

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD



DANIEL H. ANDRUS,

Charging Party,

v.

PASO ROBLES PUBLIC EDUCATORS,

Respondent.

Case No. LA-CO-1119-E

EUGENE JAMES MILLER, III, ET AL.,

Charging Party,

v.

PASO ROBLES PUBLIC EDUCATORS,

Respondent.

Case No. LA-CO-1122-E

PERB Decision No. 1589

January 22, 2004

JOHN C. METTIER,

Charging Party,

v.

PASO ROBLES PUBLIC EDUCATORS,

Respondent.

Case No. LA-CO-1124-E

CLARK A. KERR,

Charging Party,

v.

PASO ROBLES PUBLIC EDUCATORS,

Respondent.

Case No. LA-CO-1125-E

BRIAN THOMAS KERR,

Charging Party,

v.

PASO ROBLES PUBLIC EDUCATORS,

Respondent.

Case No. LA-CO-1126-E

Appearances: Daniel H. Andrus for himself and for Eugene James Miller, III, et al., John C. Mettier, Clark A. Kerr and Brian Thomas Kerr; Lawrence Rosenzweig, Attorney, for Paso Robles Public Educators.

Before Baker, Whitehead and Neima, Members.

DECISION

BAKER, Member: These consolidated cases come before the Public Employment Relations (PERB or Board) on exceptions filed by five individual public school employees Daniel H. Andrus, Eugene James Miller, III, et al., John C. Mettier, Clark A. Kerr, Brian Thomas Kerr (Charging Parties) to the proposed decision of an administrative law judge (ALJ). Charging Parties alleged that the Paso Robles Public Educators (PRPE) violated the Educational Employment Relations Act (EERA)¹ by collecting agency fees from them without complying with PERB Regulation 32992². The proposed decision found in favor of PRPE and dismissed the unfair practice charges.

¹EERA is codified at Government Code section 3540 et seq. Unless otherwise noted, all statutory reference herein are to the Government Code.

²PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

After reviewing the entire record, including the proposed decision, Charging Parties' exceptions, and PRPE's response, the Board reverses the ALJ's proposed decision.

BACKGROUND

Charging Parties are public school employees under the EERA. PRPE is an employee organization under EERA and is the exclusive representative of a unit including Charging Parties. Charging Parties allege that beginning in September 2002, PRPE collected agency fees from them without providing each of them the notice required by PERB Regulation 32992. That regulation states in full:

- (a) Each nonmember who will be required to pay an agency fee shall annually receive written notice from the exclusive representative of:
 - (1) The amount of the agency fee which is to be expressed as a percentage of the annual dues per member based upon the chargeable expenditures identified in the notice;
 - (2) The basis for the calculation of the agency fee; and
 - (3) A procedure for appealing all or any part of the agency fee.
- (b) All such calculations shall be made on the basis of an independent audit that shall be made available to the nonmember.
- (c) Such written notice shall be sent/distributed to the nonmember either:
 - (1) At least 30 days prior to collection of the agency fee, after which the exclusive representative shall place those fees subject to objection in escrow, pursuant to Section 32995 of these regulations; or
 - (2) Concurrent with the initial agency fee collection, provided however, that all agency fees so noticed shall be held in escrow in toto until all objectors are identified. Thereafter, only the agency fees for agency fee objectors shall be held in escrow, pursuant to Section 32995 of these regulations.

The notice required by this regulation is frequently called a Hudson notice, after the Supreme Court's decision in Chicago Teachers Union, Local No. 1 v. Hudson (1986) 475 U.S. 292, 106 S.Ct. 1066 [121 LRRM 2793] (Hudson).

The essential facts surrounding Charging Parties' allegations are not in dispute. In September 2001, PRPE gave notice that it was exercising its right under EERA section 3546(a) to collect agency fees. PRPE began collecting agency fees in October 2001.³ The amount collected in October, November, and December 2001, was equal to PRPE's dues which were \$64.00.

In November 2001, PRPE sent out its first Hudson notice. This notice included an independent auditor's report, dated October 27, 2001, on PRPE's expenses for the fiscal year ending August 31, 2001. The notice gave employees thirty days to request a rebate and reduction of their agency fees in the amount of 34.48 percent, which had been determined to be the percentage of non-chargeable expenses. The notice also gave employees thirty days to challenge the determination of non-chargeable expenses, with their agency fees to be held in escrow until the challenges were resolved by arbitration.

