CFA). The petition seeks to add the classification of Instructional Student Assistant (ISA) to Unit 3 - Faculty of the California State University (CSU).

By letter dated October 26, 2004 (copy enclosed), CFA was advised that its petition was subject to dismissal, for reasons summarized as follows:

The petition in LA-UM-738-H states on its face that it concerns the proposed addition of unrepresented classifications or positions to Unit 3. However, the information provided with the petition contradicts the assertion that employees in the Instructional Student Assistant classification are unrepresented. Both PERB records and the information provided by CFA demonstrate that the Instructional Student Assistant classification is not unrepresented, but rather is included in the UAW-represented unit. The petition must be dismissed as improperly filed on this basis alone. Further, as discussed above, the instant petition seeks to re-litigate issues raised and decided in PERB Case No. LA-UM-723-H.

CFA was further afforded an opportunity to show cause why its petition should not be dismissed, and a timely response was received from CFA. Both CSU and California Alliance of Academic Student Employees/UAW (UAW) submitted responses to the CFA submission.

CFA's Position

CFA contends that neither of the grounds for dismissal summarized above withstands scrutiny. First, for two reasons, CFA asserts that CSU's voluntary recognition of the UAW as the

representative of the Instructional Student Assistant classification, which CFA contends was "neither sought from or certified by the Board," does not block its petition.

CFA relies initially on Santa Clarita Community College District ("College of the Canyons") (2003) PERB Decision No. 1506 (Santa Clarita). In Santa Clarita, the Board held that the employer violated the Educational Employment Relations Act (EERA)¹ when it entered into a unit modification agreement that added unrepresented part-time faculty to an established unit while on notice that a different union was seeking to represent the part-time faculty. In that case, the exclusive representative with which the employer entered into an agreement had not demonstrated any support among the part-time faculty employees,² and the competing union at least claimed to have support from approximately twenty percent of the employees in question.³

In the present case, CFA argues that CSU was on notice, at the time of its agreement to recognize UAW, that CFA was seeking in PERB Case No. LA-UM-723-H to include student employees "similar to ISAs" in Unit 3. Thus, according to CFA, it would be consistent with the holdings of Santa Clarita and Victor Valley Community College District (2003) PERB Decision No. 1543 to find here that CFA's unit modification petition is blocked by the voluntary agreement of CSU to recognize UAW as the exclusive representative of the ISAs.

The second prong of this argument cites Article 1.7 of the collective bargaining agreement between CFA and CSU. The cited provision requires CSU to notify CFA in advance of new classifications related to bargaining unit classifications in Unit 3. CFA may then request a meeting to discuss whether the new classification is appropriate for Unit 3. If the parties disagree, their agreement further provides that either party may seek a unit modification pursuant to procedures established by PERB. CFA contends that dismissal of its instant petition would "eviscerate CFA's rights" under the collective bargaining agreement and "reduce Article 1.7 to empty verbiage." CFA opines that dismissal of this case would allow CSU, in the future, to avoid its obligations under the agreement by voluntarily recognizing another union as the representative of newly-established classifications, eroding the rights negotiated by CFA.

Turning to the second aspect of the grounds for dismissal addressed in the October 26 letter, CFA disputes the conclusion that "the instant petition seeks to re-litigate issues raised and decided in PERB Case No. LA-UM-723-H." CFA asserts the earlier case addressed only two issues: (1) the scope of the exclusion agreed upon by the parties in 1991 and whether the

¹ EERA is codified at Government Code section 3540 et seq. The text of the EERA and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

² In fact, that union withdrew a unit modification petition filed with PERB after being informed that it would have to demonstrate support of at least a majority of the affected employees.

³ The union seeking to represent part-time faculty in a separate unit subsequently filed a representation petition with PERB that was accompanied by proof of support from a majority of the employees in the proposed unit.

exclusion was limited to student employees who are not statutory employees; and (2) whether a degree requirement of instructional employment must exist in order for a student employee to be excluded from Unit 3. CFA contends that neither of these issues need be revisited in the instant case in order to determine whether ISAs should be included in Unit 3.

