STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

GEORGE DELGADO, et al., Charging Parties, v. TRUSTEES OF THE CALIFORNIA STATE UNIVERSITY (SAN MARCOS), Respondent.	Case No. LA-CE-1045-H PERB Decision No. 2134-H October 1, 2010

Appearances: George Delgado on behalf of Charging Parties; Marc D. Mootchnik, University Counsel, for Trustees of the California State University (San Marcos).

Before Dowdin Calvillo, Chair; McKeag and Wesley, Members.

DECISION

McKEAG, Member: This case comes before the Public Employment Relations Board (PERB or Board) on appeal by George Delgado (Delgado), Calvin Kidd, Patrick Pelonero (Pelonero) and Ron Williams (collectively Charging Parties) of a dismissal of an unfair practice charge. The charge alleged that the Trustees of the California State University (San Marcos) (University) violated the Higher Education Employer-Employee Relations Act (HEERA)[1] when it denied a request to pursue a Level 1 grievance regarding the contracting out of maintenance work. The Charging Parties alleged this conduct constituted unlawful interference in violation of HEERA section 3571.

Based on our review of the record, we find the Charging Parties failed to state a prima facie case of interference. In addition, we find that the Charging Parties lack standing to assert the University breached its duty to provide notice to State Employee Trades Council (SETC)

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

regarding the use of outside contractors. Further, even if the Charging Parties had standing to assert such a claim, the University did not have a duty to provide such notice. Accordingly, for the reasons set forth below, we find the University did not commit unlawful interference when it denied the Charging Parties' grievance.

BACKGROUND

A. Relevant Law

The Charging Parties are employed at the University in the classifications of either maintenance mechanic or facility worker II and work in the facilities services department (Facilities Services). Both classifications are in Bargaining Unit 6 and are exclusively represented by the SETC. The University and SETC are parties to an existing memorandum of understanding (MOU).

Relevant to this discussion, Article 9 of the MOU governs the grievance process for employees in Bargaining Unit 6. Article 9.6a provides:

> Before filing a formal written grievance, the employee shall attempt to resolve the problem by an informal conference with the immediate supervisor no later than (30) days after the event giving rise to the problem or no later than (30) days after the employee knew or should have known of the event giving rise to the complaint.

This informal conference, referred to herein as a Level 1 conference, is the first of five steps in the grievance process. In addition, Article 9.27 of the MOU authorizes one hour of release time for the employee and his or her representative to prepare for the Level 1 conference.

Also relevant to this discussion is a 2007 settlement agreement between the University and SETC in which the University agreed to inform SETC of any decision to use independent contractors, and SETC agreed to inform its members of such decisions by the University.

B. The Center For Children and Families

In 2005, the University executed a ground lease with the California State University San Marcos Foundation (Foundation) for the construction of the Center for Children and Families (CCF). Pursuant to this lease, the Foundation agreed to plan, finance, construct and operate the CCF for use as a child care facility for University employees. Later, in July 2007, the San Marcos University Corporation executed an agreement with the Children's Creative Learning Centers (CCLC) to operate and manage the CCF, including facilities maintenance.

On February 14, 2008, at a monthly meeting for Facilities Services, Pelonero asked the Director of Facilities Services, Ed Johnson, whether the department would maintain the CCF. The following day, the Assistant Director of Facilities Services, Steve Watters (Watters), held a meeting with the service center crew to answer questions and further discuss the same issue.

On February 19, 2008, the Charging Parties contacted Watters and requested a Level 1 conference to discuss what they believed to be unlawful contracting out of bargaining unit work at the CCF building. Charging Parties also requested release time to prepare for the conference. That same day, Watters rejected the Level 1 conference, citing the rule on timeliness under the MOU, and denied the request for release time. On February 20, 2008, Charging Parties made a second request for a Level 1 conference and for one hour of release time. Watters again denied the requests. In denying the informal conference as untimely, Watters stated that Charging Parties should have been aware of the working conditions at the CCF since August 2007.

DISCUSSION

The Charging Parties allege that the University's denial of their Level 1 conference constituted unlawful interference in violation of HEERA section 3571.[2] The test for whether a respondent has interfered with the rights of employees under HEERA does not require that unlawful motive be established, only that at least slight harm to employee rights results from the conduct. In *State of California (Department of Developmental Services)* (1983) PERB Decision No. 344-S, citing *Carlsbad Unified School District* (1979) PERB Decision No. 89 and *Service Employees International Union, Local 99 (Kimmett)* (1979) PERB Decision No. 106, the Board described the standard as follows:

> [I]n order to establish a prima facie case of unlawful interference, the charging party must establish that the respondent's conduct tends to or does result in some harm to employee rights granted under EERA.

Under the above-described test, a violation may only be found if HEERA provides the claimed rights. In *Clovis Unified School District* (1984) PERB Decision No. 389, the Board held that a finding of coercion does not require evidence that the employee actually felt threatened or intimidated or was in fact discouraged from participating in protected activity.

