

section 3562 (f) of the Higher Education Employer Relations Act (HEERA).¹ Accordingly, the Board found that the request for recognition petition filed by the Association of Student Employees, U.A.W., United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO (ASE) described an appropriate bargaining unit, and ordered that a representation election be conducted.

BACKGROUND

HEERA describes the circumstances under which a party may obtain judicial review of a unit determination. HEERA section 3564(a) states:

No employer or employee organization shall have the right to judicial review of a unit determination except: (1) when the board in response to a petition from an employer or employee organization, agrees that the case is one of special importance and joins in the

¹HEERA is codified at Government Code section 3560 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code. Section 3562(f) states:

"Employee" or "higher education employee" means any employee of the Regents of the University of California, the Directors of Hastings College of the Law, or the Board of Trustees of the California State University, whose employment is principally within the State of California. However, managerial, and confidential employees shall be excluded from coverage under this chapter. The board may find student employees whose employment is contingent on their status as students are employees only if the services they provide are unrelated to their educational objectives, or, that those educational objectives are subordinate to the services they perform and that coverage under this chapter would further the purposes of this chapter.

request for such review; or (2) when the issue is raised as a defense to an unfair practice complaint. A board order directing an election shall not be stayed pending judicial review.

Upon receipt of a board order joining in the request for judicial review, a party to the case may petition for a writ of extraordinary relief from the unit determination decision or order.

PERB Regulation 32500² states, in pertinent part:

(a) Any party to a decision in a representation case by the Board itself may file a request to seek judicial review within 20 days following the date of service of the decision. An original and five copies of the request shall be filed with the Board itself in the headquarters office and shall include statements setting forth those factors upon which the party asserts that the case is one of special importance.

(c) The Board may join in a request for judicial review or may decline to join, at its discretion.

The Board has applied a strict standard in reviewing requests for judicial review and evaluating whether cases are "of special importance" because the fundamental rights of employees to form, join and participate in the activities of employee organizations (HEERA sec. 3565) could be jeopardized if PERB's unit determinations were routinely subject to legal challenges. The Board has not agreed that the mere fact that a court has not ruled on an issue meets the "special importance" test, stating that "such would be an abdication of our responsibility to interpret the statute which we enforce and would tend to render

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

this Board simply another administrative hurdle to be cleared on the way to unit certification." (Livermore Valley Joint Unified School District (1981) PERB Order No. JR-9 at p. 5.) The Board has noted that its "considerable discretion in the determination of appropriate units is demonstrated by the very limited circumstances under which judicial review of its unit decisions may be obtained." (San Diego Unified School District (1981) PERB Order No. JR-10 at p. 4.)

Where a request for judicial review has been granted, the issue was found to be of special importance because: (1) it was a novel issue; (2) primarily involving construction of a unique statutory provision; and (3) was likely to arise frequently. (Los Angeles Unified School District/Lynwood Unified School District (1985) PERB Order No. JR-13 at p. 3; Palomar Community College District (1992) PERB Order No. JR-14 at p. 4.)

THE UNIVERSITY'S REQUEST

The University argues that Regents is a case of special importance warranting judicial review for several reasons. First, the University asserts that this decision, and the decision in a similar, pending case involving the University of California Los Angeles campus, may serve as precedent for resolution of no less than seven other petitions in which student academic employees are seeking recognition. As in Regents, the University's response in each of these cases includes the claim that the student academic employees included in the petitioned-for unit are not employees under HEERA section 3562(f). The

University argues that a definitive judicial ruling on the issue of the status of student academic employees is necessary to provide guidance leading to the efficient resolution of these other requests. Second, the University argues that the case is of special importance because it is inconsistent with a prior PERB decision which was affirmed by the Court of Appeals in Association of Graduate Student Employees v. Public Employment Relations Bd. (1992) 6 Cal.App.4th 1133 [8 Cal.Rptr.2d 275] rev. den. August 13, 1992 (AGSE). Third, the case is of special importance because it raises the issue of:

. . . whether HEERA, to the extent that it applies to the student academic employees in the proposed units, unconstitutionally intrudes on the University's exclusive control over its core functions in violation of article IX, section 9 of the California Constitution.

The University asserts that only judicial review can resolve this issue.

In addition to the request for judicial review, the University requests that the Board withdraw the election order it issued as part of its decision in Regents. The University argues that:

. . . the statutory purpose of developing 'harmonious and cooperative' relationships between the University and its student academic employees will be furthered by an orderly, final resolution of the threshold issues that will be the subject of appellate review before creating potentially unrealistic expectations among unit members.

