STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

ACADEMIC PROFESSIONALS OF CALIFORNIA, Charging Party, v. TRUSTEES OF THE CALIFORNIA STATE UNIVERSITY (STANISLAUS), Respondent.	Case No. LA-CE-797-H PERB Decision No. 1705-H November 9, 2004

Appearances: Rothner, Segall & Greenstone by Bernhard Rohrbacher, Attorney, for Academic Professionals of California; California State University, Office of the General Counsel by Karen Carr, Attorney, for Trustees of the California State University (Stanislaus).

Before Duncan, Chairman; Whitehead and Neima, Members.

DECISION

DUNCAN, Chairman: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Academic Professionals of California (APC) of a Board agent's partial dismissal (attached) of APC's unfair practice charge. The charge alleged that the Trustees of the California State University (Stanislaus) (CSU) violated the Higher Education Employer-Employee Relations Act (HEERA)[1] by unilaterally implementing a computer network use policy and a disciplinary policy at the Stanislaus campus. APC alleged that this conduct constituted a violation of HEERA section 3571(a), (b) and (c). The Board agent issued a complaint covering the computer network use policy and telephone policy. The rest of the case, relating to an alleged new disciplinary policy, was dismissed by the Board agent.

[1]HEERA is codified at Government Code section 3560, et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

After review of the entire record in this case, including the unfair practice charge, the amended unfair practice charge, CSU's response, the warning and dismissal letters, APC's appeal and CSU's response, the Board adopts the warning and dismissal letters as the decision of the Board itself, upholding the partial dismissal, subject to the discussion below.

BACKGROUND

On October 16, 2003, CSU Stanislaus President Marvalene Hughes (Hughes) sent an e-mail which stated, in pertinent part:

> As a CSU Stanislaus employee, please remember that state law (Government Code section 8314) prohibits the use of state resources for political campaign activity or any other personal purposes not authorized by [state] law.
>
> Violations of any of the above prohibitions carry strict penalties, especially Title II of the Government Code (i.e., the use of public resources by state employees for political campaign activities).

On October 17, 2003, a second e-mail was sent by Hughes to supersede the one sent October 16. That e-mail stated, in pertinent part:

> STATE LAW RESTRICTS THE USE OF STATE RESOURCES FOR PERSONAL PURPOSES, CAMPAIGN ACTIVITY AND OTHER PURPOSES WHICH ARE NOT AUTHORIZED BY LAW. . . .
>
> PERSONAL USAGE OF STATE RESOURCES AND CAMPAIGN ACTIVITY THAT ARE NOT *MINIMAL* OR *INCIDENTAL* ARE PROHIBITED. [FOR EXAMPLE, AN OCCASIONAL LOCAL TELEPHONE CALL IS NOT PROHIBITED.]
>
> VIOLATIONS OF THIS LAW OR APPLICABLE POLICY WILL BE REPORTED AND DEALT WITH BY THE APPROPRIATE DISCIPLINARY BODY, WHICH IN THE CASE OF EMPLOYEES, SHALL BE HANDLED IN ACCORDANCE WITH THE COLLECTIVE BARGAINING AGREEMENT, CSU STANISLAUS POLICY AND APPLICABLE LAW. [Emphasis in original.]

The Board agent found that APC failed to state a prima facie case of unilateral change. It was the position of the Board agent that the e-mail merely notifies employees that violations of the Government Code may be reported and that any resulting discipline would be addressed in accordance with the existing collective bargaining agreement (CBA) and the CSU policy already in place.

DISCUSSION

Under existing PERB precedent, it is clear that the implementation of a new rule of conduct is negotiable. (San Bernardino City Unified School District (1982) PERB Decision No. 255 (San Bernardino).) However, we do not believe that has occurred in this case.

The language relied upon by APC in San Bernardino states the following:

> Disciplinary action, particularly termination, may have a direct impact on wages, health and welfare benefits, and other enumerated terms and conditions of employment since such action may reduce or eliminate entitlement to those enumerated items. Thus, rules of conduct which subject employees to disciplinary action are subject to negotiation both as to criteria for discipline and as to procedure to be followed. The unilateral adoption of such rules therefore violates the employer's duty to notify the exclusive representative and provide it with an opportunity to negotiate. . . .

