STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA STATE EMPLOYEES' ASSOCIATION,	)	
Charging Party,	)	Case No. SF-CE-20-H
v.	)	PERB Decision No. 308-H
THE REGENTS OF THE UNIVERSITY OF CALIFORNIA (BERKELEY),	)	May 16, 1983
Respondent.	)	

Appearances: Philip E. Callis and Christine A. Bologna, Attorneys for California State Employees' Association; Claudia Cate, Attorney for the Regents of the University of California.

Before Gluck, Chairperson; Morgenstern and Burt, Members.

DECISION

MORGENSTERN, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the California State Employees' Association (CSEA or Charging Party) and the Regents of the University of California (University) to the hearing officer's proposed decision. In that proposed decision, the hearing officer found that the University had violated subsection 3571(a) of the Higher Education Employer-Employee Relations Act (HEERA)[1] by

[1]The HEERA is codified at Government Code section 3560 et seq. All references hereafter will be to the Government Code unless otherwise indicated.

Subsection 3571(a) states:

limiting employees utilizing grievance and administrative review procedures to one representative.

The University disputes the hearing officer's conclusion that HEERA provides higher education employees with the right to present grievances to their employer or to do so with the aid of more than one representative. It also contests the hearing officer's finding that the University's rule resulted in harm to employees and that the rule was not a legitimate manner of eliminating past disruption. In CSEA's exceptions, it argues that the hearing officer erred in dismissing the charged violation of subsection 3571(b)[2] by concluding that, as the nonexclusive employee organization, it enjoyed no right to represent its members in grievances or administrative review proceedings.

> It shall be unlawful for the higher education employer to:
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> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.

[2]Subsection 3571(b) of HEERA states:

> It shall be unlawful for the higher education employer to:
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> . . . . . .
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> (b) Deny to employee organizations rights guaranteed to them by this chapter.

FACTS

Beginning in September 1978,3 managerial personnel of the University applied provisions of Staff Personnel Policies 280 and 290 by imposing a limitation on the number of representatives an employee could utilize in employee grievances and administrative reviews, respectively. Policies 280 and 290 are part of the University's Staff Personnel Manual, a series of systemwide rules which delineate the employment relationship between staff (nonacademic) employees and the University.

Rule 280 sets forth the employee grievance procedure which is available to employees challenging certain personnel matters such as salary decreases, demotions, suspensions, warnings of such actions, dismissals, discriminatory practices, and improper implementations of the policy. Under rule 280, the employee can utilize an informal review process and a formal hearing process. The University's hearing officer or committee or an alternate conducts the hearing in which each party is permitted to examine witnesses and introduce relevant evidence. Certain types of decisions rendered under the

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3until July 1, 1979, higher education employees were covered by provisions of the George Brown Act, codified at Government Code section 3525 et seq., and not by HEERA. This case does not concern any allegation that the University unlawfully adopted the representation rule in September 1978.

grievance procedure are final. Others are advisory decisions presented to the chancellor for final review.

Specifically in contention in this case, with regard to rule 280 procedures, is rule 280.31 which provides:

> Representation. An employee may be self-represented or may be represented by another person at any stage of the review of a grievance. If the employee is represented by legal counsel, the University shall be represented by the Office of the General Counsel. Otherwise, the University shall be represented as the Chancellor deems appropriate.

Rule 290 sets forth the administrative review procedure applicable to specific management actions such as those which adversely affect the employee's terms and conditions of employment, including transfer or promotion selections, position classifications, merit salary increases, performance evaluations and releases of probationary employees.

Administrative review contemplates an informal and formal review by an independent party. The independent party is a University employee with whom each party to the complaint has an opportunity to meet and directly present information. Decisions rendered under the administrative review procedure are not final. The chancellor or president has final review authority.

Specifically at issue regarding these procedures is rule 290.17 which provides:

> Representation. An employee may be self-represented or represented by another person at any stage of the process. The University shall be represented as the Chancellor deems appropriate.

Evidence introduced at the hearing in the instant case concerned specific incidents which arose under both grievance and administrative review procedures. As discussed more fully infra, CSEA witnesses testified as to specific instances where management's application of the one-representative rule allegedly resulted in difficulties. The one-representative rule, CSEA asserts, denied employees a second representative familiar with the actual job functions involved in the complaint, able to take notes and assist the spokesperson, available to gain training or to offset the number of management representatives.