ASE'S RESPONSE

ASE opposes the University's request, noting the public policy considerations and legal precedent supporting the principle that PERB's representation decisions should be shielded from court challenge. ASE asserts that the issue raised in Regents, the status of student academic employees under HEERA section 3562 (f), has been presented to the appellate courts previously and is not novel. With regard to the University's reference to Article IX, section 9 of the California Constitution, ASE notes that the University did not previously present that argument, and "thus, such an argument cannot now serve as a basis for granting judicial review in the instant case."

DISCUSSION

PERB is the expert, administrative agency established to administer the HEERA. The first of the Board's rights, powers, duties and responsibilities enumerated in HEERA section 3563 is "To determine in disputed cases, or otherwise approve, appropriate units." Accordingly, HEERA provides that the Board's performance of this duty should not routinely be subjected to judicial review. It is for this reason that the Board must ensure that a case is of special importance when it joins in a request for judicial review.

The University asserts that judicial review of Regents is needed to obtain the court's review of the issue of the status of student academic employees under HEERA section 3562(f), and allow

for the expeditious resolution of the seven pending recognition petitions which raise that same issue. While the frequency with which an issue may be raised is one element of the Board's judicial review standard, frequency alone does not indicate special importance (State of California (Museum of Science and Industry) (1996) PERB Order No. JR-17-S at p. 5), particularly when the frequency results from the same party raising the issue in numerous cases. In fact, a representational issue which arises frequently may be the subject of numerous Board and/or court decisions, a circumstance which would tend to diminish the special importance of a subsequent case which raises that issue. In Unit Determination for Skilled Crafts Employees of the University of California (1983) PERB Decision No. 242a-H, the Board disagreed that an issue was of special importance because it was likely to arise in other unit determination cases in which requests for recognition petitions would be filed.

As ASE points out, the interpretation of HEERA section 3562(f) with regard to the status of student academic employees is not a novel issue. The issue has been presented to and dealt with by both the California Supreme Court in Regents of the University of California v. Public Employment Relations Bd. (1986) 41 Cal.3d 601 [224 Cal.Rptr. 631] and the Court of Appeals in AGSE. These decisions provide extensive guidance to PERB in the application of the test described in HEERA section 3562 (f). The University disagrees with the results of the Board's application of the HEERA section 3562(f) test in Regents.

asserting that it is inconsistent with an earlier Board decision. But mere disagreement with the Board's exercise of its fundamental responsibility to approve appropriate units does not demonstrate that a case is of special importance.

The University's request for judicial review stems from its position that it will not recognize the HEERA rights of the student academic employees in question until it obtains "a definitive judicial ruling" indicating that it must do so. The University asserts that this process could be "significantly expedited" if PERB were to join in seeking judicial review of Regents. HEERA section 3564 envisions two methods through which judicial review of a unit determination may be obtained: through PERB's joining in a request for such review upon finding that the case is of special importance; and through raising the issue as a defense to an unfair practice complaint. Pursuit of judicial review of a unit determination through appeal of a Board decision in an unfair practice case is likely to be the more time consuming of the two methods provided by HEERA. However, that simple fact, which applies to any and all unit determinations, does not demonstrate the special importance of this case.

With regard to the University's reference to Article IX, section 9 of the California Constitution, ASE correctly points out that that issue is not presented in Regents. The Board declines to reach the determination that a case is of special importance based on consideration of an issue not addressed in that case.

Finally, HEERA section 3564(a) specifically states that "a board order directing an election shall not be stayed pending judicial review." The withdrawal of its election order by the Board would constitute a circumvention of this clear statutory directive. The Board rejects the University's request that it withdraw the election order it issued in Regents.

ORDER

The request that the Public Employment Relations Board join in seeking judicial review of its decision in Regents of the University of California (1998) PERB Decision No. 1261-H is hereby DENIED.

Member Dyer joined in this Decision.

Member Johnson's dissent begins on page 10.

JOHNSON, Member, dissenting: I would grant the request by the Regents of the University of California (University) that the Public Employment Relations Board (PERB or Board) join in a request for judicial review of Regents of the University of California (1998) PERB Decision No. 1261-H.

After reviewing the University's request and the Association of Student Employees, U.A.W., United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO's response, I conclude that the issue is one of special importance. I think it is appropriate for the Board to exercise its discretion and grant the request as a means of expediting final resolution of this very important case.