In footnote 5, the Board noted that San Bernardino arose prior to the addition of Educational Employment Relations Act (EERA)[2] section 3543.2(b), which states:

> (b) Notwithstanding Section 44944 of the Education Code, the public school employer and the exclusive representative shall, upon request of either party, meet and negotiate regarding causes and procedures for disciplinary action, other than dismissal, including suspension of pay for up to 15 days, affecting certificated employees. If the public school employer and the exclusive representative do not reach mutual agreement, then the provisions of Section 44944 of the Education Code shall apply.

[2]EERA is codified at section 3540, et seq.

Thus, the amendment of EERA after San Bernardino arose makes it clear that the causes of discipline are negotiable. In contrast, HEERA's statutory scope of representation does not expressly include the causes of discipline. (HEERA sec. 3562 (r).) Further, with respect to CSU, the causes of discipline are set forth by statute. Specifically, Education Code section 89535 governing CSU, states:

> Any permanent or probationary employee may be dismissed, demoted, or suspended for the following causes:
>
> (a) Immoral conduct.
> (b) Unprofessional conduct.
> (c) Dishonesty.
> (d) Incompetency.
> (e) Addiction to the use of controlled substances.
> (f) Failure or refusal to perform the normal and reasonable duties of the position.
> (g) Conviction of a felony or conviction of any misdemeanor involving moral turpitude.
> (h) Fraud in securing appointment.
> (i) Drunkenness on duty.

As the Legislature has already decided the causes of discipline for CSU employees, we believe the holding in San Bernardino is inapposite. Where the Legislature has already set forth causes of discipline the topic is not within the mandatory scope of representation.

CSU has merely informed employees of the existence of this section and its applicability to employees' use of state resources. CSU has not implemented a new rule of conduct. CSU has notified employees that section 8314 may subject them to discipline under the CBA. The CBA in turn specifically references the Education Code statutes governing discipline. Whether discipline can be sustained against an employee for violating section 8314 depends on whether CSU can prove one of the enumerated reasons listed, supra.

ORDER

The partial dismissal of the unfair practice charge in Case No. LA-CE-797-H is hereby AFFIRMED.

Member Neima's concurrence begins on page 6.

Member Whitehead's dissent begins on page 7.

NEIMA, Member, concurring: I agree with the lead opinion that a new rule of conduct has not been implemented in this case. Instead, as I read the unfair practice charge, the California State University (CSU) has merely informed employees of the existence of Government Code section 8314 and its applicability to employees' use of state resources. Thus, I would adopt the Public Employment Relations Board agent's dismissal letter finding that there has been no change in policy by CSU. As I find that there was no change in policy, it is not necessary to address whether the alleged change was within the scope of representation, and therefore I do not join in that portion of the lead opinion.

WHITEHEAD, Member, dissenting: I respectfully dissent for the reasons that follow.

BACKGROUND

On October 18, 2003, Academic Professionals of California (APC) Business Manager, Edward Purcell received a copy of an e-mail sent by Trustees of the California State University (Stanislaus) (CSU) President Marvalene Hughes (Hughes) on October 16, 2003. The e-mail stated, in pertinent part, that:

> Re: Appropriate Use of University Computers and State Property
>
> As a CSU Stanislaus employee, please remember that state law (Government Code section 8314[1]) prohibits the use of state

[1]Government Code section 8314 provides:

> (a) It is unlawful for any elected state or local officer, including any state or local appointee, employee, or consultant, to use or permit others to use public resources for a campaign activity, or personal or other purposes which are not authorized by law.
>
> (b) For purposes of this section:
>
> (1) 'Personal purpose' means those activities the purpose of which is for personal enjoyment, private gain or advantage, or an outside endeavor not related to state business. 'Personal purpose' does not include the incidental and minimal use of public resources, such as equipment or office space, for personal purposes, including an occasional telephone call.
>
> (2) 'Campaign activity' means an activity constituting a contribution as defined in Section 82015 or an expenditure as defined in Section 82025. 'Campaign activity' does not include the incidental and minimal use of public resources, such as equipment or office space, for campaign purposes, including the referral of unsolicited political mail, telephone calls, and visitors to private political entities.
>
> (3) 'Public resources' means any property or asset owned by the state or any local agency, including, but not limited to, land, buildings, facilities, funds, equipment, supplies, telephones, computers, vehicles, travel, and state-compensated time.

resources for political campaign activity or any other personal purposes not authorized by law. State resources include vehicles,

---

(4) 'Use' means a use of public resources which is substantial enough to result in a gain or advantage to the user or a loss to the state or any local agency for which a monetary value may be estimated.

