STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

STATE EMPLOYEES TRADES COUNCIL UNITED, Charging Party, v. REGENTS OF THE UNIVERSITY OF CALIFORNIA (LOS ANGELES), Respondent.	Case No. SF-CE-842-H PERB Decision No. 2084-H December 14, 2009

Appearance: Leonard Carder by Matthew D. Ross, Attorney, for State Employees Trades Council United.

Before McKeag, Neuwald and Wesley, Members.

DECISION

McKEAG, Member: This case comes before the Public Employment Relations Board (Board) on appeal by State Employees Trades Council United (SETC) of the partial dismissal (attached) of its unfair practice charge. The charge alleged that the Regents of the University of California (Los Angeles) violated the Higher Education Employer-Employee Relations Act (HEERA)[1] by failing to meet and discuss changes to health benefits for employees represented by SETC. SETC alleged that this conduct constituted a violation of HEERA section 3571(b) and (c).

We have reviewed the entire record in this case and find the warning and dismissal letters well-reasoned, adequately supported by the record, and in accordance with applicable

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

law. Accordingly, the Board hereby adopts the warning and dismissal letters as the decision of the Board itself.

ORDER

The partial dismissal of the unfair practice charge in Case No. SF-CE-842-H is hereby AFFIRMED.

Members Neuwald and Wesley joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD

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

June 27, 2008

Matthew Ross, Attorney
Leonard Carder, LLP
1330 Broadway, Suite 1450
Oakland, CA 94612

Re: State Employees Trades Council United v. Regents of the University of California (Los Angeles)
Unfair Practice Charge No. SF-CE-842-H
PARTIAL DISMISSAL LETTER

Dear Mr. Ross:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on June 22, 2007. The State Employees Trades Council United (Charging Party or SETC) alleges that the Regents of the University of California (Los Angeles & San Diego) (UCLA and UCSD, respectively) violated the Higher Education Employer-Employee Relations Act (HEERA)[1] by failing to meet and consult regarding changes to health benefits for bargaining unit employees.

Charging Party was informed in the attached February 1, 2008 Warning Letter that the above-referenced charge did not state a prima facie case. The Warning Letter advised that, if there were any factual inaccuracies or additional facts which would correct the deficiencies explained in that letter, the charge should be amended. The Warning Letter further advised that, unless the charge was amended to state a prima facie case or withdrawn prior to February 13, 2008, the charge would be dismissed.

SETC requested and was granted an extension to file an amended charge. On April 15, 2008, an amended charge was received in this office. The main concern raised in the February 1 Warning Letter was the failure to establish that the charge was timely. As explained in the Warning Letter, in order to establish that the University failed to meet and discuss pending changes to the health benefits at either UCLA or UCSD, Charging Party must demonstrate some conduct within six months of the charge that objectively demonstrates the University's failure to consider SETC's proposals.

In the amended charge, SETC argues that the University withheld information that SETC needed in order to engage in a truly substantive meet and consult regarding the proposed

[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.

changes. SETC argues further that the statute of limitations on the University's failure to meet and consult in good faith began to run at the point SETC knew or should have known that good faith meeting and consulting would not be possible—the point when the University implemented the proposed changes, despite the still outstanding information request.[2]

Discussion

HEERA section 3563.2(a) prohibits PERB from issuing a complaint with respect to "any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge." The limitations period begins to run once the charging party knows, or should have known, of the conduct underlying the charge. (Gavilan Joint Community College District (1996) PERB Decision No. 1177.) A charging party bears the burden of demonstrating that the charge is timely filed. (Tehachapi Unified School District (1993) PERB Decision No. 1024; State of California (Department of Insurance) (1997) PERB Decision No. 1197-S.) The statute of limitations has also been raised by the respondent as an affirmative defense in this case. (Long Beach Community College District (2003) PERB Decision No. 1564.)

Whether an employer has satisfied its obligation to meet and discuss is determined on a case-by-case basis. (Regents of the University of California (1990) PERB Decision No. 829.) Three touchstones have been recognized, however: (1) notice before the employer's decision is final or implemented, (2) reasonable time and opportunity for meeting and discussing, between the notice and the final decision or implementation, and (3) good faith conduct in listening to and considering proposals. (Regents of the University of California (1990) PERB Decision No. 842.)

Of particular interest to SETC in this matter is the second factor, whether the University provided a reasonable time and opportunity for meeting and discussing between the notice and the final decision or implementation. SETC argues that, in addition to its duty to provide a reasonable time and opportunity for meeting and discussing, the University had a duty to provide relevant requested information before implementation, relying on Regents of the University of California (Bawal) (1999) PERB Decision No. 1354 (Bawal).