CSU's Position

CSU opposes the CFA petition, noting that there are no student employee classifications presently included in Unit 3, and supporting the view that the ISA classification is already included in the unit represented by UAW.

CSU also argues that, in PERB Case No. LA-RR-1099-H, filed in January 2004, UAW petitioned for and demonstrated majority employee support in a bargaining unit including student employees in various student assistant classifications who performed "teaching, grading and tutoring." CSU notes that CFA did not intervene on that petition nor file any competing petition seeking to represent employees in student assistant classifications. CSU's argument continues as follows:

Contrary to CFA's representations, it was necessary for the CSU to create the "new" ISA classification to properly identify which student-employees should be included in the UAW unit. This was critical since the UAW petition included, in addition to Teaching Associates, those student assistants who perform "teaching, grading or tutoring," and not all student employees in the various student assistant classifications perform these duties. The fundamental work the UAW petitioned for, and that these student employees are performing, has not changed. The ISA classification was thus created in order to segregate out the student employees that performed these "teaching, grading or tutoring" [duties] for a majority of their work time from other student workers that do not and are therefore not in the certified UAW unit.

CSU also disputes CFA's claim that dismissal of the CFA petition would undermine or eviscerate Article 1.7 of the CSU/CFA agreement. CSU argues that the contract provision does not require CSU to provide notice to and bargain with CFA "over the establishment of classifications for work that has been certified to be in other units."

CSU also contends that CFA's reliance on Santa Clarita is misplaced, as there was no competing petition for the student employees in question when the unit and recognition agreement with UAW was reached.

UAW's Position

UAW likewise argues that the holdings of Santa Clarita are inapplicable to this matter, as UAW obtained certification for its unit through PERB processes and not by external voluntary recognition or an amendment to a collective bargaining agreement while a competing union's representation claim was known. Rather, UAW filed a petition on January 7, 2004, seeking to represent, inter alia, student assistants who teach, grade or tutor; demonstrated majority support in the proposed unit; participated in various settlement conferences; reached agreement on an appropriate unit with CSU; and, in August 2004, obtained PERB certification in accordance with PERB Regulation 51096⁴ and Government Code section 3574.

UAW contends that CFA is attempting, through the instant unit modification petition, what it did not do in a timely manner with respect to LA-RR-1099-H. That is, CFA is attempting to file a competing claim of representation concerning student employees who teach, grade or tutor, but doing so long after a timely claim could be filed and doing so without any demonstrated proof of employee support.

In sum, UAW urges dismissal of the CFA petition.

Discussion

As discussed in my earlier letter, and as referenced by both CSU and UAW in their recent responses, PERB records confirm that the California Alliance of Academic Student Employees/UAW was certified in PERB Case No. LA-RR-1099-H, on August 23, 2004, as the exclusive representative of an Academic Student Employees unit. The Certification of Exclusive Representative issued by PERB in that case (see enclosed) described the unit as including the classifications of Teaching Associate, Instructional Student Assistant and Graduate Assistant.

While UAW's petition in LA-RR-1099-H did not list the classification of Instructional Student Assistant, the petition did seek, inter alia, recognition in a unit including employees in various student assistant classifications, where the employees perform teaching, grading or tutoring duties. The subsequent agreement between UAW and CSU, in pertinent part, stated:

The CSU shall create the new classification "Instructional Student Assistant." ... A Student Assistant shall be classified as an Instructional Student Assistant in an individual department or equivalent organizational unit if he/she performs grading, tutoring or instruction for a majority of his/her work hours during the duration of the academic term in that individual department or equivalent organizational unit on a CSU campus.

⁴ PERB's Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

Thus, while the ISA classification is new, the work performed by incumbents in the classification is identical to the work performed by employees covered by the UAW petition.