(c) (1) Any person who intentionally or negligently violates this section is liable for a civil penalty not to exceed one thousand dollars ($1,000) for each day on which a violation occurs, plus three times the value of the unlawful use of public resources. The penalty shall be assessed and recovered in a civil action brought in the name of the people of the State of California by the Attorney General or by any district attorney or any city attorney of a city having a population in excess of 750,000. If two or more persons are responsible for any violation, they shall be jointly and severally liable for the penalty.

(2) If the action is brought by the Attorney General, the moneys recovered shall be paid into the General Fund. If the action is brought by a district attorney, the moneys recovered shall be paid to the treasurer of the county in which the judgment was entered. If the action is brought by a city attorney, the moneys recovered shall be paid to the treasurer of that city.

(3) No civil action alleging a violation of this section may be commenced more than four years after the date the alleged violation occurred.

(d) Nothing in this section shall prohibit the use of public resources for providing information to the public about the possible effects of any bond issue or other ballot measure on state activities, operations, or policies, provided that (1) the informational activities are otherwise authorized by the constitution or laws of this state, and (2) the information provided constitutes a fair and impartial presentation of relevant facts to aid the electorate in reaching an informed judgment regarding the bond issue or ballot measure.

(e) The incidental and minimal use of public resources by an elected state or local officer, including any state or local appointee, employee, or consultant, pursuant to this section shall not be subject to prosecution under Section 424 of the Penal Code.

office supplies, computers, telephones, Fax (sic) machines, and similar equipment owned by the State.

Violations of any of the above prohibitions carry strict penalties, especially Title II of the Government Code (i.e., the use of public resources by state employees for political campaign activities.) (Emphasis added.)

On October 17, 2003, Hughes issued another e-mail, which stated, in pertinent part:

THE FOLLOWING BOTH CLARIFIES AND SUPERSEDES THE PREVIOUS E-MAIL SENT REGARDING THE 'APPROPRIATE USE OF UNIVERSITY COMPUTERS AND STATE PROPERTY.'

STATE LAW RESTRICTS THE USE OF STATE RESOURCES FOR PERSONAL PURPOSES, CAMPAIGN ACTIVITY AND ANY OTHER PURPOSES WHICH ARE NOT AUTHORIZED BY LAW.

STATE RESOURCES INCLUDE VEHICLES, SUPPLIES, OFFICE SPACE, COMPUTERS, TELEPHONES AND OTHER EQUIPMENT OWNED BY THE STATE.

PERSONAL USAGE OF STATE RESOURCES AND CAMPAIGN ACTIVITY THAT ARE NOT *MINIMAL* OR *INCIDENTAL* ARE PROHIBITED. [FOR EXAMPLE, AN OCCASIONAL LOCAL TELEPHONE CALL IS NOT PROHIBITED.]

VIOLATIONS OF THIS LAW OR APPLICABLE POLICY WILL BE REPORTED AND DEALT WITH BY THE APPROPRIATE DISCIPLINARY BODY, WHICH IN THE CASE OF EMPLOYEES, SHALL BE HANDLED IN ACCORDANCE WITH THE COLLECTIVE BARGAINING AGREEMENT, CSU STANISLAUS POLICY AND APPLICABLE LAW.

AS INDIVIDUALS WORKING AND/OR STUDYING AT AN INSTITUTION OF HIGHER LEARNING, SOUND AND REASONABLE JUDGMENT SHOULD BE EXERCISED WHEN DETERMINING WHETHER USE OF STATE RESOURCES IS APPROPRIATE. (Emphasis in original, except for underline.)

The underlined portions of the e-mails provide a definition of "state resources" that expands upon or confuses the limited definition in Government Code section 8314. APC alleges that the above institutes a new disciplinary policy because bargaining unit employees may now be disciplined for violating the Government Code. APC claims that this policy was previously unknown to APC. APC explains that Hughes' October 17 e-mail does not merely recite the Government Code because under section 8314, only the State Attorney General, or the District Attorney of a county may bring civil action against persons found in violation of the law. Nothing in section 8314 permits the University to handle alleged violations of the statute by its employees with "the appropriate disciplinary body . . . in accordance with the collective bargaining agreement (CBA), CSU Stanislaus policy, and applicable law." Therefore, APC concludes, CSU has unilaterally assumed the right to discipline employees for violation of section 8314.

