

**STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD**



UNIVERSITY PROFESSIONAL & TECHNICAL
EMPLOYEES COMMUNICATION WORKERS
OF AMERICA LOCAL 9119,

Charging Party,

v.

REGENTS OF THE UNIVERSITY OF
CALIFORNIA,

Respondent.

Case No. SF-CE-1211-H

PERB Decision No. 2646-H

June 3, 2019

Appearances: Sloan Sakai Yeung & Wong by Timothy G. Yeung, Attorney, for Regents of the University of California; Leonard Carder by Andrew Ziaja, Attorney, for University Professional and Technical Employees, CWA Local 9119.

Before Banks and Paulson, Members.

DECISION¹

BANKS, Member: This technical refusal-to-bargain case² is before the Public Employment Relations Board (PERB or Board) for decision on a stipulated record, pursuant to

¹ Pursuant to the Higher Education Employer-Employee Relations Act (HEERA), section 3563, subdivision (j), the Board has delegated this case for decision to a two-member panel of the Board. (HEERA is codified at Government Code section 3560 et seq.) Unless otherwise specified, all further statutory references are to the Government Code.

² A “technical” refusal to bargain results from an employer’s decision to engage in an unfair practice in order to obtain judicial review of an underlying unit determination. (Gov. Code, § 3564 subd. (a) [“No employer or employee organization shall have the right to judicial review of a unit determination except . . . (2) when the issue is raised as a defense to an unfair practice complaint”]; *Tri-Fanucchi Farms v. Agricultural Labor Relations Bd.* (2017) 3 Cal.5th 1161, 1169, *cert. denied* (2018) 138 S.Ct. 1451 [discussing technical refusals to bargain in the context of the California Agricultural Labor Relations Act, Labor Code, § 1140 et seq.])

PERB Regulation section 32215.³ In a prior related case involving these parties, the Board denied the Regents of the University of California's (University) appeal of an administrative determination (AD) from the Board's Office of the General Counsel (OGC), and granted the unit modification petition filed by the University Professional & Technical Employees, Communication Workers of America Local 9119 (UPTE). (*Regents of the University of California* (2017) PERB Order No. Ad-453-H (*Regents*).) In so doing, the Board modified UPTE's existing bargaining unit of technical employees (TX unit) to include the University's Systems Administrator classifications.

The present complaint alleges that the University refused to recognize or bargain with UPTE as the exclusive representative of the Systems Administrators, and that the University has thus failed to comply with the Board's order in *Regents*. Indeed, the University readily admits that it has refused to bargain with UPTE, asserting that it intends to test the propriety of *Regents* by engaging in a technical refusal to bargain. In view of this admission, it is evident that the University violated the Higher Education Employer-Employee Relations Act (HEERA) as alleged in the complaint.

³ PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq. While most unfair practice complaints are submitted to an Administrative Law Judge for a formal hearing and proposed decision, Regulation 32215 provides, in relevant part, that the Board may transfer a case to itself for a final decision in the first instance. (*Victor Valley Community College District* (2002) PERB Order No. Ad-317, pp. 1-2.) We exercised our discretion to do so in this case because there is no material factual dispute and the respondent has admitted its refusal to bargain.

FACTUAL AND PROCEDURAL HISTORY

The following facts are drawn from the Board's case files in this matter and *Regents supra*, PERB Order No. Ad-453-H,⁴ together with the relevant stipulated facts submitted by the parties. The TX unit is a system-wide bargaining unit of non-supervisory employees who provide technical support services for academic and scientific research throughout the University system and the Lawrence Berkeley National Laboratory. PERB certified UPTE as the exclusive representative of the TX Unit on December 1, 1994.

On December 22, 2016, UPTE filed with PERB a unit modification petition requesting that the TX unit be modified to include the newly-created Systems Administrator 1, 2 and 3 classifications. As of December 22, 2016, when UPTE filed its unit modification petition, the TX unit included 4,059 employees, and the petitioned-for Systems Administrator 1, 2 and 3 classifications included 325 employees located at 12 of the University's campuses, laboratories and medical centers. At the five locations where the process has not yet been completed, the University estimated that between 172 and 190 employees would eventually be reclassified as Systems Administrators.

