STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

ACADEMIC PROFESSIONALS OF CALIFORNIA, Charging Party, v. TRUSTEES OF THE CALIFORNIA STATE UNIVERSITY, Respondent.	Case No. LA-CE-723-H PERB Decision No. 1658-H July 13, 2004

Appearances: Rothner, Segall & Greenstone by Bernhard Rohrbacher, Attorney, for Academic Professionals of California; Janette Redd Williams, University Counsel, for Trustees of the California State University.

Before Duncan, Chairman; Whitehead and Neima, Members.

DECISION

NEIMA, Member: This case is before the Public Employment Relations Board (Board) on appeal by the Academic Professionals of California (APC) of a Board agent's dismissal (attached) of its unfair practice charge. The charge alleged that the Trustees of the California State University (CSU) violated the Higher Education Employer-Employee Relations Act (HEERA)[1] by making unilateral changes in the process for reviewing the reporting of improper governmental activities.

The Board has reviewed the entire record in this matter, including the original and amended unfair practice charge, the warning and dismissal letters, APC's appeal and CSU's response. The Board finds the warning and dismissal letters to be free of prejudicial error and adopts them as the decision of the Board itself.

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

ORDER

The unfair practice charge in Case No. LA-CE-723-H is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chairman Duncan and Member Whitehead joined in this Decision.

STATE OF CALIFORNIA — ARNOLD SCHWARZENEGGER, Governor
PUBLIC EMPLOYMENT RELATIONS BOARD

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January 20, 2004

Lee O. Norris, Labor Relations Representative
Academic Professionals of California
8726-D S. Sepulveda Blvd., #C172
Los Angeles, CA 90045

Re: Academic Professionals of California v. Trustees of the California State University
Unfair Practice Charge No. LA-CE-723-H, First Amended Charge
DISMISSAL LETTER

Dear Mr. Norris:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on November 14, 2002. The Academic Professionals of California APC) alleges that the Trustees of the California State University (CSU) violated the Higher Education Employer-Employee Relations Act (HEERA)[1] by making unilateral changes in the process for reviewing the reporting of improper governmental activities.

I indicated to you in my attached letter dated September 29, 2003 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. You were further advised that, unless you amended the charge to state a prima facie case or withdrew it prior to October 6, 2003, the charge would be dismissed.

I received a First Amended Charge on October 3, 2003. The initial charge provided that on May 24, 2002, APC received notice that CSU was implementing Executive Orders (EO) 821 and 822. In reviewing said documents, CFA learned of EO 664 which was implemented in 1997. EO 821 (Reporting Procedures for Protected Disclosure of Improper Governmental Activities and/or Significant Threats to Health or Safety) requires CSU to give to a "whistleblower" complainant "what if any, actions were taken" by the employer against someone found to have violated the policy. You alleged that this would include personnel actions and is a unilateral change by CSU.

The amended charge provides additional information concerning EO 821 asserting that the policy unilaterally permits CSU to determine if an allegation of misconduct has been "substantiated." Based on CSU's own findings, it can then give to the complainant confidential personnel information including proposed disciplinary action. APC asserts that

[1]HEERA is codified at Government Code section 3560 et seq. The text of the HEERA and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

the past practice was that information regarding proposed discipline from allegations of misconduct were maintained as confidential until the matter was appealed to the State Personnel Board where they became public records as a matter of course.

EO 821 provides,

> Within ninety (90) days of receipt of the protected disclosure, the vice chancellor of human resources shall issue a formal response to the complainant that includes whether the actions were substantiated and what, if any, actions were taken. Care shall be taken to protect the privacy interests of those involved." (emphasis added.)

We discussed the charge on January 16, 2004 and I asked if APC had any information, facts or examples of CSU investigating a complaint, finding that the charges were "substantiated", and then releasing confidential personnel records of proposed discipline to the complainant. You indicated that you did not have any additional factual information or specific examples.

In determining whether a party has violated HEERA section 3571(c), PERB utilizes either the "per se" or "totality of the conduct" test, depending on the specific conduct involved and the effect of such conduct on the negotiating process. (Stockton Unified School District (1980) PERB Decision No. 143.) Unilateral changes are considered "per se" violations if certain criteria are met. Those criteria are: (1) the employer implemented a change in policy concerning a matter within the scope of representation, and (2) the change was implemented before the employer notified the exclusive representative and gave it an opportunity to request negotiations. (Walnut Valley Unified School District (1981) PERB Decision No. 160; Grant Joint Union High School District (1982) PERB Decision No. 196.)

