

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



CALIFORNIA STATE EMPLOYEES' ASSOCIATION,)
)
Charging Party,) Case No. SF-CE-134-H
)
v.) PERB Decision No. 362-H
)
REGENTS OF THE UNIVERSITY OF CALIFORNIA,) December 7, 1983
)
Respondent.)
_____)

Appearances: Steve Diamond, Shop Steward, for California State Employees' Association; and Edward M. Opton, Jr., Attorney for the Regents of the University of California.

Before Tovar, Jaeger and Burt, Members.

DECISION

TOVAR, Member: This case is before the Public Employment Relations Board (Board) on an appeal by the California State Employees' Association (CSEA) to the attached decision of the Board's regional attorney refusing to issue a complaint and dismissing the unfair practice charge against the Regents of the University of California for failure to state a prima facie violation of the Higher Education Employer-Employee Relations Act (HEERA).¹

After considering the entire record in light of CSEA's arguments on appeal, the Board affirms the regional attorney's factual findings and conclusions of law.

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

ORDER

Upon the foregoing decision and the entire record in this case, the Board ORDERS that the charge filed by CSEA is hereby DISMISSED.

Members Jaeger and Burt joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD JARD

San Francisco Regional Office
Post Street, 9th Floor
San Francisco, California 94108
(415) 557-1350

February 28, 1983



Steve Diamond
CSEA, Chapter 41
2039 Shattuck Avenue, #207
Berkeley, CA 94704

James Odle
Office of the General Counsel
590 University Hall
2200 University Avenue
Berkeley, CA 94720

Re: REFUSAL TO ISSUE COMPLAINT AND DISMISSAL OF UNFAIR PRACTICE CHARGE
California State Employees Association v. Regents of the University of
California. Charge No. SF-CE-134-H

Dear Parties:

Pursuant to Public Employment Relations Board (PERB) Regulation section 32730, a complaint will not be issued in the above-referenced case and the pending charge is hereby dismissed because it fails to allege facts sufficient to state a prima facie violation of the Higher Education Employer-Employee-Relations Act (HEERA).¹ The reasoning which underlies this decision follows.

On October 14, 1982 the California State Employees Association (CSEA) filed an unfair practice charge against the Regents of the University of California (University) alleging violation of section 3571, subdivisions (a) and (b) of HEERA.² More specifically, CSEA alleged that: the University entered a settlement agreement with its organization on May 7, 1981; Mr. Vasquez, one of the employees covered by the agreement, was to be hired "in the career position of Custodian" as of May 1, 1981; instead, Vasquez was hired as a

¹References to the HEERA are to Government Code sections 3560 et seq. PERB Regulations are codified at California Administrative Code, Title 8.

²Section 3571, subdivisions (a) and (b) state:

It shall be unlawful for the higher education employer to:

- (a) Impose or threaten to impose reprisals on

lower paid "Senior Custodian;" and, such conduct breaches the terms of the settlement agreement thereby violating the HEERA provisions cited above. Further, CSEA alleges that although paid at different rates, custodians classified as Custodians and Senior Custodians perform work which requires "substantially equal effort, skill and responsibility;" the difference exists because historically the better-paid group has been represented by American Federation of State, County and Municipal Employoyees, Local 371 (AFSCME); and, "the maintenance of two separate pay scales and working conditions" violates HEERA.

My investigation revealed the following. On March 4, 1981, CSEA filed an unfair practice charge (SF-CE-46-H) against the University, alleging that four University employees were fired discriminatorily because of their association with CSEA. That charge was settled by agreement, dated May 7, 1981. Mr. Vasquez was employed at the time of the alleged discrimination as a Food Service Worker III. The agreement promised him a promotion to higher paid employment at the International ("I") House (Berkeley campus) "in the career position of Custodian."³ He began work as a custodian at "I" House during the first week of May 1981.

There were two categories of campus custodian in existence at the time the parties concluded the settlement agreement: Custodian, and the lower paid Senior Custodian. Apparently, the parties' settlement discussions did not involve reference to the existence of two distinct custodian classifications or the particular salary Mr. Vasquez would receive in his new job. Thereafter, Mr. Vasquez was employed at the "I" House; but, unknown to him or CSEA, until approximately one year later, he was classified as a Senior Custodian and paid at the lower rate. In July 1982, CSEA representatives

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.

(b) Deny to employee organizations rights guaranteed to them by this chapter.

³The agreement contained several additional terms including, but not limited to, promises of advancement to one individual and monetary awards to all four. None of the other terms are alleged to have been breached.

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complained to the University that the 14-month old agreement was not being enforced correctly.