In Bawal, the Board was asked to determine the role of information in the meet and discuss process. In the facts of that case, the employer announced department-wide layoffs in December, and began implementing them the following January. The Board found a failure to meet and consult in good faith based on such factors as the magnitude of the employer's proposed change, the holiday period in which meeting and conferring was taking place, and the fact that the changes came as a surprise to the employees. The Board found a separate violation in the fact that the employer failed to provide requested information (that it likely had in its possession) until well after it had ceased to be of any use to the organization.

[2] The issue of the University's alleged failure to respond to SETC's December 12, 2006 written request for information is addressed in a separate document.

The facts presented here differ in some significant ways to those in Bawal. In Bawal, the Board found that the employer had complied with the first and third touchstones of the duty to meet and confer. The only remaining issue was whether the employer had provided sufficient time in order to engage in meaningful meetings with the non-exclusive representative.

In this case, the University refused to meet with SETC until after it had completed negotiations with its providers—essentially foreclosing any opportunity to influence the changes to employee benefits coverage. After it completed negotiations with its providers but before meeting with SETC, the University effectively implemented these changes when it implemented an open enrollment period for SETC-represented employees in November 2006. The statute of limitations begins to run on the date the charging party has actual or constructive notice of the respondent's clear intent to implement a unilateral change in policy. (Regents of the University of California (UCAFT) (1990) PERB Decision No. 826.) A charging party must file such a charge when it has actual or constructive notice of a clear intent to implement the change, and may not rest on its rights until actual implementation occurs. (Id.)

SETC knew or should have known no later than the close of the November open enrollment period that the University would not meet and consult in any meaningful way regarding the implementation or effects of health benefits changes to employees represented by SETC. This charge was filed on June 22, 2007, more than six months after the conduct alleged to have violated the Act.

Therefore, the allegation that the University failed to meet and consult in good faith is hereby dismissed, based on the facts and reasons contained in this letter and the February 1, 2008 Warning Letter.

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 during a regular PERB business day. (Regulations 32135(a) and 32130; see also Government Code section 11020(a).) A document is also considered "filed" when received by facsimile transmission before the close of business 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.)

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

The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95811-4124
(916) 322-8231
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.) The document will be considered properly "served" when personally delivered or deposited in the mail or deposited with a delivery service and properly addressed. A document may also 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 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,

TAMI R. BOGERT
General Counsel

By _____
Alicia Clement
Regional Attorney

Attachment

cc: Susan von Seeburg

STATE OF CALIFORNIA ARNOLD 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

February 1, 2008

Matthew Ross, Attorney
Leonard Carder, LLP
1330 Broadway, Suite 1450
Oakland, CA 94612

Re: State Employees Trades Council United v. Regents of the University of California (Los Angeles & San Diego)
Unfair Practice Charge No. SF-CE-842-H
WARNING LETTER

Dear Mr. Ross:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on June 22, 2007. The State Employees Trades Council United (SETC) alleges that the Regents of the University of California (Los Angeles & San Diego) (UCLA and UCSD, respectively), violated the Higher Education Employer-Employee Relations Act (HEERA)[1] by failing to meet and confer regarding changes to health benefits for bargaining unit employees.

My investigation revealed the following facts. SETC became the exclusive representative of the Skilled Crafts Unit at the UCSD campus on October 6, 2003. UCSD and SETC are currently signatories to a collective bargaining agreement that is valid from March 9, 2005 through September 30, 2008. SETC became the exclusive representative of the Skilled Crafts Unit at the UCLA campus on January 5, 2006. The University's annual enrollment period for health benefits runs from November 1 through November 30.[2]

On January 1, 2006, the University implemented changes to its benefits packages. The January 1, 2006 changes to the University's benefits were the subject of Unfair Practice Charge SF-CE-

[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.

[2] These facts are derived from my investigation of Unfair Practice Charge SF-CE-813-H, involving the same parties and referenced in Charging Party's statement of the case for the present charge.

813-H, filed by SETC on October 16, 2006. SETC and UCLA began negotiating a successor[3] agreement in February 2006.

The SETC/UCLA CBA that became effective on September 18, 2006, contains a Side Letter of Agreement with the following language:

> 1. The University's Office of the President and the Union agree to meet no less than twice per calendar year to discuss changes, if any, to the University's health and welfare benefit programs. Such meeting shall occur in advance of the University's annual open enrollment period and will be held at UCLA.
>
> 2. In order to effectuate this meet-and-discuss process, the University will provide written notice and any information available at that time to SETC-United as soon as practicable but in no event later than sixty (60) days prior to the effective date of the proposed changes. Both parties agree to meet and discuss within fifteen (15) calendar days of the written notice.
>
> 3. The University shall provide up to four (4) hours paid release time for three (3) bargaining unit employees to participate in the meeting described herein.