PERB Regulation 32615(a)(5) requires, inter alia, that an unfair practice charge include a "clear and concise statement of the facts and conduct alleged to constitute an unfair practice." Thus, the charging party's burden includes alleging the "who, what, when, where and how" of an unfair practice. (State of California (Department of Food and Agriculture) (1994) PERB Decision No. 1071-S, citing United Teachers-Los Angeles (Ragsdale) (1992) PERB Decision No. 944.) Mere legal conclusions are not sufficient to state a prima facie case. (Ibid.; Charter Oak Unified School District (1991) PERB Decision No. 873.)

Although this letter does not decide whether the alleged change in policy is negotiable, even assuming that it is within the scope of bargaining, the meaning of the above EO 821 is vague in requiring CSU to respond to the complainant with information on what, if any actions were taken against the charged employee, but to also use "care ...to protect the privacy interest of those involved." Without additional facts or examples of information actually released, it has not been demonstrated that CSU will in fact divulge to the complainant specific information about any proposed disciplinary action. Accordingly, this unilateral change allegation must be dismissed.

EO 822 involves investigations into "Allegations of Retaliation under the California Whistleblowers Protection Act" and provides that employees are required to cooperate in the investigation and be honest in giving information to investigators. EO 664 has a similar requirement. It is alleged that this is a unilateral change. The amended charge asserts that the EO's create a system that allows CSU to require employees to answer questions where the statements made or information obtained may become a basis for discipline. Also, the employee "may not know to invoke his/her Weingarten rights;" and employees are required to participate if the complainant or CSU believe, without proof, that they may be witnesses.

The amended charge discusses the past practice in such an investigation by indicating that CSU had one method for interviewing employees charged with misconduct. The accused employee was advised that he or she was suspected of misconduct and that they were required to answer questions during the investigation. Where the accused employee requested representation, CSU could either wait for the employee's representative or cancel the meeting if it did not wish to proceed with the representative present.

The facts alleged do not demonstrate there has been a change in policy. Whether under the new or the old policy, it is presumed that an employee should participate by cooperating and giving honest answers. In addition, I note that EO 822 does not attempt to supplant collective bargaining as it provides in part,

> If the provisions of this executive order are in conflict with the provisions of a memorandum of understanding reached pursuant to Government Code section 3560, et seq., the memorandum of understanding shall be controlling.

Therefore, this allegation must be dismissed.

The initial charge also alleges that EO 822 provides no guarantee of union representation for employees subject to investigation. My letter dated September 29, 2003 discussed in detail the law on an employee's right to union representation. I still conclude that you have not provided facts which demonstrate that employee rights to representation will be violated by the procedures of EO 822. We cannot assume that CSU will refuse a valid request for representation in a "whistleblower" investigation. Furthermore, I am not aware of any legal authority that requires that an employer must set forth representational rights when creating an investigatory procedure. Therefore, this allegation must also be dismissed.

Accordingly, I am dismissing the charge based on the facts and reasons contained above and in my September 29, 2003 letter.

Right to Appeal

Pursuant to PERB Regulations,[2] 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. (Regulation 32635(a).) Any document filed with the Board must contain the case name and number, and the original and five (5) copies of all documents must be provided to the Board.

A document is considered "filed" when actually received before the close of business (5 p.m.) on the last day set for filing. (Regulations 32135(a) and 32130.) A document is also considered "filed" when received by facsimile transmission before the close of business on the last day for filing together with a Facsimile Transmission Cover Sheet which meets the requirements of Regulation 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Regulations 32135(b), (c) and (d); see also Regulations 32090 and 32130.)

The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95814-4174
FAX: (916) 327-7960

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 (20) calendar days following the date of service of the appeal. (Regulation 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 Regulation 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. A document filed by facsimile transmission may be concurrently served via facsimile transmission on all parties to the proceeding. (Regulation 32135(c).)

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

[2] PERB's Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

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. (Regulation 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,

ROBERT THOMPSON
General Counsel

By _____
Marc S. Hurwitz
Regional Attorney

Attachment

cc: Janette Redd Williams & Marc D. Mootchnik, University Counsel

STATE OF CALIFORNIA GRAY DAVIS, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD

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September 29, 2003

Lee O. Norris, Labor Relations Representative
Academic Professionals of California
8726-D S. Sepulveda Blvd., #C172
Los Angeles, CA 90045

Re: Academic Professionals of California v. Trustees of the California State University
Unfair Practice Charge No. LA-CE-723-H
WARNING LETTER

Dear Mr. Norris:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on November 14, 2002. The Academic Professionals of California APC) alleges that the Trustees of the California State University (CSU) violated the Higher Education Employer-Employee Relations Act (HEERA)[1] by making unilateral changes in the reporting of improper governmental activities.

Your charge states the following. On May 24, 2002, APC received notice that CSU was implementing Executive Orders (EO) 821 and 822. While investigating these documents, CFA became aware of EO 664 which was implemented in 1997.

