STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

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| B. BENEDICT WATERS, | ) | |
| | ) | |
| Charging Party, | ) | Case No. LA-CE-220-H |
| | ) | |
| v. | ) | PERB Decision No. 694-H |
| | ) | |
| THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, | ) | July 26, 1988 |
| | ) | |
| Respondent. | ) | |
| | ) | |

Appearances: B. Benedict Waters, on his own behalf; Susan H. von Seeburg, Attorney, for The Regents of the University of California.

Before Hesse, Chairperson; Porter, Craib and Shank, Members.

DECISION AND ORDER

This case is before the Public Employment Relations Board (Board) on appeal by Charging Party of the Board agent's dismissal, attached hereto, of his charge that the Respondent violated section 3571, subdivisions (a) and (d) of the Higher Education Employer-Employee Relations Act. We have reviewed the dismissal and, finding it to be free of prejudicial error, adopt it as the Decision of the Board itself.

The unfair practice charge in Case No. LA-CE-220-H is hereby DISMISSED WITHOUT LEAVE TO AMEND.

By the BOARD

PUBLIC EMPLOYMENT RELATIONS BOARD
**Los Angeles Regional Office**
**3530 Wilshire Blvd., Suite 650**
**Los Angeles, CA 90010-2334**
**(213)736-3127**

February 2, 1988

B. Benedict Waters

Re: LA-CE-220-H, B. Benedict Waters v. Regents of the University Of California, DISMISSAL OF UNFAIR PRACTICE CHARGE

Dear Mr. Waters:

The above-referenced unfair practice charge, filed on September 21, 1987, alleges that the Regents of the University of California (University) interfered with employees' rights by failing to distribute copies of the memorandum of understanding **between** the University and the American Federation of State, County and Municipal Employees (AFSCME). This conduct is **alleged** to violate Government Code sections 3571(a) and (d).

I indicated to you in my attached letter dated January 25, 1988 that the above-referenced charge did not state a prima facie case. **You** were advised that if there **were** any factual inaccuracies or additional facts which would correct the deficiencies explained in that letter, you should amend the charge accordingly. You were further advised that unless you **amended** the charge to state a prima facie case, or withdrew it prior to February 1, 1988, it would be dismissed.

I have not received either a request for withdrawal or an amended charge and am therefore dismissing the charge based on the facts and reasons contained in my January 25, 1988 letter.

Right to Appeal

Pursuant to Public Employment Relations Board regulations, 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 dismissal (California Administrative Code, title 8, section 32635 (a)). To be timely filed, the original and five copies of such appeal must be actually received by the Board itself before the close of business (5:00 p.m.), or sent by telegraph, certified or Express United States mail postmarked no later than the last date set for filing. Code of Civil Procedure section 1013 shall apply. (See 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 copies of a statement in opposition within twenty 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 each copy of a document served upon a party or 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 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).

Final Date

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

Sincerely,

JOHN SPITTLER
Acting General Counsel

By
Donn Ginoza
Regional Attorney

Attachment

cc: Susan H. Von Seeburg

STATE OF CALIFORNIA GEORGE DEUKMEJIAN, *Governor*

PUBLIC EMPLOYMENT RELATIONS BOARD
Los Angeles Regional Office
3530 Wilshire Blvd . Suite 650
Los Angeles, CA 90010 2334
(213)736-3127

**January 25, 1988**

**B. Benedict Waters**

**Re: LA-CE-220-H, B. Benedict Waters v. Regents of the University of California**

**Dear Mr. Waters:**

**The above-referenced unfair practice charge, filed on September 21, 1987, alleges that the Regents of the University of California (University) interfered with employees' rights by failing to distribute copies of the memorandum of understanding between the University and the American Federation of State, County and Municipal Employees (AFSCME). This conduct is alleged to violate Government Code sections 3571(a) and (d) .**