The University's witnesses testified as to instances where the presence of more than one representative caused disruption and delay.[4] They described instances where the employee's representatives asked numerous questions and interrupted University officials, and where the participation of numerous

[4]Some of these circumstances occurred prior to the adoption of the rule in September 1978. Other incidents occurred during an eight-month period when, by preliminary order of the Alameda Superior Court in a lawsuit initiated by the American Federation of State, County and Municipal Employees, Local 1695, the University was enjoined from enforcing its one-representative rule.

employee representatives was said to have obstructed resolution and settlement.[5]

CSEA cross-examined University witnesses and introduced direct testimony from its own witnesses in order to dispel the contention that a correlation existed between multiple representatives and delay and disruption.

DISCUSSION

Higher education employees have a right under HEERA to present grievances to their employers. The language of section 3565 affords employees the right to participate in the activities of an employee organization regarding matters of

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[5]The University witnesses also testified that the one-representative rule was not absolute and argued that exceptions to the rule are permissible under authority delegated from the chancellor and have been granted.

CSEA witnesses rebutted that assertion and testified that they were not aware of the fact that the University's interpretation of the personnel policies contemplated exceptions to the one-representative rule.

The hearing officer did not discuss the existence of exceptions to the representation rules. We conclude, however, that the University's rules do not contemplate flexibility.

The wording of the rules is unambiguous. They permit a "person" to represent an employee. The rules do not state that exceptions will be granted nor did the University advise the employees or the employee organizations that exceptions would be permitted. The record fails to identify if or for what reasons exceptions were granted in the past. In light of this lack of evidence, we are particularly disinclined to rely on the University's eleventh-hour assurance that, in the future, multiple representatives will be permitted. Thus, in the discussion which follows, we analyze the legality of the rules pursuant to their unambiguous facial meaning which precludes flexibility or variance.

employer-employee relations.[6] Under the Educational Employment Relations Act (EERA)[7] the Board has found that participation in employee organization activities includes the right of employees to be represented by an employee organization in grievance proceedings.[8] While the language in EERA is not identical to section 3565 of HEERA, it is sufficiently similar to warrant application of the Board's prior decisions. In this case, therefore, the Board must determine whether the University violated subsection 3571(a) by unlawfully interfering with this employee right by limiting

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[6]Section 3565 provides:

> Higher education employees shall have the right to form, join and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations and for the purpose of meeting and conferring. Higher education employees shall also have the right to refuse to join employee organizations or to participate in the activities of these organizations subject to the organizational security provision permissible under this chapter.

[7]EERA is codified at section 3540 et seq. of the Government Code and section 3543 grants public school employees, inter alia, the right to "form, join, and participate in the activities of employee organizations."

[8]See Victor Valley Joint Union High School District (12/31/81) PERB Decision No. 192; North Sacramento School District (12/20/82) PERB Decision No. 264; Rio Hondo Community College District (12/28/82) PERB Decision No. 272.

employees to one representative in grievance and administrative review proceedings.

In Carlsbad Unified School District (1/30/79) PERB Decision No. 89 and in Novato Unified School District (4/30/82) PERB Decision No. 210, the Board has considered the necessary components of a charge that the employer's conduct has interfered with employees' statutory rights.[9] A nexus or connection must be demonstrated between the employer's conduct and the exercise of a protected right resulting in harm or potential harm to that right which, in balance, outweighs the employer's proffered business justification.

Thus, in order to sustain its charges, CSEA is required to demonstrate that, as a result of the University's limitation on representatives, the rights of the employees were harmed. However, merely demonstrating that multiple representatives would provide better representation is insufficient. The University's rule is unlawful if the impact of it is to deprive employees of their statutory rights to effectively present

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[9]The Board interprets CSEA's charge to be that the University's policy interfered with employees' rights although the actual language of the charge claims the policy deprived CSEA and its members of rights and acted with the unlawful motivation of discouraging the exercise of such rights.

While the standard relied on by the Board in Carlsbad, supra, and Novato, supra, emerged under the EERA, it has been applied to cases involving alleged violations of subsection 3571(a) of HEERA. California State University, Sacramento (4/30/82) PERB Decision No. 211-H.

their grievances.[10]

As evidence of the harm suffered as a result of the representative rule, CSEA witnesses involved in grievances and administrative reviews testified. Five such incidents in which harm allegedly occurred were examined.

In the case of employee Nancy Gusack, the grievant requested that certain letters placed in her personnel file be removed and that management apologize for placing them in her file. The University contested the grieveability of this dispute. At a meeting scheduled to discuss this issue, CSEA wanted two representatives, the job steward who had attended the informal meetings and another who was familiar with the technical question of GRIEVABILITY. The University refused to permit two representatives and the grievant refused to proceed with one representative.

Although the record demonstrates that the University advised Gusack that the letters were in fact removed from her file, CSEA claims the grievant was denied assurances that such had been accomplished and an apology for the action.