The PERB certification of UAW as exclusive representative was issued following issuance of an administrative determination that UAW had demonstrated proof of majority support among employees included in the agreed-upon unit. As observed by UAW and CSU, at no time during the pendency of LA-RR-1099-H did CFA file a competing claim of representation. The earlier petition filed by CFA in Case No. LA-UM-723-H, even if construed to affect student assistants who perform teaching, grading and/or tutoring duties, was not a petition to add unrepresented positions to Unit 3 and was not filed with proof of employee support.⁵

Under these facts, CSU and UAW argue persuasively that Santa Clarita does not support CFA's position. Rather, the holdings of Santa Clarita would be turned upside down if used to uphold CFA's desired outcome. In Santa Clarita, an employer and incumbent union agreed to add previously unrepresented positions to a unit, without any evidence of employee support and despite knowledge that a competing union claimed the support of at least twenty percent of the affected employees. In this case, CFA seeks, without any evidence of employee support and despite demonstrated proof of majority support for UAW, and despite a PERB certification issued two months prior to its petition, to add employees to Unit 3.

CFA's argument that dismissal of its petition would "eviscerate" its rights under Article 1.7 of the collective bargaining agreement is not persuasive. As previously discussed, the creation of the "new" classification at issue here was a result of the agreement on a unit by CSU and UAW to include certain employees then classified as student assistants and an agreement to distinguish those student employees in the unit from those who are not by creating the Instructional Student Assistant classification. Moreover, the agreement between CFA and CSU regarding bargaining obligations vis-à-vis new classifications does not and cannot change PERB's authority to determine appropriate units or decide unit modification issues. PERB does not enforce agreements between parties (Government Code section 3563.2(b)) and existing agreements regarding unit placement are not binding on PERB where a unit placement dispute has arisen and one party to an agreement brings the dispute to PERB for resolution pursuant to the Board's unit modification procedures. It is PERB's procedures that are controlling, not the parties' agreement. (Hemet Unified School District (1990) PERB Decision No. 820.)

The final CFA argument to be considered concerns whether the instant petition seeks to re-litigate issues previously considered and decided in PERB Case No. LA-UM-723-H. CFA itself posits somewhat contradictory arguments in this regard. On the one hand, CFA argues

⁵ A petition to add unrepresented classifications or positions to an established unit must be filed under PERB Regulation 32781(a)(1) and may be filed only by an exclusive representative. However, the petition in LA-UM-723-H was filed jointly by CFA and CSU and asked PERB to clarify the existing unit description pursuant to PERB Regulation 32781(b)(2). Further, the petition did not otherwise express the desire of the filing parties to add student assistants to Unit 3.

that CSU's recognition of UAW should not bar its petition because CSU was aware at the time that "CFA was seeking to represent ISAs" because CFA sought, via LA-UM-723-H, inclusion in Unit 3 of "student employees similar to ISAs." However, on the following pages of its November 8, 2004 letter, CFA contends that the issues raised and decided in that earlier case are not at issue in the present case.

While the issues in these two cases (LA-UM-723-H and LA-UM-738-H) can be distinguished, there is still an overlap that CFA's protestations do not overcome. The issue in LA-UM-723-H was described by the parties as concerning the need for clarification of the inclusion or exclusion of student employees engaged in instructional activities. Though most of the focus in the case was on CSU's use of the Teaching Associate classification, the issue described was also applicable to employees then classified in student assistant classifications who performed teaching, grading and/or tutoring duties. Thus, CFA is incorrect when it argues that the issues decided in LA-UM-723-H are wholly distinguished from that in the present case.

Conclusion

For the above reasons, as well as those set forth in my October 26, 2004 letter, the unit modification petition filed by CFA in PERB Case No. LA-UM-738-H is hereby DISMISSED.

Right of Appeal

An appeal of this decision to the Board itself may be made within ten (10) calendar days following the date of service of this decision. (Regulation 32360.) To be timely filed, the original and five (5) copies of any appeal must be filed with the Board itself at the following address:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street, Suite 200
Sacramento, CA 95814-4174
FAX: (916) 327-7960

A document is considered "filed" when actually received before the close of business (5 p.m.) on the last day set for filing. (Regulations 32135(a) and 32130.) A document is also considered "filed" when received by facsimile transmission before the close of business on the last day for filing together with a Facsimile Transmission Cover Sheet which meets the requirements of 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. (Regulation 32135(b), (c) and (d); see also Regulations 32090 and 32130.)