The University disputes CSEA's claim that the settlement agreement is being enforced incorrectly. The University asserts that: Vasquez was hired, as promised, to perform custodial work at the "I" House; all the custodians at that location are classified as Senior Custodians; the use of capital "C" in the contract term "Custodian" was not included for the purpose or with the effect of granting him the higher paid status; and therefore, the classification and payment of Vasquez is consistent with the terms of the parties agreement.

The University does not dispute CSEA's allegations regarding the derivation of the pay differential existing between the Custodians and Senior Custodians. Rather, the University defends on legal grounds, contending that the existence of two wage scales does not violate HEERA.

Two factors mandate dismissal of the charge. First, breach of a settlement agreement, without more, does not violate section 3571 subdivisions (a) and (b). HEERA section 3563.2(b) states:

The board shall not have authority to enforce agreements between the parties, and shall not issue a complaint on any charge based on alleged violation of such an agreement that would not also constitute an unfair practice under this chapter.

Resolution by PERB of a dispute about the meaning of an agreement must be incidental to its review of a charge alleging separate violations of HEERA. Victor Valley Joint Union High School District (12/31/81) PERB Decision No. 192; Grant Joint Union High School District (2/26/82) PERB Decision No. 196. This rule applies to settlement agreements as well as the parties' collective bargaining agreement.

CSEA bases its unfair practice charge on breach of an agreement. However, it argues that the breach of an agreement which settled an unfair practice charge affects HEERA interests more vitally than does the breach of a collective bargaining contract and, therefore, the breach itself violates HEERA. There is no legal authority to support that position. Moreover, even if the Board were a party to a settlement, thereby lending its authority to the agreement and rendering it somewhat akin to a Board order, a breach would "not constitute a per se separate, new violation of statute." (See San Francisco Community College District (12/31/82) PERB Decision No. 278, holding that violation of a Board order is not a separate violation of the

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Educational Employment Relations Act (EERA) which is codified at Government Code section 3540 et seq.)

Second, and relatedly, charging party has failed to allege or establish that the employer's conduct was undertaken in retaliation against the charging party for having exercised HEERA rights or that it tended to interfere or interferes with charging party's exercise of HEERA rights.⁴ The charging party must allege facts establishing a "nexus" or "connection" between the employer's conduct and the employee's exercise of HEERA rights. (Carlsbad Unified School District (1/30/79) PERB Decision No. 89; Novato School District (4/30/82) PERB Decision No. 210; California State University (Sacramento) (4/30/82) PERB Decision No. 211-H.) CSEA's charge is deficient for failing to allege a violation of HEERA rights. There is no allegation that the University classified Vasquez as a Senior Custodian in retaliation for his having exercised HEERA rights, or, that such a classification tended to interfere or interfered with the exercise of such rights. CSEA for similar reasons has not stated a prima facie violation of sections 3571(a) and (b) by alleging that there exist two separate groups of employees who, while possessing essentially identical skills and performing comparable work, work under different conditions and receive different pay. There is no allegation that the University's conduct constituted retaliation against the lower paid group because its members exercised HEERA rights. Nor is it alleged that the conduct caused harm to the HEERA rights of an employee and/or the employee organization. Finally, the allegations do not establish a "connection" between the employer's conduct and the exercise of HEERA rights. For the reasons stated above, no complaint will be dissued and the charge accordingly is dismissed.

⁴HEERA establishes certain rights on behalf of covered employees. Section 3565 states:

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.

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Pursuant to Public Employment Relations Board regulation section 32635 (California Administrative Code, title 8, part III), you may appeal the refusal to issue a complaint (dismissal) to the Board itself.

Right to Appeal

You may obtain a review of this dismissal of the charge by filing an appeal to the Board itself within twenty (20) calendar days after service of this Notice (section 32635(a)). To be timely filed, the original and five (5) copies of such appeal must be actually received by the Board itself before the close of business (5:00 p.m.) on March 21, 1983, or sent by telegraph or certified United States mail postmarked not later than March 21, 1983 (section 32135). The Board's address is:

Public Employment Relations Board
1031 18th Street
Sacramento, CA 95814

If you file a timely appeal of the refusal to issue a complaint, any other party may file with the Board an original and five (5) copies of a statement in opposition within twenty (20) calendar days following the date of service of the appeal (section 32635(b)).

Service

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding, and a "proof of service" must accompany the document filed with the Board itself (see section 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.

Extension of Time

A request for an extension of time in which to file a document 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 (3) 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 (section 32132).

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Final Date

If no appeal is filed within the specified time limits, the dismissal will become final when the time limits have expired.

Very truly yours,

DENNIS M. SULLIVAN
General Counsel

By _____
PETER HABERFELD
Regional Attorney

cc: General Counsel