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[10]Consistent with this analysis, we necessarily do not perceive the University's rule to be inherently destructive of the employee's rights and agree with the University's argument that the language of HEERA does not specifically grant higher education employees the right to more than one representative.

We do not find in the record any evidence that the University's rule effectively prevented Gusack from participating in the grievance process. Contrary to CSEA's claim, it is highly speculative that, had the meeting been conducted with the assistance of two representatives, the grievant would have gained assurances and/or apologies from the employer. The remedy provided for by the personnel policy does not include issuance of letters of apology.[11] Further, the grievant could have reviewed her file personally to determine whether the University had complied. (See Cal. Civ. Code, section 1798.34.)

The case of David Weinberg involved the administrative review of the dismissal of this probationary employee. Two representatives were desired, one an experienced grievance handler and another who possessed technical knowledge concerning the grievant's classification and duties as a mechanician's helper. Weinberg was denied two representatives at a meeting with the appointed independent party assigned to investigate the administrative appeal. While CSEA attempted to

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[11]Rule 280.27 provides:

> Remedy. If the management action grieved is determined to be in violation of staff personnel policy or the Chancellor's implementing procedure or if the corrective action or dismissal is determined not to be reasonable under the circumstances, the remedy shall not exceed restoring to the employee the pay, benefits, or rights lost as a result of the action, less any income earned from any other employment.

have the investigator's ruling overruled, the University advised Weinberg that he had 15 days to meet with the investigator with one representative. No meeting was arranged and the grievant's appeal was denied. A CSEA witness testified that he had been planning to make arguments at the meeting with the investigator but was denied the opportunity to do so. The University argues that Weinberg was harmed not by the University rule, but by the decision to forfeit participation in the investigative process. The procedure provided by rule 290 does not involve a formal hearing. It is an investigation by an "independent party" appointed by the chancellor which provides the complainant with an opportunity to meet with and present information to the investigator. The University witness testified that a party can identify other persons for the independent party to interview and can submit written documents for consideration.

We therefore find that CSEA failed to substantiate its allegation that employee Weinberg was harmed as a result of the University's representation rule. An employee representative familiar with the technical aspects of the grievant's job could have been identified and interviewed by the investigator.

Evidence concerning the arbitration of employee John Ella Reese was also presented. The dispute involved recall rights of a laid-off employee. A second CSEA

representative, who had represented Reese initially, was desired in order to provide clerical assistance (note-taking, monitoring tape recording operation by University).

The arbitrator denied Reese the second representative although he ultimately concluded that Reese was improperly laid off and ordered reinstated with back pay. CSEA claims it was harmed because, in subsequent efforts to resolve questions of settlement "that will have to be pursued," better notes from the arbitration would be helpful. By denying the second representative, CSEA avers, accurate and complete record keeping was hindered and future settlement efforts thwarted.

We find that CSEA has not proved that harm in fact resulted because a second representative for clerical assistance was denied. Even assuming that actual implementation of the arbitrator's back pay award proved difficult, any connection between that difficulty and the unavailability of contemporaneous notes is highly speculative.[12]

In the Edward Santos grievance, CSEA sought to have two representatives, a CSEA staff member and a job steward with

[12]Also in connection with Reese, CSEA alleges that harm resulted when the manager of the personnel services unit refused to permit two representatives to participate at a meeting convened to discuss the consolidation of a number of grievances filed by Reese. Testimony from University witnesses defeats this speculative assertion. The manager lacked authority to consolidate grievances and, in any event, the grievances would not have been consolidated under University policies.

familiarity in the building trades. The University refused to permit two representatives and no meeting occurred. Eventually, the Santos grievance was rejected as being outside the scope of rule 280 and was referred to the rule 290 administrative process. No appeal was taken of this decision as to grieveability nor did Santos pursue the dispute through the administrative review process.

CSEA has clearly failed to establish that harm resulted because of the application of the representation rule rather than through CSEA's own failure to further pursue the grievant's complaint.

Finally, CSEA introduced testimony regarding the administrative review of a dispute involving employee Joseph Light. The University refused to permit the employee two representatives. Although CSEA decided to accede to this restriction under protest, the representative who participated testified that four management representatives were present at the meeting. He testified that he felt that the University was attempting to be intimidating by having several people present.

The University argues that CSEA failed to establish that its representative was in fact intimidated or that Light's complaint was adversely affected. It also points out that CSEA did not request affirmative relief for Light.

We find insufficient evidence to conclude that actual harm resulted to the employee because of the application of the University's rule in this instance.