The appeal must state the specific issues of procedure, fact, law or rationale that are appealed and must state the grounds for the appeal (Regulation 32360(c)). An appeal will not automatically prevent the Board from proceeding in this case. A party seeking a stay of any

activity may file such a request with its administrative appeal, and must include all pertinent facts and justifications for the request (Regulation 32370).

If a timely appeal is filed, any other party may file with the Board an original and five (5) copies of a response to the appeal within ten (10) calendar days following the date of service of the appeal (Regulation 32375).

Service

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding and on the regional office. A "proof of service" must accompany each copy of a document served upon a party or filed with the Board itself (see Regulation 32140 for the required contents and a sample form). The document will be considered properly "served" when personally delivered or deposited in the first-class mail postage paid and properly addressed. A document filed by facsimile transmission may be concurrently served via facsimile transmission on all parties to the proceeding. (Regulation 32135(c).)

Extension of Time

A request for an extension of time in which to file an appeal or opposition to an appeal with the Board itself must be in writing and filed with the Board at the previously noted address. A request for an extension must be filed at least three calendar days before the expiration of the time required for filing the document. The request must indicate good cause for and, if known, the position of each other party regarding the extension, and shall be accompanied by proof of service of the request upon each party (Regulation 32132).

Sincerely,



Les Chisholm
Regional Director

Enclosures

cc: Sharyn Abernatha
Sam Strafacci
Margo A. Feinberg

PUBLIC EMPLOYMENT RELATIONS BOARD



Sacramento Regional Office
1031 18th Street
Sacramento, CA 95814-4174
Telephone: (916) 327-8383
Fax: (916) 327-6377



October 26, 2004

Bernhard Rohrbacher, Attorney
Rothner, Segall & Greenstone
510 South Marengo Avenue
Pasadena, CA 91101-3115

Re: Case No. LA-UM-738-H
California State University

Dear Mr. Rohrbacher:

The above-referenced unit modification petition was filed with the Public Employment Relations Board (PERB or Board) on October 19, 2004, by California Faculty Association (CFA). The petition seeks to add the classification of Instructional Student Assistant to Unit 3 - Faculty of the California State University (CSU).

The petition indicates on its face that it is filed pursuant to PERB Regulation 32781(a)(1).¹ That regulation section provides as follows:

(a) A recognized or certified employee organization may file with the regional office a petition for modification of its units:

(1) To add to the unit unrepresented classifications or positions[.]

In its petition, CFA indicates that the CSU and the United Auto Workers (UAW) reached agreement in PERB Case No. LA-RR-1099-H on an appropriate unit including the classification of Instructional Student Assistant, and CSU agreed to recognize UAW as the exclusive representative of the described new bargaining unit. According to PERB records, the California Alliance of Academic Student Employees/UAW has been recognized since August 23, 2004, as the exclusive representative of an Academic Student Employees unit.

The UAW petition in LA-RR-1099-H did not list the classification of Instructional Student Assistant, but the petition did seek, inter alia, recognition in a unit including certain Student Assistants. The subsequent agreement between UAW and CSU, in pertinent part, stated:

The CSU shall create the new classification "Instructional Student Assistant." ... A Student Assistant shall be classified as

¹ PERB's Regulations are codified at California Code of Regulations, title 8, section 31001 et seq. Copies may be purchased from PERB's Publications Coordinator, 1031 18th Street, Sacramento, CA 95814-4174, and the text is available at www.perb.ca.gov.

an Instructional Student Assistant in an individual department or equivalent organizational unit if he/she performs grading, tutoring or instruction for a majority of his/her work hours during the duration of the academic term in that individual department or equivalent organizational unit on a CSU campus.

CFA notes in its petition that the Instructional Student Assistant classification description specifies that employees in the classification perform teaching, grading or tutoring duties. Thus, argues CFA, the classification is properly included in Unit 3 as Unit 3 was established to encompass "all instructional faculty, full-time and part-time, tenured and non-tenured, including coaches and librarians."

Discussion

CFA's instant petition does not reference two earlier unit modification petitions that are related to the issue raised here. In March 1991, CSU and CFA filed a joint petition (PERB Case No. LA-UM-514-H) to exclude students from Unit 3, and PERB subsequently approved ~~modification of the unit to exclude:~~

Individuals serving in bargaining unit classifications who are students and whose employment is solely and exclusively dependent upon their status as degree seeking graduate students in the department in which they are employed are involved with the University primarily as students rather than as employees.

