STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

AMERICAN FEDERATION OF TEACHERS GUILD, CALIFORNIA FEDERATION OF TEACHERS, LOCAL 1931, Charging Party, v. SAN DIEGO COMMUNITY COLLEGE DISTRICT, Respondent.	Case No. LA-CE-4217-E Request for Reconsideration PERB Decision No. 1467 PERB Decision No. 1467a April 18, 2003

Appearances: Gattey, Cooney & Baranic LLP by Michael P. Baranic, Attorney, for American Federation of Teachers Guild, California Federation of Teachers, Local 1931; Liebert Cassidy Whitmore by Bruce A. Barsook, Attorney, for San Diego Community College District.

Before Baker, Whitehead and Neima, Members.

DECISION

BAKER, Member: This case is before the Public Employment Relations Board (PERB or Board) on a request for reconsideration filed by American Federation of Teachers Guild, California Federation of Teachers, Local 1931 (Guild) of the Board's decision in San Diego Community College District (2001) PERB Decision No. 1467. In that decision, the Board considered whether the San Diego Community College District (District) violated the Educational Employment Relations Act (EERA)[1] by prohibiting the use of its employee mail

[1] EERA is codified at Government Code section 3540 et seq.

system and other equipment for the distribution of political flyers.[2] The Board held that the District did not violate EERA and dismissed the unfair practice charge filed by the Guild.

After reviewing the entire record in this case, including the Guild's request for reconsideration, the District's response, and the informational briefs filed by interested parties[3], the Board hereby denies the request for reconsideration.

DISCUSSION

Pursuant to PERB Regulation 32410(a):

> The grounds for requesting reconsideration are limited to claims that: (1) the decision of the Board itself contains prejudicial errors of fact, or (2) the party has newly discovered evidence which was not previously available and could not have been discovered with the exercise of reasonable diligence.

The Guild's request for reconsideration is purportedly based on five grounds. First, the Guild argues that the Board's decision does not distinguish between the District's "inter-site" mail system and the District's "intra-site" mail system.

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[2] "Political flyers" refers only to materials "urging the defeat or support of any ballot measure or candidate." (Ed. Code sec. 7054.)

[3] On or about December 21, 2001, the Board received a petition to file an informational brief from the San Mateo Community College Federation of Teachers AFT Local 1493, CFT/AFT, AFL-CIO; Faculty Association of the California Community Colleges, Foothill-DeAnza Faculty Association; American Federation of Teachers Local 2121, CFT/AFT, AFL-CIO; Peralta Federation of Teachers Local 1603, CFT/AFT, AFL-CIO; and United Professors of Marin AFT Local 1610, CFT/AFT, AFL-CIO. On or about March 28, 2002, a petition to file an information brief was received from the International Federation of Professional and Technical Engineers, Local 21, AFL-CIO. Pursuant to PERB Regulation 32210, both petitions were granted on July 17, 2002 (PERB regs are codified at Cal. Code Regs., tit. 8, sec. 31001 et seq).

On or about August 27, 2002, the Board received a request to file an informational brief and request to present oral arguments from the Los Angeles Unified School District (LAUSD). As the Board had already began deliberations into this matter by August 2002, the petition of LAUSD is denied. Likewise, LAUSD's request to present argument is denied as the record and briefs in this matter adequately present the issues and positions of the parties.

The Guild argues that it does not seek to have the District distribute political flyers between campuses. Rather, the Guild seeks to distribute political flyers through the "intra-site" mail system within each campus. This ground is rejected. The use of the term "inter-site" was not prejudicial. The Board's decision does not turn upon whether the political flyers are being distributed between campuses as opposed to within a campus.

Second, the Guild argues that the Board did not make a determination that the Guild's placement, as opposed to distribution by the District, of political flyers in District mailboxes would violate Education Code section 7054[4]. This argument is improper because it neither identifies a prejudicial error of fact nor newly discovered evidence. The Guild merely seeks to have the Board further clarify its decision. The Board is not inclined to entertain such a request. Our decision speaks for itself. Specifically, the Board's holding that: "The plain meaning of Education Code section 7054 clearly prohibits the use of school district or community college district funds, services, supplies, or equipment for the purpose of the urging the support or defeat of any ballot measure or candidate," adequately resolves the issues presently in the Guild's charge.