The Public Employment Relations Board (PERB or Board) agent dismissed this allegation reasoning that the policy merely notifies employees that violations of the Government Code may be reported and that any resulting discipline would be handled in accordance with the existing CBA and CSU policy.

DISCUSSION

In adopting the partial dismissal, the majority has held only that CSU has not unilaterally changed the process for discipline; but the majority does not address whether CSU has unilaterally changed the criteria for discipline.

As a preliminary matter, APC argues that the criteria for discipline found in the e-mail policy falls within the scope of representation. On the other hand, CSU contends that the

policy stated within the e-mails is not within scope. Based upon Board precedent, I agree with APC and find the October 17 e-mail containing criteria for discipline to be negotiable.

In San Bernardino City Unified School District (1982) PERB Decision No. 255 (San Bernardino I), the Board held that causes of discipline as well as procedures for discipline are negotiable items. Significantly, the Board made this finding despite the fact that soon after the issuance of San Bernardino I, Educational Employment Relations Act (EERA)[2] section 3543.2 was amended to expressly include causes of discipline within the scope of representation. (EERA sec. 3543.2(b).) In fact, in Monrovia Unified School District (1984) PERB Decision No. 460 (Monrovia), the Board held that this amendment to Section 3543.2(b) did not suggest that the subject was previously outside of scope. Quoting Arvin Union School District (1983) PERB Decision No. 300, the Monrovia Board affirmed that:

> 'The addition of a new enumerated subject to the scope section doesn't mean such a subject was not previously related to an enumerated item. The change in the law means that the negotiability of specific procedures for disciplinary action arising after January 1, 1982 no longer need be analyzed in terms of the Anaheim balancing test.'
> (Emphasis in text.)[3]

To my knowledge, the Board has never held that because a statute defines causes of discipline, that other causes of discipline or variations of the specified causes are not

---

[2]EERA is codified at Government Code section 3540, et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

[3]In United Steelworkers of America, Local 8599, AFL-CIO v. Board of Education of the Fontana Unified School District (1984) 162 Cal.App.3d 823, 831 [209 Cal.Rptr. 16], the court noted that the San Bernardino I cause of action arose before the 1981 amendment to EERA section 3543.2, which included causes and procedures for disciplinary action of certificated employees as a negotiable issue. It found that nevertheless, the Board's reasoning, based on the Anaheim test (Anaheim Union High School District (1981) PERB Decision No. 177), was good law to the extent it was not inconsistent with EERA or the Education Code.

negotiable.[4] On the contrary, over the years, the Board has attempted to expand those causes that are subject to negotiation using the Education Code provisions to be a baseline for negotiations under EERA and Higher Education Employer-Employee Relations Act (HEERA).[5] As stated by the Board in Trustees of the California State University (2003) PERB Decision No. 1507-H (Trustees):

> [A]s correctly stated by the ALJ, the absence of Education Code section 89535 from HEERA section 3572.5 does not preclude the parties from negotiating forms and bases for discipline not included within section 89535, provided that the subject is related to wages, hours or other negotiable terms and conditions of employment.[6]

Unlike EERA section 3543.2, HEERA section 3562(r) does not list items within scope; rather, it serves to exclude specific items. Discipline is not one of the excluded items. In fact, under that provision, "scope of representation" is specifically defined as items limited to "wages, hours of employment, and other terms and conditions of employment." Thus, the definition of scope in HEERA is more expansive than that of EERA, which specifically defines terms and conditions of employment.

Appellate courts have held that items covered by the Education Code continue to be negotiable unless the proposed contractual provisions would supplant or nullify the pertinent provisions of the Education Code. In San Mateo, the school districts argued that the language

---

[4]The California Supreme Court in San Mateo City School Dist. v. Public Employment Relations Board (1983) 33 Cal.3d 850 [191 Cal.Rptr. 800] (San Mateo) rejected the notion that the scope of negotiations is strictly limited to items enumerated in EERA and expressly disavowed the district's contention to that effect. (See San Mateo, at pp. 862-863, 866.)

