STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

KERRY JEAN NICKOLS, LAUREL DAVIS, JAMES A. DURDEN, KELLY DAVIS CLIFF, MICHAEL JOHN WEN, PHILLIP J. RIZZO, BARBARA JO DOWDLE-RIZZO, ELIZABETH COSCIA, ADRIA ARTESEROS, GARY W. EVERSON, KENNETH R. DIETSCH, B. KRYSTYAN KOZAKIEWICZ, JOHN R. FIORILLO, JAMES A WARD, KIMBERLY M. PELZ, CHRISTIANA R. TUTHILL, LAURIE A. HERRAIZ, KATHLEEN L. JEE, KATHERINE A. SEEBER, DAYLE ELIZABETH GATES, LINDA ROSS, BRADFORD LYNN COLWELL, SYLVIA ANN RAYNER, DENISE WEISMAN, LORENE AKEMI KONG, KEVIN M. KONG, TERESA LOU JACKSON, MANUEL MUNDO-OCAMPO, WILLIAM THOMAS CAMPAGNA, SIMONE FRANCES GREEN, CAROLYN PETER, RACHEL ALEXANDER, CHRISTINE GERBELOT, NANCY DEE DALTON, KATHY CANEER SMITH, CHERYL LUCINDA CHALBERG, LEAH K. KIM, ANA ISABEL ALVAREZ-RETUERTO, KRIS KROGH, LAWRENCE GERALD STEPHANSON, VINCENT W. MIKULS, JR., STEFFNEY ROUGHT-CRAWFORD, LUCINDA G. BECK, MARY Y. STOVALL, WILLIAM BIASI, DAVID PETER MORGAN, KATHLEEN SUZANNE BURNETT, JANET LOUISE PALESE, SARAH NOSSAMAN, JUDY SHARP, JOANNE HIGGINS, HOWARD DEAN HALTER, ALISON JUNE WEIR, JOHN M. BRIC, DENNIS R. RAMIREZ, CHRYSTAL VEGA WA, GAIL CASSAFER, MICHAEL A. HORNING, NANCY D. SEIN, MARIETTA PANINGBATAN, ANTHONY S.W. LAM, MARIA T. STOECKLIN,

Case Nos. LA-CO'-205-H, LA-CO-228-H
LA-CO-229-H, SA-CO-44-H,
SF-CO-95-H, SF-CO-96-H,
SF-CO-97-H,
SF-CO-98-H, SF-CO-99-H,
SF-CO-100-H, SF-CO-101-H,
SF-CO-102-H,
SF-CO-103-H, SF-CO-104-H,
SF-CO-105-H,
SF-CO-106-H,
SF-CO-107-H, SF-CO-108-H,
LA-CO'-235-H,
LA-CO-236-H, LA-CO-237-H,
LA-CO'-238-H,
LA-CO-239-H, LA-CO-240-H,
LA-CO-241-H, LA-CO-242-H,
LA-CO-243-H,
LA-CO-244-H,
LA-CO-245-H,
LA-CO-246-H,
LA-CO-247-H, LA-CO-248-H,
LA-CO-249-H,
LA-CO-250-H,
LA-CO-251-H,
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LA-CO-253-H,
LA-CO-254-H,
LA-CO-255-H,
LA-CO-256-H,
LA-CO-257-H,
LA-CO-258-H,
LA-CO-259-H, SA-CO-48-H,
SA-CO-49-H, SA-CO-50-H,
SA-CO-51-H,
SA-CO-52-H, SA-CO-53-H,
SA-CO-54-H, SA-CO-55-H,
SA-CO-56-H,
SA-CO-57-H, SA-CO-58-H,
SA-CO-59-H, SF-CO-109-H,
SF-CO-110-H, SF-CO-111-H,
SF-CO-112-H, SF-CO-113-H,
SF-CO-114-H, SA-CO-60-H,

PETER TAKEO TEKEUCHI, DOUGLAS E. WALKER, JODY ELLEN JACOBSON, IRINA KRYLOVA, Charging Parties, v. UPTE, CWA LOCAL 9119, Respondent.	SA-C0-61-H, LA-CO-268-H, LA-CO-278-H, SF-C0-118-H Request for Reconsideration PERB Decision No. 1817-H PERB Decision No. 1817a-H January 24, 2007

Appearances: National Right to Work Legal Defense Foundation by Milton L. Chappell, Attorney, and Werner Witke, Representative, for Kerry Jean Nickols, et al.; Leonard Carder by Robert Remar, Attorney, for UPTE, CWA Local 9119.