In February 2004, CSU and CFA again filed a joint unit modification petition (PERB Case No. LA-UM-723-H), seeking clarification of the Order issued in LA-UM-514-H. That petition was filed subsequent to the filing of UAW's petition in LA-RR-1099-H which, as noted above, sought, inter alia, inclusion of certain positions then classified as Student Assistants that were later designated, pursuant to the agreement between UAW and CSU, to be classified instead as Instructional Student Assistants.

In LA-UM-723-H, the gravamen of CFA's argument was that CSU was interpreting the scope of the Order in LA-UM-514-H too broadly and thus classifying instructional positions outside Unit 3 that were and are properly included in the unit. The arguments made by CFA in the instant petition are consonant with that position. However, CFA's position was not upheld in that case and CSU's interpretation of the earlier modification of Unit 3 was adopted. (Trustees of the California State University (2004) PERB Order No. Ad-342-H.²)

² Notice is taken that CFA has filed a request for judicial review of the Board's decision, pursuant to PERB Regulation 32500.

Conclusion

The petition in LA-UM-738-H states on its face that it concerns the proposed addition of unrepresented classifications or positions to Unit 3. However, the information provided with the petition contradicts the assertion that employees in the Instructional Student Assistant classification are unrepresented. Both PERB records and the information provided by CFA demonstrate that the Instructional Student Assistant classification is not unrepresented, but rather is included in the UAW-represented unit. The petition must be dismissed as improperly filed on this basis alone. Further, as discussed above, the instant petition seeks to re-litigate issues raised and decided in PERB Case No. LA-UM-723-H.

In light of the above, CFA is afforded this opportunity to SHOW CAUSE as to why its unit modification petition in Case No. LA-UM-738-H should not be dismissed. Factual assertions must be supported by declarations under penalty of perjury by witnesses with personal knowledge and should indicate that the witness, if called, could competently testify about the facts asserted. If the facts asserted are reliant on a writing, the writing must be attached to the declaration and authenticated therein. Legal argument and supporting materials must be filed ~~with the undersigned no later than November 8, 2004. Service and proof of service pursuant to~~ PERB Regulation 32140 are required.

Upon receipt of CFA's argument and factual assertions, or the expiration of the time allowed for same, the undersigned shall contact each of the parties regarding further case processing steps, including a deadline for responses to the CFA's submittal, if requested.

Please contact me at the address or telephone number shown above if you have any questions concerning this matter.

Sincerely,



Les Chisholm
Regional Director

cc: Sharyn Abernatha
Margo Feinberg

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD



TRUSTEES OF THE CALIFORNIA STATE
UNIVERSITY,

Employer,

and

CALIFORNIA ALLIANCE OF ACADEMIC
STUDENT EMPLOYEES/UAW,

Petitioner

Case No.LA-RR-1099-H

CERTIFICATION OF EXCLUSIVE REPRESENTATIVE

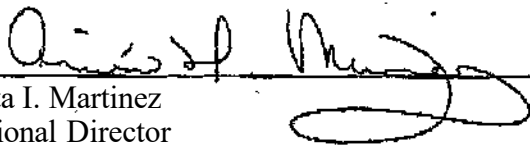
Pursuant to the authority vested in the undersigned by the Public Employment Relations Board, and in accordance with PERB Regulation 51096, IT IS HEREBY CERTIFIED that the California Alliance of Academic Student Employees/UAW is the exclusive representative of all employees in the unit set forth below:

- Title of Unit: Academic Student Employees
- Shall INCLUDE: Teaching Associate, Instructional Student Assistant, and Graduate Assistant,
- Shall EXCLUDE: All other employees, including employees represented by the California Faculty Association, the Academic Professionals of California, and/or the California State Employees Association, and all management, confidential, and supervisory employees.

Signed at Oakland, California

On August 23, 2004

On behalf of the
PUBLIC EMPLOYMENT RELATIONS BOARD


Anita I. Martinez
Regional Director