On May 23, 2017, the OGC issued the AD granting UPTE's unit modification petition, to which the University filed a timely appeal. On September 29, 2017, the Board issued *Regents*, denying the University's appeal and affirming the AD. Specifically, the Board rejected the University's arguments challenging the application of the "ten percent rule" found in PERB Regulation 32781. The Board held that UPTE was permitted to add the Systems Administrators to the TX unit without proof of support because the employees in those

⁴ PERB may take administrative notice of matters in its own files, including Board decisions from other cases. (*County of Santa Clara* (2015) PERB Decision No. 2431-M, p. 5, fn. 5.)

classifications constituted less than 10 percent of the overall TX unit as of the date UPTE filed the petition. (*Regents, supra*, PERB Order No. Ad-453-H, pp. 6-13.) Additionally, the Board rejected the University's contention that the Systems Administrators did not share a community of interest with the other employees in the TX unit. (*Id.*, pp. 13-15.) Thus, the Board agreed with the AD and concluded that UPTE's petition should be granted.

On October 19, 2017, pursuant to HEERA section 3564 and PERB Regulation 32500, the University asked the Board to join in a request for judicial review of *Regents, supra*, PERB Order No. Ad-453-H, which the Board declined to do on February 27, 2018. (*Regents of the University of California* (2018) PERB Order No. JR-28-H.) Despite these developments, the University did not comply with its duty to recognize and bargain with UTPE.

Rather, on August 17, 2018, the University announced that it would not recognize UPTE as the representative of the Systems Administrators or bargain over their terms and conditions of employment. As stated in a letter by Peter Chester, the University's Executive Director for Labor Relations, "the University has decided to engage in a technical refusal to bargain in order to obtain judicial review of PERB's order [in *Regents*]."

On January 22, 2019, UPTE filed the charge in this case, and OGC issued a complaint on January 25. On April 10, the parties submitted their joint stipulated facts directly to the Board pursuant to PERB Regulation 32215. Additionally, the University filed evidence in the form of declarations, to which UPTE objected. The parties filed their briefs on April 30, at which time the matter was submitted for decision.

DISCUSSION

"PERB decisional law has not sanctioned an employer's refusal to recognize an exclusive bargaining representative based on the employer's unilateral determination that the

unit is, for some reason, inappropriate.” (*Los Angeles Unified School District* (2007) PERB Decision No. 1884, p. 2 (citing *Regents of the University of California* (1989) PERB Decision No. 722-H).) Here, the University admits that it has failed and refused to recognize and bargain with UPTE because it disagrees with the Board’s order in *Regents*. Such conduct contravenes the mandates of HEERA section 3571, subdivision (c), which requires higher education employers meet and confer in good faith with exclusive representatives. The University attempts to justify this conduct by arguing that the Board wrongly decided *Regents* and should never have granted UPTE’s unit modification petition. However, as the University acknowledges, all of its contentions in this regard were raised and rejected in the underlying representation proceeding.

Specifically, the University contends that the Board erred in *Regents* by failing to count all the employees performing the work of Systems Administrators at the time it determined that these employees constituted less than 10% of UPTE’s existing bargaining unit. But we considered and rejected this claim in *Regents*: “Although the University estimated that additional employees would be added to the [Systems Administrators] classification at a later time, or that additional employees were already performing the Systems Administrator duties as of December 22, 2016, it was unable to provide PERB and UPTE a complete and accurate list at the time the Office of the General Counsel made its administrative determination,” and thus could not delay or defeat the petition on this basis. (*Regents, supra*, PERB Order No. Ad-453-H at p. 21.)

Secondly, the University argues that UPTE purposely structured its unit modification petitions to evade the requirement to furnish proof of support for accretions involving more than 10% of the existing unit. Again, in *Regents*, we considered and rejected this argument,

concluding that UPTE's "motive or its decision to avail itself of PERB's unit modification procedures by accreting multiple groups of employees at different times" was irrelevant under PERB Regulation 32781. (*Regents, supra*, PERB Order No. Ad-453-H at p. 11.)

Finally, the University restates its contention that the Systems Administrators do not share a community of interest with the other employees in the TX unit. In *Regents*, we concluded that the underlying AD more than adequately addressed this question. (*Regents, supra*, PERB Order No. Ad-453-H at pp. 13-15.) Thus, all of the University's defenses to the instant charge were previously considered and rejected during the underlying representation proceeding.

Moreover, the University has not proffered any newly discovered and previously unavailable evidence,⁵ nor does it allege any special circumstances that would require the Board to reexamine the decision made in the underlying unit modification proceeding. (See *Regents of the University of California, supra*, PERB Decision No. 722-H [to effectuate a change in a unit, an employer must show newly discovered or previously unavailable evidence or special circumstances].) We therefore find that the University has not raised any representation issue that is a proper subject for litigation in this unfair practice proceeding.

For the foregoing reasons, we find that the University's refusal to recognize and bargain in good faith with UPTE is a violation of HEERA section 3571, subdivisions (b) and (c). By this same conduct, the University has unlawfully interfered with employees because their exercise of representational rights in violation of HEERA section 3571, subdivision (a).