The SETC/UCSD CBA in effect at this time contains a Side Letter of Agreement which states:

> It is agreed that one time each contract year, upon request of SETC, a representative of SETC, a SETC UCSD steward, a representative of the Office of Labor Relations and a Representative of the UCSD Benefits Office shall meet. At this meeting, SETC shall be given an opportunity to provide input to the University about benefit plans offered to the employees in the bargaining unit.

Prior to the completion of successor negotiations between SETC/UCLA, on or around August 17, 2006, SETC learned that the University was entering "final" negotiations with its health plan providers regarding benefits rates for 2007. At the next bargaining session, SETC stated its desire to provide input on benefits issues *before* the University finalized them with its providers. Specifically, SETC voiced a desire to convene a meeting with the University's benefits specialist to discuss changes to benefits provisions at both the UCLA and UCSD campuses. Although University representatives Howard Pripas and Randy Scott promised to provide SETC with information about the new rates and discuss benefits as soon as they could,

[3] The Skilled Crafts Unit at UCLA had previously been exclusively represented by Stationary Engineers, Local 501, whose collective bargaining agreement with UCLA expired just prior to SETC's certification of that unit.

they stated that they were as yet unable to do so because the University President had not completed its negotiations with the benefits providers.

Immediately following the completion of negotiations for the SETC/UCLA contract, SETC requested to meet with the University to discuss the 2007 health benefits changes. The University maintained that such a meeting was premature, as rate information was as yet, unavailable. SETC argued that the University had agreed to postpone the implementation of the 2007 rate increases for other bargaining units and requested that the University extend the same treatment to SETC's members. According to SETC, the University was "non-committal if not dismissive" about a postponement for SETC members. Nevertheless, SETC argues that the University's response that it would "get back to" SETC representative Patrick Hallahan regarding SETC's proposals created a reasonable expectation in him that the University would not implement any changes before completing its meet and consult obligations.

On October 10, 2006, SETC received notice from the University that the 2007 health benefits changes were posted on its intranet site, notice of the same had been sent to employees on September 29, 2006. The September 29, 2006 notice states in relevant part:

> Increases in employee contribution rates for medical plan options are subject to negotiations with unions representing employees in bargaining units for which the contract is expired or for which the parties are currently engaged in negotiations.

In response to the October 10, 2006 notice, SETC protested the University's apparent failure to postpone rate increases as to SETC-represented employees. The University agreed to meet and discuss the situation on November 1, 2006. Prior to that meeting, on October 24, 2006, the University provided SETC a copy of the brochure that had been sent to employees, announcing the 2007 health benefits changes. By the time the meeting convened, the open enrollment period for 2007 benefits had already begun. The University's position at this time was that they would seek answers to SETC's "immediate concerns and questions" as presented in writing by SETC at the November 1, 2006 meet and discuss session, but were unable to change the 2007 health benefits at this late date. Among SETC's inquiries at this meeting were:

> 1. Why are the "Single Employee" Rates contributions being increased at the lowest Salary Bands, $ 43,000 or Less, for all Health Plans, except for the "Core-CA", when the increases could be *absorbed at minimal cost*??
>
> 2. Why is the UC, like the Cal PERS and the CSU, not absorbing the remaining increases to the "Single Rates," "Self + Child(ren)" Self + Adult for these PLANS:...
>
> 3. *Why can't the "lowest paid" Salary Band be "frozen" at the 2006 rates*??

4. Why doesn't the UC use a "formula" similar to the Government Code (GC) Section 22871 (CalPERS), based on the cost of the most popular three (3) Health Plans, i.e., Kaiser, Health Net and PERS Choice and take an average of those plans in calculating the "minimum" contribution that the UC will pay. . . .

5. Why can't the UC consider "alternative" Contributions based on what each Labor Union in each bargaining unit is willing to negotiate?? Why is the UCOP so "strident" on this position.????

6. Is the UCOP willing in the future to consider "subsidy rates" for certain bargaining units, and to consider comparisons to other State, CSU, county or city rates ???? If not, why not???

7. Why can't the UCOP finish negotiating its rates earlier in the calendar year to allow Unions an opportunity to "negotiate" on Health Plan increases BEFORE the new rates are announced and implemented???