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

[6]In Trustees, the parties had negotiated provisions for discipline based on specified causes. Some of these causes were not among the enumerated bases for discipline in Education Code section 89535.

in EERA section 3540 pertaining to the relationship between EERA and the Education Code evidenced a Legislative intent to narrowly restrict the scope of representation. The Board, on the other hand, had interpreted this language to prohibit negotiations only where the provisions of the Education Code would be "replaced, set aside or annulled by the language of the proposed contract clause." (Id., at p. 864.) In San Mateo, at pp. 864-865, the California Supreme Court enunciated the standard for negotiability in these circumstances:

> In the words of board member Moore, 'Unless the statutory language [of the Education Code] clearly evidences an intent to set an inflexible standard or insure immutable provisions, the negotiability of a proposal should not be precluded.'
>
> PERB's interpretation reasonably construes the particular language of section 3540 in harmony with the evident legislative intent of the EERA and with existing sections of the Education Code. This, rather than the preemption theory offered by the Healdsburg Districts, is the correct approach when several provisions of state law address a similar subject. (Industrial Welfare Com. v. Superior Court (1980) 27 Cal.3d 690, 723 [166 Cal.Rptr. 331, 613 P.2d 579]; Certificated Employees Council v. Monterey Peninsula Unified Sch. Dist. (1974) 42 Cal.App.3d 328 [116 Cal.Rptr. 819].) It is consistent with the fact that the EERA explicitly includes matters such as leave, transfer and reassignment policies within the scope of representation, even though such matters are also regulated by Education Code. (See, Ed. Code § 44963 et seq. [pertaining to certificated employees] and § 45105 et seq. [pertaining to classified employees].) (Emphasis added.)

The court thus approved of the Board's interpretation of the supersession language in EERA section 3540:

> PERB's approach is consistent with judicial interpretations of substantially similar language which appeared in the Winton Act.[6] In Certificated Employees Council v. Monterey Peninsula Unified Sch. Dist., supra, 42 Cal.App.3d 328, the Court of Appeal held it permissible for a school district to meet and confer on matter such as tenure notwithstanding the fact the matters were regulated by the Education Code. The court explained that its holding harmonized sections of the Education Code bearing on

> the same general subject and effectuated the purpose of strengthening existing tenure rules by promoting orderly and uniform communication between teachers and administrators. (Id., at pp. 333-335.)
>
> PERB's approach is also consistent with the approach taken by the Court of Appeal in Sonoma County Bd. of Education v. Public Employment Relations Bd. (1980) 102 Cal.App.3d 689 [163 Cal.Rptr. 464]. There school employees sought to negotiate wages for individual job classifications. Although Education Code section 45268 forbids salary changes which effectively 'disturb the relationship which compensation schedules bear to one another,' the court held negotiation of salary adjustments for individual job classifications permissible provided that the relationship between positions established by the personnel commission remained intact. (Ibid.)
>
> ---
>
> [6]Former Education Code section 13080 provided: 'Nothing contained herein shall be deemed to supersede other provisions of this code and the rules and regulations of public school employers which establish and regulate tenure or a merit or civil service system or which provide for other methods of administering employer-employee relations.'

Other PERB decisions have applied the San Mateo test and held discipline to be a negotiable subject. See, e.g., San Bernardino City Unified School District (1998) PERB Decision No. 1270 (San Bernardino II), in which sick leave review policies were held to be within scope. The Board in San Bernardino II, citing San Bernardino I, affirmed that "rules of conduct which subject employees to disciplinary action are subject to negotiation . . . both as to criteria for discipline and as to procedure to be followed." In Healdsburg Union High School District and Healdsburg Union School District/San Mateo City School District (1984) PERB Decision No. 375 (Healdsburg), the Board on remand from San Mateo noted that the Board has applied the San Mateo test in numerous cases since the San Mateo City School District (1980) PERB Decision No. 129 and Healdsburg Union High School District and Healdsburg Union

School District (1980) PERB Decision No. 132, the original Board decisions at issue in San Mateo.[7]

That Government Code section 8314 existed as a statutory mandate before the issuance of these e-mails does not exclude its provisions from the scope of representation. Interestingly, in San Mateo, while the court did not approve the negotiability of provisions that would "set aside or replace" sections of the Education Code, it noted that the Board has approved negotiations of the terms established by the Education Code within a collective bargaining agreement. (San Mateo, at p. 366.) The court stated:

> Such an agreement would not supersede the relevant part of the Education Code, but would strengthen it. (Id.)