Some Charging Parties did request a rebate and reduction, and as a result their agency fees were reduced by 34.48 percent to \$41.93. Some Charging Parties also challenged the determination of non-chargeable expenses, and as a result their agency fees were eventually further reduced to \$19.20. Charging Parties did not, however, file an unfair practice charge concerning the timing of the November 2001 Hudson notices.

³Agency fees were collected from one employee in September 2001, but they were refunded.

In September, October, and November 2002, PRPE again collected agency fees from its unit members. In September 2002, PRPE issued a memo setting out the following guidelines:

1. All current and new PRPE members will pay the full amount of dues. (Last year's amount + 2%)
2. All current and new agency fee payers will pay full amount of dues. (Last year's amount only)
3. All current and new reduced fee payers will pay the reduced fee. (Last year's reduced amount only)
4. The following list of 10 challengers will pay a new reduced fee amount of \$19.20 tenthly.

- A. Dan Andrus
- B. Sue Apkarian
- C. Arthur G. Cook
- D. Gail Dennis
- E. A. Elaine DeVaul
- F. Clark A. Kerr
- G. Brian T. Kerr
- H. Nathaniel William Maas
- I. Eugene James Miller III
- J. John C. Mettier

5. All new hires who are not union members have no deductions at this time, but we will notify you about their correct deduction amount later.

It is undisputed that PRPE did not provide its unit members with another Hudson notice when it collected agency fees from September to November 2002. PRPE's position at hearing was that new notices were not necessary, because the December 2001 Hudson notice was still in effect. PRPE emphasizes that although member dues increased by two (2) percent, agency fees did not increase in 2002. Meanwhile, new hires, who would not have received the December 2001 Hudson notice, did not have to pay any agency fees.

In December 2002 (specifically, on December 17, 2002), PRPE sent out its second Hudson notice. This notice included an independent auditor's report, dated November 23,

2002, on PRPE's expenses for the fiscal year ending August 31, 2002. The auditor testified at hearing that he could not have completed the report earlier because he needed to receive confirmation from the California Teachers Association (CTA) and the National Education Association (NEA), whose fiscal years had also ended August 31, 2002, of dues paid by PRPE to CTA and NEA.⁴

The December 2002 Hudson notice gave employees 30 days (specifically, until January 19, 2003) to request a rebate and reduction of their agency fees (in the amount of 29.04 percent) and also to challenge the determination of non-chargeable expenses. Some Charging Parties did request a rebate and reduction, and as a result their agency fees were adjusted to \$46.32, effective February 2003. Some Charging Parties also challenged the determination of non-chargeable expenses. At the time of hearing, an arbitration of these challenges was pending.

ALJ'S PROPOSED DECISION

The issue before the ALJ was whether PRPE collected agency fees in September, October, and November 2002, without providing the required Hudson notice. The ALJ began by noting that PERB Regulation 32992(c) requires Hudson notices to be sent "[c]oncurrent with the initial agency fee collection." (PERB Reg. 32992(c).) There appears to be little doubt that PRPE failed to comply with that requirement in 2001. However, Charging Parties did not file an unfair practice charge over the initial collection of agency fees for 2001; such a charge is now untimely. Accordingly, the sole issue before the ALJ was the timing of the 2002 Hudson notices.

⁴PRPE is affiliated with CTA and NEA and also with the California Federation of Teachers (CFT) and the American Federation of Teachers (AFT). Most of PRPE's expenses consist of dues or taxes paid to CTA, NEA, CFT and AFT.

The ALJ concluded that the issue turned on the language of PERB Regulation 32992(a), which provides that:

Each nonmember who will be required to pay an agency fee shall annually receive [a Hudson notice]. [Emphasis added.]

Relying on Black's dictionary, the ALJ concluded that "annually" must be interpreted literally to mean "every 12 months". Since the initial Hudson notice was sent in December 2001, PRPE was not required to send another notice until December 2002. The ALJ rejected Charging Parties' reliance on PERB Regulation 32992(c) by concluding that, PERB Regulation 32992(c) does not specifically require that there be a new Hudson notice no later than concurrent with each school year's initial agency fee collection. If such a requirement had been intended, it presumably would have been specified.

Based on this reasoning, the ALJ held that PRPE met its obligation to send out a Hudson notice "annually" when it sent a notice in December 2002. The ALJ therefore concluded that PRPE did not improperly collect agency fees in September, October, and November, 2002, and dismissed the charges.