**My investigation revealed the following facts. Charging Party became employed at the University of California at Los Angeles (UCLA) on May 20, 1986 in a casual position. As a casual employee, Charging Party was covered by the memorandum of understanding negotiated between AFSCME and the University, covering Unit 11 (Service) and Unit 12 (Clerical and Allied Services).**

**Article 2, section N.1. of the memorandum of understanding, effective from July 1, 1986 through June 30, 1988, provides as follows:**

> **The employer shall be responsible for reproducing a sufficient number of copies of this Agreement. The University shall determine the number of copies it needs in order to provide copies of this Agreement to its managerial, supervisory and confidential personnel. The University shall be responsible for the cost associated with the reproduction of the number of copies it needs. The Union shall be responsible for for the cost of the number of copies needed to provide a copy of this Agreement to each employee presently covered by the Agreement whether or not such employee is a member of the Union. The Union shall also be responsible for the cost of a sufficient number of copies to provide new employees with copies of the Agreement, whether or not such new employees are or become members of the Union. Additionally, the Union shall be**

> responsible for the costs of any copies that it needs for Union uses of the Agreement.

Article 2, section N.2. provides as follows:

> Based upon a reasonable estimate of the number of copies the respective parties need to fulfill their respective obligations and needs for copies, the University shall inform the Union of that portion of the reproduction costs which is to be paid by the Union. Upon receipt of payment from the Union for its share of the reproduction costs, the University shall distribute one copy of this Agreement and shall commence distribution of one copy of the agreement to each new employee covered by the Agreement as those employees are hired. Concurrent with the distribution to employees currently covered by the agreement the University will provide the Union with the number of copies which are to be made available for Union purposes.

Charging Party has alleged in related unfair practice charges that he became the victim of employment discrimination beginning on or after February 2, 1987 and attempted on February 7, 1987 to file a grievance over the matter (LA-CE-217-H). An agent of the University, Frank Martinez, Personnel Representative for UCLA's Facilities Division, Personnel and Payroll Department, allegedly falsely informed him that he was required to complete the informal resolution stage of the grievance process prior to filing a grievance, when in fact the memorandum of understanding indicates that a grievant must file a grievance within thirty (30) days of the occurrence of the violation, regardless of the outcome of any attempts at informal resolution. When he did file the grievance in May 1987, the University initially rejected the grievance as being untimely. He claims that not having a copy of the memorandum of understanding prevented him from knowing about the timeliness requirements of the agreement.

Charging Party indicated to the undersigned in a telephone conversation on October 20, 1987 that he made attempts to obtain a copy of the memorandum of understanding for the purpose of ascertaining his rights thereunder. These attempts included contacting representatives from AFSCME. Charging Party indicated that he spoke with an AFSCME representative at Bunche Hall in February 1987 about the agreement and that she gave him a copy at that time. He also stated that in February 1987 he spoke to Cliff Fried, a representative for AFSCME, who stated that copies of the agreement were at the Wilshire

office. In this conversation he raised the problem that copies of the agreement had not been distributed to employees as required by the Article 2, section N.2. Charging Party complains that Fried failed to offer him a copy of the agreement or to arrange for a time when he could pick up a copy at the Wilshire office. Charging Party further indicated that he had heard from Andrea Ryan, an employee in Campus Architects and Engineers, that copies were not distributed to employees at the same time the managerial employees received their copies because AFSCME had failed to provide the University with the necessary funds for reproduction of the document.

Charging Party alleges in this unfair practice charge that the University, acting in concert or collusion with AFSCME, has deprived members of the bargaining unit of the information contained in the memorandum of understanding by failing to distribute copies, and that as a result he was personally injured when the University rejected his grievance as being untimely on May 6, 1987.