Similarly, the negotiability of discipline for violation of Government Code section 8314 would augment and clarify the meaning of this provision for the parties.

In other words, this is a new policy announced by e-mail that subjects unit employees to discipline. Employees and their representatives should have the right to negotiate the details of this provision, to define and clarify specifically what conduct would subject them to discipline. The subject of the October 16 e-mail is "Appropriate Use of University Computers and State Property." Both e-mails include a definition of "state resources" that expands upon or confuses the limited definition in section 8314. The first sentence in the October 17, 2003 e-mail reads:

> The following both clarifies and supersedes the previous e-mail sent regarding the 'appropriate use of University computers and state property.' (Emphasis added.)

---

[7]Footnote 3, page 7 of Healdsburg refers to Jefferson School District (1980) PERB Decision No. 133; North Sacramento School District (1981) PERB Decision No. 193; Holtville Unified School District (1982) PERB Decision No. 250; Calexico Unified School District (1982) PERB Decision No. 265; and Mt. San Antonio Community College District (1983) PERB Decision No. 297.

By their own terms, these e-mails effect a unilateral change in work rules. Work rules are negotiable, whether specific or more general. (See Trustees of the California State University (2001) PERB Decision No. 1451-H, in which CSU implemented a new requirement to wear name tags and employees who violated the new policy were subject to discipline; see also, Trustees; State of California (Water Resources Control Board) (1999) PERB Decision No. 1337-S; San Bernardino City Unified School District (1998) PERB Decision No. 1270; and Vernon Fire Fighters v. City of Vernon (1980) 107 Cal.App.3d 802 [165 Cal.Rptr. 908] for other cases in which work rules were found to be negotiable.) The two e-mails read together comprise a work rule.

In addition, the statutory penalty for violation of Government Code section 8314 differs from the penalty for violation of the October 17 e-mail policy. Section 8314 states that personal use of state property subjects the violator to civil liability. The only parties authorized to seek the judicial remedy under section 8314 are the office of the Attorney General or a local district attorney. The provision states nothing about administrative discipline nor contemplated such discipline.

In this case, the October 17 e-mail stated that violations of section 8314 would result in discipline under the collective bargaining agreement, CSU Stanislaus policy and applicable law.[8] Applicable law does not provide for discipline but for judicial remedies. The e-mail itself created confusion among unit members as to the meaning of section 8314 and the

[8]If, instead, the e-mail would merely have advised employees of the contents of section 8314 and the potential for civil penalties, there would have been no unilateral change in policy.

impact of the e-mail. The e-mail interchange among unit employees attached to the charge evidences this confusion.[9]

CSU further claims that the e-mail recitation of section 8314 is distinguishable from cases cited by APC, in which the policies provided specific guidelines for employee conduct. On the contrary, that the e-mail's recitation of section 8314 and its definition of "state resources" do not provide guidelines, yet a violation subjects employees to discipline, generates more concern than if detailed rules had been issued. The ambiguity of conduct that leads to discipline raises questions of due process. This argument actually strengthens APC's claim that the content of this e-mail requires negotiation.

The Board's decision in Trustees is also on point. In that case, CSU unilaterally implemented a telephone and facsimile usage policy and subjected employees to discipline for its violation. CSU had argued, in part, that the disciplinary consequences of this new policy were consistent with section 8314. However, in Trustees, the Board found that:

> The new grounds for discipline are inconsistent with section 8314. APC is correct in its contention that section 8314 does not cover discipline. Rather, section 8314 calls for civil action brought by either the Attorney General's or a local district attorney's office and for assessment of civil penalties if a violation is found.

In contrast, violations of the October 17 e-mail "will be reported and dealt with by the appropriate disciplinary body, which in the case of employees, shall be handled in accordance with the collective bargaining agreement, CSU Stanislaus policy and applicable law." CSU

[9]Section 8314 is so general that it implicitly incorporates, among other items, computer use and telephone usage policies, policies also alleged as unilateral changes in APC's charge. Section 8314 also prohibits use of state facilities for political purposes. Incidental or minimal personal use is permitted under section 8314. "Incidental" and "minimal" personal use are not clearly defined terms in the statute and so beg to be clarified in negotiations in order to

somehow argues that the October 17 e-mail is a mere recitation of section 8314. But there can be no argument that the October 17 e-mail made violation of section 8314 subject to a disciplinary process that is not provided in section 8314 itself.