Before Duncan, Chairman; Shek and McKeag, Members.

DECISION

DUNCAN, Chairman: Kerry Jean Nickols and the additional charging parties listed in the above caption (Charging Parties) and UPTE, CWA LOCAL 9119 (UPTE) jointly request that the Public Employment Relations Board's (PERB or Board) decision in UPTE. CWA Local 9119 (Nickols. et al.) (2006) PERB Decision No. 1817-H, be vacated in view of a settlement agreement reached by the parties.

PROCEDURAL HISTORY

In their unfair practice charges, the Charging Parties alleged that UPTE violated the Higher Education Employer-Employee Relations Act (HEERA)[1] when it committed the following unlawful acts: (1) UPTE unlawfully collected agency fees prior to providing a Hudson[2] notice to nonmembers; (2) UPTE unlawfully benefited from an "interest free loan" during the time between the collection of the fees and the refund of the challenged fees; (3) the

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

[2] Chicago Teachers Union. Local 1 v. Hudson (1986) 475 U.S. 292 [121 LRRM 2793] (Hudson).

retention of these wrongfully retained fees constituted forced speech in violation of the First Amendment; and (4) the Hudson notice provided by UPTE was defective.

The Board agent determined that the Charging Parties stated a prima facie case for the first three allegations listed above, but failed to state a prima facie case for the allegation regarding a defective Hudson notice. Accordingly, the Board agent issued a partial dismissal for the fourth allegation, and Charging Parties appealed. On appeal, the Board affirmed the Board agent's partial dismissal. The Charging Parties filed a request for reconsideration.

After the Board's decision, but prior to the Board's response to the request for reconsideration, the parties reached a global settlement agreement. As part of the agreement, the parties agreed to (1) file a joint motion with PERB to vacate its decision in the instant case (Joint Motion);[3] (2) dismiss the pending motion for reconsideration in the decision as moot; and (3) withdraw any complaints issued on behalf of any of the Charging Parties in the case.

DISCUSSION

In the Joint Motion, the parties argue that PERB generally allows a charging party to withdraw an underlying charge. The parties then argue that the Joint Motion is an attempt to withdraw "all of their charges at whatever stage the charge is, i.e., complaint issued, Board decision rendered,. . ." The parties cite ABC Unified School District (1991) PERB Decision No. 831b (ABC Unified) as authority for the motion to vacate. However, ABC Unified held that PERB has the discretion to allow the withdrawal of a charge and to vacate a "proposed" decision and neither withdrawing a charge nor vacating a proposed decision are the issue before PERB in the instant case. PERB has often vacated proposed decisions when the parties

[3]In addition to the instant case, the Joint Motion was also filed for UPTE. CWA Local 9119 (Hawley, et al) (2006) PERB Decision No. 1818-H, UPTE. CWA Local 9119 (Jimenez-Newby) (2006) PERB Decision No. 1819-H, UPTE. CWA Local 9119 (Yaron) (2006) PERB Decision No. 1820-H and UPTE. CWA Local 9119 (Ball) (2006) PERB Decision No. 1821-H, which involve the same subject matter, same respondent and similarly situated charging parties.

have reached settlement and where PERB determined that granting the motion would effectuate the purposes of the governing statute. (Trustees of the California State University/State Employees Trade Council (2003) PERB Decision No. 1514-H.) These situations arise before the Board has issued its own decision. In the instant case, the Board must determine whether or not to extend this approach to the decisions of the Board itself.

PERB has rarely vacated its own decisions. One instance where the Board vacated its decision involved an agreement by the parties. In California State University/California Faculty Association (1987) PERB Decision No. 621a-H (CSU/CFA), the Board vacated an underlying decision (PERB Decision No. 621-H) which reversed a Board agent's dismissal. The charge involved an allegation by the California State University (CSU) against the California Faculty Association (CFA) that CFA engaged in an unfair practice by attempting to bypass CSU negotiators and deal directly with the Board of Trustees during the negotiations for a new contract. The charge was dismissed by the Board agent and the dismissal was reversed by the Board and remanded to the PERB General Counsel's Office for a complaint to issue. CFA filed a motion for reconsideration and thereafter the parties reached agreement on a new collective bargaining agreement (CBA) and then made a joint request of PERB that PERB Decision No. 621-H be vacated and the unfair practice charge dismissed. The Board determined that "it is in the interest of the parties and is consistent with the purposes of [HEERA]" to grant the motion to vacate and dismiss the charge. It is important to note that the Board's decision to vacate in that case was not based on settlement of the unfair practice charge at issue in the case, but on the basis of the parties reaching agreement on a new CBA.