In support of the claim of collusion, Charging Party submitted copies of an October 28, 1987 Public Records Act request and the University's response thereto, dated November 9, 1987 from Sandra J. Rich, Assistant Labor Relations Manager. In this response the University indicated that (1) the Administrative Information System containing a list of all employees would have been used to calculate the number of employees initially entitled to receive copy of the contract, (2) records for job openings kept by the Employment Department provide a count of the number of new hires entitled to receive a copy of the agreement subsequent to the initial distribution, (3) the distribution procedure for casual employees would be through the Personnel Department, and (4) during the past several years new employees were informed that the contract is available from AFSCME. Charging Party asserts that this information request response demonstrates that there has been no distribution of contracts to casual employees or recent hires for several years, although the University has the capability to distribute copies. On this basis, the Charging Party contends the University is in breach of its obligations under Article 2, section N.1. and section N.2.

Further, Charging Party has asserted that Antonia DeCuir, Coordinator of the UCLA Instant Personnel Service (manages all temporary hires including Charging Party), stated to him on October 22, 1987 that her department does not distribute a copy of the contract to new hires and has never been asked to assist in determining the number of future hires on which to base estimates of the number of contracts which must be printed. Frank Martinez is alleged to have also conceded that new hires are not provided copies of the contract during orientation.

The University provided correspondence from Gregory L. Kramp,

Deputy Director, Office of Labor Relations (Office of the President, Berkeley Campus) to Nadra Floyd, Executive Director of AFSCME, dated July 24, 1986, in which Kramp confirms the parties' June 30, 1986 meeting during which Floyd indicated no interest in joining the University in the printing and distribution of the agreement to employees in Units 11 and 12, and on that basis the University denied any obligation to distribute the copies.

Based on the facts as described above, the unfair practice charge fails to state a prima facie violation of the HEERA for the reasons which follow.

Statute of Limitations

As a preliminary matter, Charging Party has failed to file this charge in a timely fashion. A complaint will not issue in respect of any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge. Government Code section 3563.2(a). Charging Party is required to file a charge within six months of the date the alleged violation is discovered or reasonably could have been discovered. Regents of the University of California (1983) PERB Decision No. 359-H. In this **case.** Charging Party indicates he attempted to file a grievance on February 7, 1987. Within that month, he had received a copy of the contract, knew of the distribution requirement, and had realized that he had not received a copy upon his hire. He was then on notice that the University **was** allegedly failing to comply with the terms of the agreement. By speaking with DeCuir and Martinez, he was later able to confirm that his failure to receive a copy of the agreement as a new employee was allegedly the University's policy.

Furthermore, the obligation of the University to reproduce copies of the agreement for the entire bargaining unit (other than new hires) would have been activated when the contract was executed in July 1986. Thus the repudiation would have occurred when the parties ascertained their respective positions regarding their mutual obligations in regard to the matter. The correspondence provided by the University indicates this may have occurred in July 1986. Charging Party could have reasonably discovered these facts or others concerning the breach prior to March 21, 1987. As indicated above, the University responded to his Public Records Act request within twelve days. Since he was aware of the University's obligations under the agreement in February and could reasonably have discovered that the University had allegedly repudiated or was in breach of the agreement prior to March 21, 1987 (six months preceding the filing), his charge is not timely filed.

Charging Party's claim that the violation is a continuing one does not have merit. A continuing violation will not be found

where the employer's conduct during the limitations period, constitutes an unfair practice only by relation to the original offense. El Dorado Union High School District (1984) PERB Decision No. 382.

Section 3571(a) Violation

In order to state a prima facie violation of the HEERA under Government Code section 3571(a), it must be alleged that the employer's conduct tends to or has resulted in some harm to rights guaranteed by the Act. Carlsbad Unified School District (1978) PERB Decision No. 89.