For the first time on appeal, APC referred to the CBA zipper clause and stated that under Fountain Valley Elementary School District (1987) PERB Decision No. 625, if APC chooses not to negotiate this change in policy, then under the CBA, CSU may not lawfully implement the change. This issue was also not addressed by the majority. Under PERB Regulation 32635(b)[10], the charging party may not raise new issues on appeal absent good cause. APC has not provided evidence to show good cause to raise this issue for the first time on appeal and therefore we need not address it here.

In light of the above, I find that the October 17 e-mail unilaterally changed a policy within the scope of representation without providing APC notice and an opportunity to negotiate. As a result, I would reverse the partial dismissal and remand to the General Counsel for inclusion into the complaint.

---

augment and explain them. Failure to do so violates the above principle articulated in San Mateo that negotiations strengthen a statutory mandate.

[10]PERB regulations are codified at California Code of Regulations, title 8, section 31001, et seq.

STATE OF CALIFORNIA — 'NOLD SCHWARZENEGGER, Governor
PUBLIC EMPLOYMENT RELATIONS BOARD
San Francisco Regional Office
1330 Broadway, Suite 1532
Oakland, CA 94612-2514
Telephone: (510) 622-1023
Fax: (510) 622-1027

March 23, 2004

Lee O. Norris, Labor Consultant
8726D S. Sepulveda Blvd., #C172
Los Angeles, CA 90045

Karen D. Carr, University Counsel
California State University
401 Golden Shore, 4th Floor
Long Beach, CA 90802-4210

Re: Academic Professionals of California v. Trustees of the California State University (Stanislaus)
Unfair Practice Charge No. LA-CE-797-H
PARTIAL DISMISSAL

Dear Mr. Norris:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on January 5, 2004. The Academic Professionals of California alleges that the Trustees of the California State University (Stanislaus) violated the Higher Education Employer-Employee Relations Act (HEERA)[1] by unilaterally implementing a computer network use policy, a campus telephone policy, and a new disciplinary policy at the Stanislaus campus. This letter addresses only the new disciplinary policy.

The March 2, 2004 Partial Warning Letter indicated that the CSU's issuance of emails regarding the Government Code's restriction of the use of state resources for personal purposes failed to state a prima facie unilateral change allegation. The Partial Warning Letter stated, in pertinent part:

> The first email indicates that the Government Code prohibits employees from using state resources for personal uses. The second email clarifies that the Government Code does not prohibit minimal and incidental use. The second email specifically indicates that employees who violate the Government Code or campus policies prohibiting similar activities will be dealt with by the appropriate disciplinary body and in accordance with the collective bargaining agreement. As the CSU states it

[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.

> will act in accordance with the parties' CBA it is unclear how the CSU's actions demonstrate a unilateral change.

The first amended charge alleges, in pertinent part:

> The email Hughes sent on October 17, 2003 constitutes a policy previously unknown to the Union, which makes violation of Government Code section 8314 an act from which discipline may flow. The email is not a mere recitation of the government code, because pursuant to § 8314 only the State Attorney General, or the District Attorney of a county may bring civil action against person found in violation of the law. Nothing in the statute permits the University to handle alleged violations of the statute by its employees "WITH THE APPROPRIATE DISCIPLINARY BODY...IN ACCORDANCE WITH THE COLLECTIVE BARGAINING AGREEMENT, CSU STANISLAUS POLICY AND APPLICABLE LAW."
>
> The University has unilaterally granted itself the authority, a right previously unknown to the Union, to discipline members of the bargaining unit for alleged violations of the government code.

The above-stated information fails to state a prima facie violation for the reasons that follow.

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.)