One other instance where the Board vacated its decision was in Office of the Santa Clara County Superintendent Of Schools (1982) PERB Decision No. 233a (Santa Clara), where the Board vacated its decision in PERB Decision No. 233, based on a joint request from

both parties subsequent to a settlement agreement related to the issues before PERB. Significantly, the settlement was reached on December 11, 1980, nearly two years before PERB's August 12, 1982, issuance of PERB Decision No. 233. As part of their December 1980 settlement the parties agreed to withdraw the cases before PERB and while the union requested a withdrawal of its case, the county inadvertently failed to request withdrawal of its exceptions. When PERB issued a decision based on the county's exceptions, it had no knowledge of the part of the parties' prior settlement agreement which required the county to withdraw its exceptions. The county filed a motion for reconsideration based on the terms of the settlement agreement. The Board ordered dismissal of the charges and vacated its decision. In reaching this decision, PERB held that vacating the Board decision and allowing the withdrawal of the cases was consistent with the Board's "policy to favor voluntary settlement of disputes." The Board's decision also referenced the substantial lapse of time between the settlement and the issuance of PERB Decision No. 233.

In neither CSU/CFA nor Santa Clara did the Board grant the joint motion to vacate based solely on a settlement agreement after the Board already issued a decision and we decline to do so in the instant case. To date, vacating a decision of the Board itself has only occurred in unique circumstances and the parties in the instant case have cited no circumstances other than their own agreement as a basis for the Board to vacate.

While PERB has a policy of favoring voluntary settlement of disputes (Santa Clara), the Board finds that settlement at the earliest level possible will be encouraged by denying motions to vacate, except under unique or extraordinary circumstances, even when the parties to a settlement agree otherwise. Based on the absence of unique circumstances in the Joint Motion, the motion to vacate the Board's decision in this case is denied.

Motion for Reconsideration

As part of the Joint Motion, the parties request that the Board "dismiss the pending requests for reconsideration as moot."[4] The Board views the joint request for a dismissal of the pending requests for reconsideration[5] in this case as a request for withdrawal of the motion for reconsideration filed by the moving party. As the request in the Joint Motion is based primarily on the settlement agreement reached by the parties, the Board finds that withdrawal is in the interests of the parties and is consistent with the purposes of HEERA.

PERB Regulation 32410(a)[6] pertains to requests for reconsideration, however, based on our determination that the motion is withdrawn, the Board need not determine whether or not the requirements of this regulation for reconsidering a decision have been met.

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[4]An August 24, 2006, request for withdrawal with prejudice of all pending charges and complaints was also filed by the Charging Parties. The pending charges and complaints will be addressed administratively by the General Counsel's Office.

[5]As referenced in footnote 3 above, motions for reconsideration were similarly filed for PERB Decision Nos. 1818-H, 1819-H, 1820-H and 1821-H, and the request for withdrawal also extends to those cases.

[6]PERB regulations are codified at California Code of Regulations, title 8, section 31001, et seq. PERB Regulation 32410(a) provides, in pertinent part, that:

> Any party to a decision of the Board itself may, because of extraordinary circumstances, file a request to reconsider the decision within 20 days following the date of service of the decision. . . . 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. A request for reconsideration based upon the discovery of new evidence must be supported by a declaration under the penalty of perjury which establishes that the evidence: (1) was not previously available; (2) could not have been discovered prior to the hearing with the exercise of reasonable diligence; (3) was submitted within a reasonable time of its discovery; (4) is relevant to the issues sought to be reconsidered; and (5) impacts or alters the decision of the previously decided case.

ORDER

The Public Employment Relations Board denies the joint motion to vacate UPTE, CWA Local 9119 (Nickols. et al) (2006) PERB Decision No. 1817-H and grants the request for withdrawal of the motion for reconsideration as moot.

Members Shek and McKeag joined in this Decision.