Third, the Guild argues that the Board did not make a determination that the Guild's publications actually violate the provisions of Section 7054. Again, this is an improper ground for reconsideration. Further, the Guild misconstrues the issue in this matter which is whether the District violated EERA by unilaterally implementing a policy prohibiting the use of its employee mail system and other equipment for the distribution of political flyers. Since it is the legitimacy of the District's policy that is at issue, whether the Guild actually intended to distribute such flyers is irrelevant.

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[4] All further statutory references are to the Education Code unless otherwise noted.

Fourth, the Guild argues that the Board failed to follow precedent by not sending this matter to a formal hearing. This is also not a proper ground for reconsideration. As discussed above, the issue in this matter is whether the District's unilateral implementation of its policy violated EERA. As there was no dispute that the District had implemented such a policy, the sole issue was whether the District's unilateral implementation violated EERA. This is an issue of law that was properly decided without an evidentiary hearing.

Fifth, the Guild argues that the Board failed to properly consider "new" legal authority. Specifically, the Guild argues that the Board failed to properly construe an opinion of the Attorney General. Even if the discovery of "new" legal authority was a proper ground for reconsideration, the Attorney General opinion was not "new" in the sense that it was issued after the Board's decision. It was only "new" to the Guild which was not aware of the opinion earlier. In any event, the opinion was cited by the District and thoroughly analyzed and discussed in the Board's decision. Accordingly, this ground for reconsideration is also rejected.

Finally, the Board turns to the arguments advanced in the informational briefs. First, it is argued that the Board erred in its interpretation of Section 7054. In support, the briefs contain a complete copy of the legislative history behind Education Code section 7054. After reviewing the materials submitted, the Board declines to alter its ruling. The legislative history does not evince a clear intent to allow the use of the District's mail system to distribute the Guild's political flyers. Absent such a clear indication of intent, the Board must follow the plain language of the statute.

Next, it is argued that if the Board is correct in its interpretation of Section 7054, then that section is unconstitutional since the District's mailboxes are "public forums" and any

limitation upon their use must be "narrowly drawn to effectuate a compelling state interest." The Board is prohibited from entertaining such an argument. Article III, section 3.5 of the California Constitution provides, in pertinent part:

> An administrative agency, including an administrative agency created by the Constitution or an initiative statute, has no power:
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> (a) To declare a statute unenforceable, or refuse to enforce a statute, on the basis of it being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional;
>
> (b) To declare a statute unconstitutional;
>
> (c) To declare a statute unenforceable, or to refuse to enforce a statute on the basis that federal law or federal regulations prohibit the enforcement of such a statute unless an appellate court has made a determination that the enforcement of such statute is prohibited by federal law or federal regulations. [New sec. adopted June 6, 1978.]

The Board is not aware of any appellate decision declaring Section 7054 unconstitutional. Accordingly, the Board is bound by its plain language.

Lastly, the informational briefs advance numerous public policy arguments for allowing the use of the District's mail system for distribution of the Guild's political flyers. It is noted that Section 76120 provides students the right to distribute printed materials and that there is no reason faculty should not have the same right. In addition, Section 82537 creates "civic centers" within community colleges for the use of various groups, including political associations. Further, it is argued that the goals of EERA require that the Guild be able to freely communicate with its members on a wide variety of issues. These public policy arguments are well taken. However, they should be addressed to the Legislature and not this administrative body. The Board is not free to "overturn" a statute of the Legislature.

For all these reasons, the Board denies the Guild's request for reconsideration.

ORDER

The Guild's request for reconsideration of the Board's decision in San Diego Community College District (2001) PERB Decision No. 1467 is hereby DENIED.

Members Whitehead and Neima joined in this Decision.