CHARGING PARTIES' EXCEPTIONS

In its exceptions, Charging Parties proffer two arguments. First, Charging Parties argue that the ALJ relied on an old edition of Black's Law Dictionary. According to Charging Parties, the newer edition does not specify that "annually" means every 12 months, but rather "in annual order or succession." Second, Charging Parties assert that since PRPE's first Hudson notice in 2001 was late, it cannot be used as the beginning point for determining when the 2002 notices must be sent. In other words, Charging Parties argue that the 2002 notices should be measured from when the 2001 notices were legally required, not from when the 2001 notices were actually sent.

PRPE'S RESPONSE

PRPE responds by emphasizing the vagueness of PERB Regulation 32992. According to PRPE, that regulation lacks any specificity as to when a Hudson notice must be sent other than to require them annually. Thus, PERB should broadly interpret that regulation, argues PRPE.

DISCUSSION

Constitutional Requirements of Hudson

In Hudson, the United States Supreme Court considered the constitutionality of a union's collection of agency shop fees. In that case, the Chicago Teachers Union implemented the collection of agency fees and created a system whereby employees could subsequently object or challenge the fees and receive a rebate. The court struck down the union's collection system finding that a rebate system which allowed even the temporary use of money for activities that violate nonmembers' rights was unconstitutional. The court held that any agency fee collection system must meet three requirements: (1) it must provide for the objection or challenge of agency fees before their collection; (2) provide nonmembers with adequate information about the basis for the agency fee; and (3) provide for a reasonably prompt decision regarding any challenge by an impartial decision-maker. (Hudson, at p. 310.) After Hudson, PERB enacted a set of regulations to comply with these requirements. (PERB Reg. 32990 et seq.)

Hudson Notice Must be Provided Prior to the Collection of Agency Fees

In the proposed decision, the ALJ focused almost exclusively on the term “annually” in PERB Regulation 32992(a). In doing so, the ALJ ignored subsection (c)(1). On its face, the Board finds that subsection (c)(1) modifies the requirement in subsection (a) that Hudson notices be provided annually. Specifically, (c)(1) requires that Hudson notices be provided 30 days prior to the collection of agency fees.⁵ (PERB Reg. 32992(c)(1).) Thus, reading the provisions of PERB Regulation 32992 in conformity with each other, it is plain that Hudson notices must be provided every year at least 30 days prior to the collection of the agency fee. Such an interpretation is not only in conformity with the Hudson decision, but required by it.

Indeed, the Hudson decision states:

Basic considerations of fairness, as well as concern for the First Amendment rights at stake, also dictate that the potential objectors be given sufficient information to gauge the propriety of the union’s fee. Leaving the nonunion employees in the dark about the source of the figure for the agency fee – and requiring them to object in order to receive information – does not adequately protect the careful distinctions drawn in Abood.

The Board has interpreted the language above to require that enough information be provided to potential agency fee objectors to make an “intelligent objection.” (San Ramon Valley Education Association, CTA/NEA (Abbot and Cameron) (1990) PERB Decision No. 802 (San Ramon)). More importantly, the Board has held that such information must be provided to potential agency fee objectors with the initial notice of collection. (San Ramon.) Although the facts in San Ramon arose prior to the promulgation of PERB Regulation 32992, the holdings in San Ramon are entirely consistent with the regulation.

⁵The only exception is for the initial collection of agency fees where the Hudson notice may be provided concurrently. (PERB Reg. 32992(c)(2).)

The ALJ's proposed decision essentially sanctions the implementation of a rebate system. Under the proposed decision, PRPE would be able to collect agency fees beginning in September of each year even though it did not provide a Hudson notice until December. Nonmembers are thus relegated to seeking a rebate of fees paid from September through December. Such a system is exactly the kind of rebate system the court found unconstitutional in Hudson.

Here, it is undisputed that PRPE began collecting agency fees in September for the 2002-2003 year. However, it did not provide a Hudson notice for the 2002-2003 year until December. Under PERB Regulation 32992 and the Hudson decision, PRPE's collection of agency fees prior to the provision of a Hudson notice was improper.