⁵ None of the University's proffered declarations contains any new, previously unavailable evidence regarding the propriety of the unit determination or resulting certification in *Regents, supra*, PERB Order No. 453-H. On the contrary, all of them simply repeat contentions that the University made, and the Board rejected, during the underlying unit modification proceeding.

REMEDY

UPTE requests that we order a make whole remedy, including attorneys' fees and litigation costs. While such fees may be awarded where the unfair conduct is "without arguable merit and pursued in bad faith" (*City of Alhambra* (2009) PERB Decision No. 2036-M), we do not believe this is such a case, at least at present, because the University has invoked HEERA section 3564, subdivision (a)(2), which provides that an employer cannot seek judicial review of a unit determination except "when the issue is raised as a defense to an unfair practice complaint." Thus, the University's position, viz. that it must refuse to bargain in order to obtain judicial review of the underlying unit modification decision in *Regents, supra*, PERB Order No. Ad-453-H has at least minimal merit under the statute.⁶

In any event, a finding of overall subjective bad faith is unnecessary, if not irrelevant, to the issue before us because the University's refusal to bargain frustrates the fundamental purposes of HEERA and is anathema to collective bargaining. (*California State Employees' Assn. v. Public Employment Relations Bd.* (1996) 51 Cal.App.4th 923, 934-935, citing *NLRB v. Katz* (1962) 369 U.S. 736.) In this, the University's unfair practice is anything but technical, rather it is serious and persistent. Until remedied, such misconduct could predictably contaminate all aspects of the parties' relationship and prevent the possibility of good faith negotiations. (See, e.g., *Fresno County In-Home Supportive Services Public Authority* (2015) PERB Decision No. 2418-M, p. 54 [a bona fide overall impasse is predicated on good faith

⁶ We do not mean to suggest that attorneys' fees or other forms of make-whole relief are categorically unavailable in these cases. On the contrary, we will not hesitate to fashion a suitable remedy where it is evident that an employer has engaged in a technical refusal to bargain for frivolous reasons or for the purpose of delaying or stifling union organization. However, the stipulated record in this case does not support such a finding. (See *J. R. Norton Co. v. Agricultural Labor Relations Bd.* (1979) 26 Cal.3d 1.)

negotiation and precluded by existence of unremedied unfair practices that impact bargaining].)

In light of the record in this case and the University's admission of its refusal to bargain, we will order it to cease and desist its unlawful conduct, negotiate with UPTE upon demand, and post a notice to all unit employees advising them of this decision.

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, it is found that The Regents of the University of California (University) violated the Higher Education Employer-Employee Relations Act (HEERA), Government Code section 3571, subdivisions (a), (b), and (c), by refusing to recognize and bargain in good faith with the University Professional & Technical Employees, Communication Workers of America Local 9119 (UPTE).

Pursuant to HEERA section 3563.3, it is hereby ORDERED that the University shall

A. CEASE AND DESIST FROM:

1. Refusing to recognize or negotiate in good faith with UPTE as the exclusive representative of all classifications and positions within the Technical unit (TX unit);
2. By the same conduct, interfering with the rights of employees to be represented by their exclusive representative; and
3. Denying UPTE the right to represent its members.

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

1. Recognize and upon request meet and negotiate with UPTE as the exclusive representative of all employees in the TX unit, including Systems Administrators 1, 2, and 3.

2. Within ten (10) workdays following the date this Decision is no longer subject to appeal, post at all work locations where notices to employees are customarily placed, copies of the Notice attached hereto as an Appendix, signed by an authorized agent of the University indicating that it will comply with the terms of this Order. In addition to physical posting of paper notices, the Notice shall be posted by electronic message, intranet, internet site, and other electronic means customarily used by the University to communicate with employees represented by UPTE. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to ensure that this 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 University 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 UPTE.

Member Paulson 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 Unfair Practice Case No. SF-CE-1211-H, *University Professional & Technical Employees, Communication Workers of America Local 9119 (UPTE) v. The Regents of the University of California (University)*, in which all parties had the right to participate, it has been found that the University violated the Higher Education Employer-Employee Relations Act (HEERA), Government Code section 3560 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 recognize or negotiate in good faith with UPTE as the exclusive representative of all classifications and positions within the Technical unit (TX unit);
2. By the same conduct, interfering with the rights of employees to be represented by their exclusive representative; and
3. Denying UPTE the right to represent its members.

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

1. Recognize and upon request meet and negotiate with UPTE as the exclusive representative of all employees in the TX unit, including Systems Administrators 1, 2, and 3.

Dated: _____

Regents of the University of California

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.