In the same document, SETC included a section with the heading, "SETC-UNITED RECOMMENDATIONS (Initial)". This section states:

SETC is recommending that the UCOP consider the following:

1. A Second SETC-UCOP Benefits Meeting @ UCLA in late November/early December 2006, in order to follow-up on the questions and concerns raised by SETC-UNITED and the information provided by the UCOP Benefits representatives;

2. A comparison of the UC Health Plans Contributions with both the State of California (Cal PERS) Health Plans and the California State University (CSU) system for further discussion at the second meeting;

3. A willingness to continue to "meet and discuss" with SETC on Health Benefits throughout 2007 and to consider alternatives for future meetings in 2007 and 2008 for SETC-represented "Skilled Trades" bargaining Units;

4. A request by SETC to delay the "2007 Open Enrollment Period" for the following three (3) bargaining units, to allow "time" for the parties to "meet and discuss" our issues BEFORE employees have to sign up for the new Plans:

- UCLA Skilled Trades Unit (600 employees ----K4);

- UCSD Skilled Trades Unit (200 employees – K-6); and
- UC Merced Skilled Trades Employees (16 employees—as you have already acknowledged in your "at Your Service" Flyers).

Discussion

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." 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.)

The charging party's burden also includes alleging facts showing that the unfair practice charge was timely filed; i.e., that the alleged unfair practice occurred no more than six months prior to the filing of the charge. (Los Angeles Unified School District (2007) PERB Decision No. 1929; City of Santa Barbara (2004) PERB Decision No. 1628-M.) PERB is prohibited from issuing a complaint with respect to any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge. (Coachella Valley Mosquito and Vector Control District v. Public Employment Relations Board (2005) 35 Cal.4th 1072.) The limitations period begins to run once the charging party knows, or should have known, of the conduct underlying the charge. (Gavilan Joint Community College District (1996) PERB Decision No. 1177.)

Where the alleged violation is an illegal unilateral change, the statute of limitations begins to run on the date the charging party has actual or constructive notice of the respondent's clear intent to implement a unilateral change in policy, providing that nothing subsequent to that date evinces a wavering of that intent. (Anaheim Union High School District (1982) PERB Decision No. 201.) Thus, a unilateral change occurs when an official action has been taken, not a subsequent date when the action becomes effective. (State of California (Department of Corrections) (1994) PERB Decision No. 1056.)

In this case, the University did not have a duty to meet and confer with SETC over health benefits changes, but rather, a duty to meet and *discuss*. The duty to meet and discuss means that an employer must consider the exclusive representative's proposals, but an employer is not bound to attempt in good faith to reach a negotiated written agreement. (San Dieguito Union High School District (1977) PERB Decision No. 22.) SETC argues that the University cajoled the union into thinking that it was considering its proposals, all the while it was planning to implement in January, regardless of the status of discussions. Aside from its own belief that this was the case, the only objective conduct SETC points to by the University which may evidence a lack of consideration of SETC's proposals occurred more than six months prior to the filing of the charge: the initial refusal in August 2006 to meet with SETC prior to

completion of negotiations with the providers; and the failure to provide information to SETC, as evidenced by the December 12, 2006 letter from Mr. Hallahan to the University.

SETC present two conflicting theories in its charge. On the one hand, SETC argues that the University failed, all along, to meet and discuss based on its refusal to meet with SETC until after it had completed negotiations with its health care providers in August and failure to respond to SETC's information request(s) before each successive meeting, the last of which was on December 12, 2006. If this version of events is to be credited, then SETC has failed to meet its burden to establish that the charge is timely as having been filed within six months of the events in question.

On the other hand, SETC argues that the charge is timely because the ultimate and operative failure to meet and discuss occurred on January 1, 2007, the date that the University implemented its changes, rather than some earlier date when the University failed to meet with SETC or respond to information requests. While the implementation of changes does not, in itself, constitute refusal to meet and discuss, it certainly foreclosed any further opportunity to meet and discuss with the union. However, adopting the January 1, 2007 implementation date as the operative date assumes the University had met and discussed in good faith up to that point. Along this line of argument, SETC argues that up until the University implemented the changes on January 1, 2007, it was "cajoled" into believing that the University was truly meeting and discussing in good faith. However, SETC fails to provide any facts within the statutory period, as opposed to its subjective belief, that the University failed to consider SETC's proposals when it met with SETC and agreed to "get back to" Mr. Hallahan as late as December 2006. If this version of events is to be credited, then SETC has not met its burden to show that the University failed to meet and discuss with the union.

For these 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 February 13, 2008, I shall dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Alicia Clement
Regional Attorney

AC