Charging Party has failed to allege any facts from which it can be concluded that any rights guaranteed by the HEERA have been violated. Charging Party has admitted that he obtained a copy of the memorandum of understanding from an AFSCME representative in February 1987 and that he was told by AFSCME representative, Fried, that copies were available at the AFSCME office on Wilshire. Even if he were to deny now that he had received a copy of the agreement, he failed to take sufficient steps to obtain a copy from AFSCME. The mere failure of the University to provide a copy of the agreement at the time he became employed did not prevent him from ascertaining his rights to file a grievance under the agreement and taking appropriate steps to exercise them.

Charging Party's reference to Government Code sections 3560(d) and 3561(a)1 do support the claim that any injury to his

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1/ Government Code section 3560(d) provides as follows:

> The people and the aforementioned higher education employers each have a fundamental interest in the preservation and promotion of the responsibilities granted by the people of the State of California. Harmonious relations between each higher education employer and its employees are necessary to that endeavor.

Government Code section 3561(a) provides as follows:

> It is the further purpose of this chapter to provide orderly and clearly defined procedures for meeting and conferring and the resolution of impasses, and to define and prohibit certain practices which are inimical to the public interest.

rights has occurred. Section 3560(d) establishes in the broadest terms that "harmonious and cooperative labor relations between the public institutions of higher education and their employees" (Government Code section 3560(a)) are necessary to the universities' endeavor to provide higher education pursuant to the legislative mandate. Government Code section 3561(a) states that it is the purpose of the HEERA to provide defined procedures for collective bargaining and to prohibit certain illegal practices. Neither of these sections defines what is or is not an unlawful or unfair practice under the HEERA.

Section 3571(d) Violation

Charging Party has also failed to allege a prima facie violation under Government Code section 3571(d). That subdivision makes it unlawful for an employer to dominate or control the administration of an employee organization so as to render the employee representative unable to make wholehearted efforts on behalf of the employees it represents. Santa Monica Unified School District (1978) PERB Decision No. 52; Antelope Valley Community College District (1979) PERB Decision No. 97. See Clovis Unified School District (1984) PERB Decision No. 389. "Interference," although a lesser degree of intrusion than "domination," is considered equally unlawful. This term includes intruding into the internal functioning of the organization, setting up a rival organization, or engaging in a campaign to induce employees to support a particular union. See Antelope Valley Community College District, supra. Lending financial support or encouraging membership in a particular union has also been found by PERB to constitute unlawful "assistance."

Charging Party's theory appears to be that the University has engaged in collusion with AFSCME in the non-enforcement of the requirements in the contract for the distribution of copies of the agreement. Even if such a theory could be conceived of as unlawful domination, interference or assistance the facts alleged fail to state a prima facie violation. The failure of the University on this count does not render the employee representative unable to make wholehearted efforts to represent its employees nor does it otherwise significantly compromise the union. (See, generally, Gorman, Labor Law, at pp. 201-203; lawful cooperation distinguished from unlawful support).

In the absence of any showing that the University interfered with any rights guaranteed by the HEERA in violation of Government Code section 3571(a) or unlawfully assisted AFSCME under Government Code section 3571(d), Charging Party's claim is reduced to that of a failure by the University to abide by the terms of the memorandum of understanding as set forth in Article 2, sections N.1. and N.2. However, under Government Code section 3563.2, PERB "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." Since Charging Party has alleged no independent theory for an unfair practice, a complaint cannot issue merely to require compliance with the memorandum of understanding.

For these reasons, the charge as presently written does not state a prima facie case. If you feel that there are any factual inaccuracies in this letter or any additional facts which would correct the deficiencies explained above, please amend the charge accordingly. The amended charge should be prepared on a standard PERB unfair practice charge form clearly labeled First Amended Charge, contain all the facts and allegations you wish to make, and be signed under penalty of perjury by the charging party. The amended charge must be served on the respondent and the original proof of service must be filed with PERB. If I do not receive an amended charge or withdrawal from you before February 1, 1988, I shall dismiss your charge. If you have any questions on how to proceed, please call me at (213) 736-3127.

Sincerely,

DONN GINOZA
Regional Attorney