EO 821 permits the employer to release to a "whistleblower" complainant "what, if any, actions were taken" by the employer against someone found to have violated the policy. You allege that this would include personnel actions and is a unilateral change by the employer. You have provided no information on the past practice regarding privacy of personnel actions in such cases.

In determining whether a party has violated HEERA section 3571(c), PERB utilizes either the "per se" or "totality of the conduct" test, depending on the specific conduct involved and the effect of such conduct on the negotiating process. (Stockton Unified School District (1980) PERB Decision No. 143.) Unilateral changes are considered "per se" violations if certain criteria are met. Those criteria are: (1) the employer implemented a change in policy concerning a matter within the scope of representation, and (2) the change was implemented before the employer notified the exclusive representative and gave it an opportunity to request negotiations. (Walnut Valley Unified School District (1981) PERB Decision No. 160; Grant Joint Union High School District (1982) PERB Decision No. 196.)

[1]HEERA is codified at Government Code section 3560 et seq. The text of the HEERA and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

Without information setting forth the employer's past practice or policy it cannot be determined that a change has occurred. Accordingly, this allegation must be dismissed.

EO 822 relates to investigations into "whistleblower" complaints and states that employees are required to cooperate and be honest in providing information to investigators. EO 664 has a similar requirement. You state that the employer did not negotiate over this requirement. Again, you have provided no information regarding the employer's past policy in such an investigation. Thus, you have not demonstrated a change. These allegations must also be dismissed.

You also allege that the investigative procedure of EO 822 does not provide a guarantee of Union representation for employees subject to investigation.

An employee required to attend an investigatory interview with the employer is entitled to union representation where the employee has a reasonable basis to believe discipline may result from the meeting. PERB adopted the Weingarten[2] rule in Rio Hondo Community College District (1982) PERB Decision No. 260. In order to establish a violation of this right, the charging party must demonstrate: (a) the employee requested representation, (b) for an investigatory meeting, (c) which the employee reasonably believed might result in disciplinary action; and (d) the employer denied the request. (See Redwoods Community College District v. Public Employment Relations Board (1984) 159 Cal.App.3d 617.; Fremont Union High School District (1983) PERB Decision No. 301.)

In Rio Hondo Community College District (1982) PERB Decision No. 260, the Board cited with approval Baton Rouge Water Works Company (1979) 246 NLRB 995, which provided:

> the right to representation applies to a disciplinary interview, whether labeled as investigatory or not, so long as the interview in question is not merely for the purpose of informing the employee that he or she is being disciplined.

In approving the Weingarten rule, the U.S. Supreme Court noted with approval that the National Labor Relations Board would not apply it to "such run-of-the-mill shop-floor conversations as, for example, the giving of instructions or training or needed corrections of work techniques." (Weingarten, quoting Quality Manufacturing Co. (1972) 195 NLRB 197, 199 [79 LRRM 1269, 1271].)

A right to union representation may be held to exist, in the absence of an objectively reasonable fear of discipline, only under "highly unusual circumstances." (Redwoods Community College District v. PERB (1984) 159 Cal.App.3d 617 [205 Cal.Rptr. 523].) The finding of "highly unusual circumstances" in the Redwoods case was based on the requirement

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[2]In National Labor Relations Board v. Weingarten (1975) 420 U.S. 251 (Weingarten), the Court granted employees the right to representation during disciplinary interviews.

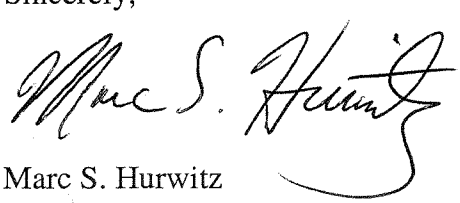
that the employee attend a meeting which she no longer sought over her appeal of a negative performance rating; the fact that the interview was investigatory and formal; the interview was held by a high-ranking official of the employer; and the hostile attitude of the official toward the employee.

You have not set forth facts which demonstrate that employee rights to representation will necessarily be violated by the procedures of EO 822. It cannot be assumed that the employer will refuse a valid request for representation in a "whistleblower" investigation. Additionally, I am aware of no legal authority which mandates that an employer must set forth representational rights when establishing an investigatory procedure. Accordingly, this allegation must also be dismissed.

Please note that I called you on Friday, September 26, 2003, to discuss this case and left a you a message to call me. We traded several electronic-mail messages today and it was decided that I would send you this letter.

For the above reasons the charge, as presently written, does not state a prima facie case. If there are any factual inaccuracies in this letter or additional facts that would correct the deficiencies explained above, please amend the charge. 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 have the case number written on the top right hand corner of the charge form. The amended charge must be served on the respondent's representative and the original proof of service must be filed with PERB. If I do not receive an amended charge or withdrawal from you before October 6, 2003, I shall dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,



Marc S. Hurwitz
Regional Attorney

MSH