A. The Charging Parties' Access To The Grievance Process Was Not Wrongfully Denied

In the instant case, the Charging Parties sought a Level 1 conference in February 2008 regarding the use of outside contractors to perform maintenance at the CCF. However, the request was denied as untimely. The Charging Parties claim that this denial constitutes an unlawful interference with their right to access their grievance process.

---

[2] It is noteworthy that neither the original charge nor the amended charge clearly state a theory of recovery. Consequently, the Board agent, without objection by the Charging Parties, framed the issue in this case as an interference claim. Based on our review of the moving papers, we agree with the Board agent and, therefore, analyze this case solely in terms of an alleged interference violation.

As indicated above, Article 9.6 of the MOU requires aggrieved employees to attempt to resolve problems by use of an informal conference with their immediate supervisor prior to filing a formal written grievance. That provision, however, requires employees to seek an informal conference within 30 days of the time they knew or should have known of the improper action.

In the instant case, the Charging Parties asked whether they would be providing maintenance service for the CCF building on February 14, 2008. The day after, on February 15, 2008, Watters conducted a follow-up meeting and responded to numerous questions regarding this issue.

Later, on February 19, 2008, the Charging Parties contacted Watters and requested a Level 1 conference and also requested release time to prepare for the conference. That same day, Watters denied both of the requests, citing the rule on timeliness under the MOU.

Based on these facts, it is clear that employees in Facilities Services requested an informal conference pursuant to Article 9.6. In response, Watters denied the request based on the determination that the employees' response was untimely. Watters informed the Charging Parties that they should have known since August 2007 that maintenance was not being performed by the Facilities Services department. Under these circumstances, we find the University complied with the requirements set forth in Article 9.6. Therefore, we conclude the University met its obligations under the MOU and did not unlawfully deny the Charging Parties access to their grievance procedures.[3]

[3] In making this finding, the Board only considered whether the Charging Parties established a wrongful denial of the grievance process. Since we conclude the Charging Parties were not denied access to the grievance process, we need not decide whether the grievance was untimely.

Assuming, arguendo, the University did not adequately comply with Article 9.6, that issue could have been addressed at the next level of the grievance process. However, the Charging Parties did not elevate their grievance to the next level, and there is nothing in the record to suggest that the Charging Parties were precluded from doing so. Under these circumstances, we find that the Charging Parties failed to establish that they were denied access to the grievance process. Accordingly, we find the evidence is insufficient to establish that the Charging Parties suffered any harm to their rights based on the University's conduct and, therefore, conclude the University did not violate HEERA when it denied the Charging Parties' Level 1 grievance.

B. The Charging Parties Lack Standing To Assert The University Breached Its Duty To Provide Notice Regarding Its Use Of Outside Contractors

The Charging Parties also claim that the University breached its duty to inform them of its decision to contract out bargaining unit work at the CCF. According to the Charging Parties, the University breached this duty when it waited until February 13, 2008, to inform the Charging Parties of the use of outside contractors. The Charging Parties base this claim on a 2007 settlement agreement between the University and SETC in which the University agreed to inform SETC of any decision to use independent contractors, and SETC agreed to inform its members of such decisions by the University.

Although unclear, it appears the Charging Parties argue that this alleged breach of the settlement agreement somehow interfered with their protected rights. However, under the settlement agreement, the University owes a duty of notification to the SETC, not the Charging Parties. Therefore, the Charging Parties lack standing to assert this claim.

Assuming, arguendo, that the Charging Parties have standing to assert this claim, the record establishes that the CCLC, and not the University, contracted for maintenance services at the CCF. Since the University did not contract for such services, it did not have a duty to

notify SETC of CCLC's use of outside contractors at the CCF. Accordingly, the facts do not demonstrate the University breached its duty of notification to SETC. Therefore, the University did not commit unlawful interference when it failed to notify the Charging Parties that the CCLC elected to use outside contractors at the CCF.

C. Retaliation Claim

After the case was dismissed, Delgado, one of the Charging Parties, informed PERB by letter dated November 19, 2009, that he received a lay off notice effective January 4, 2010. Delgado claims the layoff notice was due, in part, to the reduction in bargaining unit work caused by the use of outside contractors at the CCF. In addition, Delgado claims he was selected for layoff in retaliation for filing the instant charge.

Although not stated in the letter, it appears that Delgado may be attempting to amend the charge. PERB Regulation 32621[4] provides that a charging party may file an amended charge "[b]efore the Board agent issues or refuses to issue a complaint." Since the charge was dismissed on October 20, 2008, Delgado's attempted amendment dated November 19, 2009, was not timely filed by operation of PERB Regulation 32621 and is not subject to review on the merits.

ORDER

The unfair practice charge in Case No. LA-CE-1045-H is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chair Dowdin Calvillo and Member Wesley joined in this Decision.

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