STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

STATEWIDE UNIVERSITY POLICE ASSOCIATION, Charging Party, v. TRUSTEES OF THE CALIFORNIA STATE UNIVERSITY, Respondent.	Case No.LA-CE-901-H PERB Decision No. 1871-H December 28, 2006

Appearances: Adams, Ferrone & Ferrone by Stuart D. Adams, Attorney, for Statewide University Police Association; Marc. D. Mootchnik, University Counsel, for Trustees of the California State University.

Before Duncan, Chairman; Shek and Neuwald, Members.

DECISION

SHEK, Member: This case is before the Public Employment Relations Board (Board) on appeal by the Statewide University Police Association (SUPA) of a dismissal (attached) of its unfair practice charge. The charge alleged that the Trustees of the California State University (CSU) violated sections 3565, 3566, 3571, and 3572 of the Higher Education Employer-Employee Relations Act (HEERA).[1] Specifically, SUPA alleged that two emails sent by CSU directly to unit members constituted interference with SUPA's right to represent its members. Additionally, SUPA alleged that CSU's placement of a time limit on an offer constituted failure to meet and confer; discrimination; retaliation; and punitive action. This case included a request to seek injunctive relief. The Board agent dismissed the charge.

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

The Board has reviewed the entire record in this case, including, but not limited to, the unfair practice charge, the amended unfair practice charge, CSU's position statement, the warning and dismissal letters, the appeal letter, and the CSU's opposition to the appeal. Based on this review, the Board adopts the warning and dismissal letters as the decision of the Board itself.

ORDER

The unfair practice charge in Case No. LA-CE-901-H is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chairman Duncan and Member Neuwald joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
1031 18th Street
Sacramento, **CA** 95814-4174
Telephone: (916) 327-8387
Fax:(916)327-6377

September 26, 2005

Stuart D. Adams, Esquire
Adams, Ferrone & Ferrone
660 Hampshire Road, Suite 204
Westlake Village, CA 91361

Re: Statewide University Police Association v. Trustees of the California State University
Unfair Practice Charge No. LA-CE-901-H
DISMISSAL LETTER

Dear Mr. Adams:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on August 11, 2005.[1] The Statewide University Police Association (SUPA) alleges that the Trustees of the California State University (CSU) violated the Higher Education Employer-Employee Relations Act (HEERA)[2] by dealing directly with employees regarding the status of ongoing negotiations.

I indicated to you in my attached letter dated August 24, 2005, that the above-referenced charge did not state a prima facie case. You were advised that, if there were any factual inaccuracies or additional facts which would correct the deficiencies explained in that letter, you should amend the charge. You were further advised that, unless you amended the charge to state a prima facie case or withdrew it prior to September 2, 2005, the charge would be dismissed.

Following the granting of additional time to amend the charge, a first amended charge was filed via fax on September 8, 2005. In this amended charge you provide details of the extent of circulation of Samuel Strafaci's August 3 e-mail. (Eight campus representatives responded that the e-mail was circulated to Unit 8 members.) In addition you point out that SUPA President, Jim Procida, was telephoned by two SUPA Representatives seeking an explanation of the e-mail.

Furthermore, SUPA raised a new allegation in the amended charge regarding what transpired as the parties met in further negotiations on August 22. At that meeting CSU made its "last best and final offer." SUPA indicated that it believed an impasse existed but it would present its final offer to CSU on September 2. On August 23, you received a fax from CSU's

[1] The Exhibits referenced in the charge were filed on August 15, 2005.

[2] 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.

negotiator, Sharyn Abernatha, which indicated that CSU's offer of a 5.5% increase was conditioned on SUPA's acceptance by Monday, August 29. SUPA wished to object to CSU"s "regressive and conditional bargaining" but, "due to scheduling" SUPA never disputed or accepted the offer. On August 30, when you called Sam Strafaci, CSU confirmed that the 5.5% offer was rescinded. You contend that CSU's offer and then withdrawal of the offer evidences bad faith. You indicate that PERB does not tolerate conditional bargaining and cited State of California (1998) PERB Decision No 1249-S (State); Modesto City Schools (1983) PERB Decision No. 291 (Modesto) and Muroc Unified School District (1978) PERB Decision No.80 (Muroc).

In reviewing these cases I draw a different conclusion. In the State case the Board upholds the dismissal of an unfair practice charge which alleged that the employer had proposed that in exchange for the State meeting the union's economic demands the employer wanted the union's commitment to support legislation meeting the employer's non-economic demands relating to civil service reforms. The Board Agent apprised the charging party that under Fremont Unified School District (1980) PERB Decision No. 136 there was no violation of the law if a party conditions a proposal on something within the control of the negotiators. (In Fremont the employer's proposal relied on a tax measure to be approved by voters and thus was held to be outside the control of the negotiator and an illegal proposal.) In the instant case, the time limits placed on the proposal were within the control of the parties and thus not illegal.