PRPE Cannot Rely on its 2001-2002 Hudson Notice

PRPE argues that if a Hudson notice is required prior to the collection of fees, then PERB should deem its December 2001 Hudson notice applicable to its collection of fees from September through November 2002. This contention must be rejected. The December 2001 Hudson notice was based on an audit of the 2000-2001 year. The notice explicitly stated that it applied for the 2001-2002 year. Nothing in the December 2001 Hudson notice informed employees that it would also serve as a basis for determining the agency fee for 2002-2003. PERB Regulation 32992(a)(2) requires that nonmembers be informed of the basis for the calculation of agency fees. Such notice is required by the Hudson decision. Without such notice, employees would be unable to effectively challenge the calculation of an agency fee.

Here, Charging Parties were not informed that the December 2001 Hudson notice would also serve as a basis for calculating agency fees in 2002-2003. To the contrary, Charging Parties were informed in the December 2001 notice that it only applied for the 2001-

2002 year. PRPE's attempt to use the December 2001 Hudson notice to justify its collection of agency fees in September through November 2002 thus contravenes PERB Regulation 32992 and the Hudson decision.

Accordingly, the Board finds that PRPE violated PERB Regulation 32992 when it collected agency fees from September to November 2002 without providing the required Hudson notice.

REMEDY

In the present case, it has been found that PRPE failed to provide the notice required by PERB Regulation 32992 prior to the collection of agency fees. PRPE's actions interfered with the right of nonmembers to refrain from participation in the activities of the exclusive representative in violation of EERA section 3543.6(b). Accordingly, the Board finds that it is proper to order PRPE to return to Charging Parties any amounts, with interest, that were collected from them from September 2002 to December 17, 2002, when PRPE provided the required Hudson notice. Additionally, PRPE is prohibited from further collecting agency fees without complying with PERB Regulation 32992 as discussed herein.

ORDER

Based on the foregoing findings of fact, conclusions of law, and the entire record in this case, it is found that the Paso Robles Educators Association (PRPE) violated the Educational Employment Relations Act (EERA), Government Code section 3543.6(b), by failing to provide the notice required by PERB Regulation 32992 prior to the collection of agency fees.

Pursuant to EERA section 3541.5(c), it is hereby ORDERED that PRPE, its administrators and representatives shall:

A. CEASE AND DESIST FROM:

1. Interfering with the rights of individual employees by failing to provide the notice required by PERB Regulation 32992 prior to the collection of agency fees.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF EERA:

1. Return to Daniel H. Andrus, Eugene James Miller, III, et al., John C. Mettier, Clark A. Kerr, Brian Thomas Kerr (Charging Parties) any amounts, with interest, that were collected from them from September 2002, to PRPE's compliance with PERB Regulation 32992 on December 17, 2002. Interest shall be calculated at the rate of seven (7) percent per annum.

2. Within ten (10) workdays following the date this decision is no longer subject to appeal, post at all locations where notices are customarily posted, copies of the notice attached hereto as an Appendix.

3. Written notification of the actions taken to comply with this Order shall be made to the San Francisco Regional Director of the Public Employment Relations Board in accordance with the director's instructions. Continue to report, in writing, to the regional director thereafter as directed. All reports to the regional director shall be concurrently served on Charging Parties.

Members Whitehead and Neima joined in this Decision.

**NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD
An Agency of the State of California**



After a hearing in Unfair Practice Case Nos. LA-CO-1119-E, et al., Daniel H. Andrus, et al. v. Paso Robles Public Educators in which all parties had the right to participate, it has been found that the Paso Robles Public Educators (PRPE) violated the Educational Employment Relations Act (EERA), Government Code section 3543.6(b), by failing to provide the notice required by PERB Regulation 32992 prior to the collection of agency fees.

As a result of this conduct, we have been ordered to post this Notice and we will:

A. CEASE AND DESIST FROM:

1. Interfering with the rights of individual employees by failing to provide the notice required by PERB Regulation 32992 prior to the collection of agency fees.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF EERA:

1. Return to Daniel H. Andrus, Eugene James Miller, III, et al., John C. Mettier, Clark A. Kerr, Brian Thomas Kerr any amounts, with interest, that were collected from them from September 2002, to PRPE's compliance with PERB Regulation 32992 on December 17, 2002. Interest shall be calculated at the rate of seven (7) percent per annum.

Dated: _____

PASO ROBLES PUBLIC EDUCATORS

By: _____
Authorized Agent

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR AT LEAST THIRTY (30) CONSECUTIVE WORKDAYS FROM THE DATE OF POSTING AND MUST NOT BE REDUCED IN SIZE, DEFACED, ALTERED OR COVERED WITH ANY OTHER MATERIAL.