In sum, we find that the Charging Party has failed to demonstrate actual harm to support its unfair practice allegation. This is in accord with the decision in City of Hackensack (12/21/77) 4 NJPERC para. 4011 where the New Jersey Commission adopted the unexcepted-to opinion of the hearing officer (at 3 NJPER 280) finding that the City did not commit an unfair practice by denying an employee the right to have more than one union representative at his disciplinary hearing. In that case, the hearing officer concluded:

> It is not unreasonable for the City to limit the number of representatives at a hearing for the purpose of maintaining order and, as in a typical courtroom situation, one competent representative should, in most cases, be able to adequately represent the interest of the individual in question and the Association. Accordingly, the burden of proof here must be on the Association to prove that they could not receive adequate representation. Since the Association failed to prove they did not receive adequate representation, the undersigned finds the City did not commit an unfair practice in limiting the representatives at [the employee's] hearing to one person. (Footnote omitted.)

Even if actual harm did not result from the University's representation limitation, the Board may find that the rule is violative of HEERA subsection 3571(a) because it has a tendency to cause harm to employees' rights. Carlsbad, supra; Novato, supra. This potentiality, however, will not be based on boundless speculation or conjecture. To be violative of HEERA, the potential for harm must emerge in the context of reasonably

anticipated circumstances from which it is logical to infer or expect that harm to employees' rights would result.

In this case, CSEA has identified four reasons for wanting more than one representative available to an employee. They are:

a. The need to have stewards present with different areas of expertise;

b. The need to have a more experienced steward to assist and to train a new steward;

c. The need for parity to avoid management intimidation; and

d. The need for clerical assistance during complicated proceedings.

We agree that the right to representation includes the right to present all relevant evidence, including expert opinion, the right to representation by a trained steward, the right to freedom from intimidation, and the right to a record of the hearing. However, we find that the University's rule does not deprive the employee of these rights because achievement of these legitimate aims is not dependent upon being allowed multiple representatives.

The ability to utilize individuals with expertise in certain areas of employment relevant to a particular dispute may be critical to a successful grievance. However, the

University's rule does not significantly impede this goal. In grievances, such individuals may be called as witnesses in the formal proceeding and, unlike a representative or spokesperson, may give direct testimony. In administrative review proceedings, the knowledgeable person can be identified to the investigator and in that manner provide his/her knowledge of the particular work environment.

Permitting a novice representative to be assisted by a second, more experienced representative might provide valuable training to CSEA representatives. However, we do not believe that the University is required to fashion its internal dispute resolution procedures to facilitate this result. Alternative methods of training experienced and skillful representatives are available to CSEA.

The organization is properly concerned with providing employees with representatives whose effectiveness and abilities are not diminished or undermined by virtue of their intimidation. However, there is no factual basis to support CSEA's claim that intimidation resulted from the disparate number of representatives of the University and the employee. Neither do we find that the University's rule is inherently intimidating.

Finally, we again recognize that clerical assistance provided by a second representative may indeed prove beneficial to the employee's representation. We fail to find, however, that the single allowed representative and the employee

himself/herself would not be able, between them, to maintain a useful and adequate contemporaneous record.

CONCLUSION

In sum, it is our conclusion that the Charging Party has failed to present sufficient evidence to demonstrate that the University's representation rule actually harmed or tended to harm employees by interfering with rights afforded them by HEERA provisions. Likewise, while we find that CSEA, as the nonexclusive employee organization, enjoys a right under HEERA to represent employees in grievance and administrative review proceedings,[13] we find no evidence that the University's rule denied the employee organization its rights in contravention of HEERA subsection 3571(b).

13Although HEERA does not specifically grant representational rights to a nonexclusive representative, the Board has found in California State University, Sacramento, supra, that the nonexclusive representative enjoys those rights previously granted by the George Brown Act. See Regents of the University of California, Lawrence Livermore National Laboratory (4/30/82) PERB Decision No. 212-H; Regents of the University of California (UCLA) (12/21/82) PERB Decision No. 267-H. See also section 3528 of the George Brown Act, which provides:

> Employee organizations shall have the right to represent their members in their employment relations, including grievances, with the state. Employee organizations may establish reasonable provisions for the dismissal of individuals from membership. Nothing in this section shall prohibit any employee from appearing in his own behalf or through his chosen representative in his employment relations and grievances with the state.

Having concluded that the representation limitation did not deprive either the employees or CSEA of rights granted by HEERA, we need not address the University's argument that the rule was legitimately enacted to prohibit multiple representatives and thus avoid disruption and delay.

ORDER

Upon the foregoing findings of fact, conclusions of law and the entire record in this case, the Public Employment Relations Board hereby ORDERS that the complaint issued by the general counsel and the underlying charge filed by the California State Employees' Association in Case No. SF-CE-20-H be DISMISSED.

Chairperson Gluck, and Member Burt joined in this Decision.