In Modesto the issue was whether an employer's insistence on both a no-strike clause and exclusion of a binding arbitration clause was evidence of conditional bargaining. The Board held that the employer did not condition its proposals only to avoid a contract.

In Muroc the 'condition' which was reviewed was whether bargaining would occur without a tape recorder. The union contended that the employer evidenced bad faith by refusing to meet if the union insisted on tape recording negotiations. The Board found that the employer objected but did not refuse to meet and therefore there was no condition placed by the employer on continued bargaining.

The condition you assert as violative was a deadline placed by CSU on its offer. I have found no case law to support the theory that such a proposal by itself is evidence of bad faith. Therefore this allegation will be dismissed.

The other new allegation in the September 8 amended charge is that an August 25 internal administration e-mail was again forwarded to Unit 8 members from at least one campus Chief of Police to police officers at CSU Monterey Bay. This e-mail indicates that it is a status report following the August 22 negotiations meeting.

SUPA disputes four comments made by Strafaci in the report. First, he describes the two major areas of disagreement as being the Holiday and Salary articles. SUPA points out that there are more than two areas and lists: on-call pay, call back hours for court, consecutive work

days and days off and plus/minus time as major disagreements. Second, SUPA disputes CSU's description of holiday credit for future use. CSU describes SUPA's proposal as:

> Employees will not receive the additional compensation provided in the current contract for working on the holiday.

SUPA states its proposal provides that members may choose whether to receive straight pay or holiday credit at the member's choice as well as other enhancements. Third, SUPA believes that CSU's e-mail is misleading because it states CSU's proposal regarding limiting the amount of holiday credit that could be accrued at 100 hours and paying employees for any that already surpassed the 100 hours, fails to indicate that the choice of pay or credit is up to the Administration, not the member. Finally, SUPA states it is seeking a Service Based Salary Increase of 4.6% not 2.3% in the first two years of the contract as CSU asserts.

As I pointed out in my August 24 letter, PERB has held that although accurate reporting of the status of negotiations or the nature of the proposals exchanged is permissible, an employer must refrain from a campaign of communications to sway the views of the employees while maintaining an inflexible position at the negotiating table. Such conduct bypasses and undermines the exclusive representative. (Muroc Unified School District, supra, PERB Decision No. 80 at 25; see also California State University (1989) PERB Decision No. 777-H, at 2-4 (CSU).

An employer may not communicate proposals to employees before first submitting them to the exclusive representative, seek to bargain directly with employees, or invite them to abandon their representative to achieve better terms directly from the employer. (See United Technologies Corp. (1985) 274 NLRB 1069, 1074 [118 LRRM 1556].) Nor may the employer engage in a campaign to disparage the exclusive representative's negotiators so as to drive a wedge between union representation and the bargaining unit employees. (See Safeway Trails, Inc. (1977) 233 NLRB 1078, 1081-1082 [96 LRRM 1614].)

The alleged misrepresentations in the August 25 e-mail do not appear to rise to the level of a "campaign to disparage" SUPA. Nor are they so detailed as those in CSU where the Chancellor informed the CSU workforce that despite ongoing negotiations with unions, the employer intended to implement salary increases and referenced the effective date and the exact percentage. The Board upheld the Hearing Officer who found that the comments by the Chancellor in her "Wrap-Up" did cross the "fine line" of employer free speech by suggesting it was the sole authority of the employer to impose salary increases and their timing.

Those facts are not alleged here. Rather, there is a dispute in the manner in which negotiations are described. The explanation of proposals by Strafaci while not complete in SUPA's view, do not attempt to confuse employees or disparage SUPA's proposals. The alleged misstatements by CSU may be viewed as "spin" that seeks to explain the status of negotiations from their perspective. The audience of the message is first of all campus administrators. The fact that certain managers share the document with Unit 8 members does not evidence a

campaign by CSU to undermine SUPA or its bargaining positions. Neither statement is pejorative or states SUPA is responsible for there not being a new agreement.

None of the other indicia of bad faith are specifically alleged in the charge. Without that information, a case for totality of circumstances is not established either.

Therefore, I am dismissing the charge based on the facts and reasons contained in this and my August 24 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 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. (Regulations 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

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

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).)