As stated in the warning letter, the CSU explained that disciplinary matters involving employees will be handled in accordance with the collective bargaining agreement, CSU Stanislaus policy and applicable law. Although the first amended charge characterizes the email as authorizing the CSU to handle alleged violations of the statute, the email states, "violations of this law or applicable policy will be reported and dealt with by the appropriate disciplinary body, which in the case of employees, shall be handled in accordance with the collective bargaining agreement, CSU Stanislaus policy and applicable law."[2] The charge fails to demonstrate the CSU implemented a unilateral change, by notifying employees that violations of the Government Code may be reported and that discipline would be in accord

[2] In the original email this language was written in capital letters.

with CSU policies and collective bargaining agreements. Thus, this allegation fails to state a prima facie violation and must be dismissed.

Right to Appeal

Pursuant to PERB Regulations,[3] 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. (Regulation 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).)

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

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. (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 Tammy Samsel
Tammy Samsel
Regional Attorney

Attachment

cc: Karen Carr

TLS

STATE OF CALIFORNIA (NOLD SCHWARZENEGGER, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
1330 Broadway, Suite 1532
Oakland, CA 94612-2514
Telephone: (510) 622-1023
Fax: (510) 622-1027

March 2, 2004

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

Re: Academic Professionals of California v. Trustees of the California State University (Stanislaus)
Unfair Practice Charge No. LA-CE-797-H
PARTIAL WARNING LETTER

Dear Mr. Norris:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on January 5, 2004. The Academic Professionals of California alleges that the Trustees of the California State University (Stanislaus) violated the Higher Education Employer-Employee Relations Act (HEERA)[1] by unilaterally implementing a computer network use policy, a campus telephone policy, and a new disciplinary policy at the Stanislaus campus. This letter addresses only the new disciplinary policy. My investigation revealed the following information.

On October 18, 2003, APC Business Manager Edward Purcell received a copy of an email sent by President Marvalene Hughes on October 16, 2003 that referred to Government Code section 8314 which prohibits the use of state resources for personal purposes. The email indicated in pertinent part:

> Violations of any of the above prohibitions carry strict penalties, especially Title II of the Government Code (i.e. the use of public resources by state employees for political campaign activities.)

On October 17, 2003, Hughes issued another email which stated, in pertinent part:

> THE FOLLOWING BOTH CLARIFIES AND SUPERSEDES THE PREVIOUS E-MAIL SENT REGARDING THE STATE "APPROPRIATE USE OF UNIVERSITY COMPUTERS AND STATE PROPERTY."

[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.

> STATE LAW RESTRICTS THE USE OF STATE RESOURCES FOR PERSONAL PURPOSES, CAMPAIGN ACTIVITY AND ANY OTHER PURPOSES WHICH ARE NOT AUTHORIZED BY LAW.
>
> * * * * *
>
> PERSONAL USAGE OF STATE RESOURCES AND CAMPAIGN ACTIVITY THAT ARE NOT MINIMAL OR INCIDENTAL ARE PROHIBITED. [FOR EXAMPLE, AN OCCASIONAL LOCAL TELEPHONE CALL IS NOT PROHIBITED.]
>
> VIOLATIONS OF THIS LAW OR APPLICABLE POLICY WILL BE REPORTED AND DEALT WITH BY THE APPROPRIATE DISCIPLINARY BODY, WHICH IN THE CASE OF EMPLOYEES, SHALL BE HANDLED IN ACCORDANCE WITH THE COLLECTIVE BARGAINING AGREEMENT, CSUS STANISLAUS POLICY AND APPLICABLE LAW.

APC alleges this email institutes a new disciplinary policy because bargaining unit employees may now be disciplined for violating the Government Code.

The above-stated information fails to state a prima facie violation for the reasons that follow.

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.)

The charge fails to demonstrate CSU implemented a change in policy. The first email indicates that the Government Code prohibits employees from using state resources for personal uses. The second email clarifies that the Government Code does not prohibit minimal and incidental use. The second email specifically indicates that employees who violate the Government Code or campus policies prohibiting similar activities will be dealt with by the appropriate disciplinary body and in accordance with the collective bargaining agreement. As the CSU states it will act in accordance with the parties' CBA it is unclear how the CSU's actions demonstrate a unilateral change. Thus, this allegation must be dismissed.

For these reasons the allegation that the President's emails instituted a new disciplinary policy, 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 March 11, 2004, I shall dismiss the above-described allegation from your charge. If you have any questions, please call me at the telephone number listed above.

Sincerely,

Tammy Samsel
Regional Attorney

TLS