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.
Roger Smith

Labor Relations Specialist

Attachment

cc: Marc D. Mootchnik

PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
1031 18th Street
Sacramento, CA 95814-4174
Telephone: (916) 327-8387
Fax:(916)327-6377

August 24, 2005

Stuart D. Adams, Esquire
Adams, Ferrone & Ferrone
660 Hampshire Road, Suite 204
Westlake Village, CA 91361

Re: Statewide University Police Association v. Trustees of the California State University
Unfair Practice Charge No. LA-CE-901 -H
WARNING LETTER

Dear Mr. Adams:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on August 11, 2005.[1] The Statewide University Police Association (SUPA) alleges that the Trustees of the California State University (CSU) violated the Higher Education Employer-Employee Relations Act (HEERA)[2] by dealing directly with employees regarding the status of ongoing negotiations.

My investigation of the charge has revealed that SUPA is the exclusive representative of a unit of law enforcement personnel at CSU, Unit 8. CSU and SUPA have been in negotiations for many months following the expiration of the most current MOU on June 30, 2004. On August 3, 2005, Assistant Vice Chancellor of Human Resources, Samuel Strafaci, sent an e-mail to Chancellor Charles Reed, Human Resources Directors and Vice Presidents of Business at each campus giving an update on the status of negotiations. Vice Chancellor Jackie McClain then forwarded Stafaci's memo to the Chiefs of Police at each CSU campus. The e-mail indicates that it may be shared with Unit 8 members.[3]

SUPA states that the e-mail contains numerous errors and misstatements that has caused SUPA President Procida, to answer phone calls and e-mails correcting the information. SUPA asserts that the misinformation was a deliberate attempt to undermine the union. The misstatements are as follows:

1. "At SUPA's request the parties have not met since February 9, 2005." SUPA argues

[1] The Exhibits referenced in the charge were filed on August 15, 2005.

[2] 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.

[3] SUPA President, Jim Procida, indicates that some Chiefs forwarded the e-mail to all Unit 8 members, others forwarded it to SUPA delegates at their campus and other Chiefs did not forward the e-mail at all.

that it made no such request but instead agreed to await the "May revise" of the State budget as suggested by CSU 's representative, Sharyn Abernatha. SUPA indicated it was ready to declare impasse in February but decided to await CSU's new offer.

2. "When contacted by the CSU in May, the Union requested that the CSU provide a proposal by mail." This creates the impression that the CSU was proactive while SUPA did nothing. In fact, SUPA asserts that it reinitiated bargaining by asking for an economic proposal on June 9, 2005. Bargaining was supposed to start anew in May with a comprehensive economic proposal from CSU. It was not forthcoming, so SUPA requested such a proposal following a negotiations session on May 31.

3. "On July 20, 2005 the University received a comprehensive counter-proposal from SUPA which, unfortunately, raised new issues and expanded previously discussed issues. This created an unexpected setback in our ability to conclude bargaining as quickly as possible." There were no new proposals only fleshed out previous proposals.

Higher Education Employer-Employee Relations Act (HEERA) section 3571.3 states:

> The expression of any views, arguments, or opinions, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute, or be evidence of, an unfair labor practice under any provision of this chapter, unless such expression contains a threat of reprisal, force, or promise of benefit; provided, however, that the employer shall not express a preference for one employee organization over another employee organization.

Like the HEERA, the National Labor Relations Act (NLRA) imposes on private sector employers an obligation to bargain in good faith and expressly guarantees employers the right of free, non-coercive speech in Section 8(c) (29 U.S.C, sec. 158(c)) which is nearly identical to HEERA section 3571.3.

Looking to the NLRA and the National Labor Relations Board's interpretation of section 8(c), PERB has consistently held that employers may communicate with employees about labor relations matters as long as the communication does not contain a threat of reprisal or force or promise of benefit.

Without further facts to demonstrate that CSU was engaged in "surface bargaining," the facts as alleged by themselves do not establish a violation. PERB has held that it is the essence of surface bargaining that a party goes through the motions of negotiations, but in fact is weaving otherwise unobjectionable conduct into an entangling fabric to delay or prevent agreement. (Muroc Unified School District (1978) PERB Decision No. 80.) Where there is an accusation

of surface bargaining, PERB will resolve the question of good faith by analyzing the totality of the accused party's conduct. The Board weighs the facts to determine whether the conduct at issue "indicates an intent to subvert the negotiating process or is merely a legitimate position adamantly maintained." (Oakland Unified School District (1982) PERB Decision No. 275.)

In Muroc Unified School District (1979) PERB Decision No. 80, PERB construed the Educational Employment Relations Act to allow public school employers to communicate "in a noncoercive fashion, with employees during negotiations." (Id. at 25, citing NLRB v. General Electric Co. (2nd Cir. 1969) 418 F.2d 736, 762 [72 LRRM 2530, 2551], cert.den. (1970) 397 U.S. 965 [73 LRRM 2600]; and Proctor & Gamble Mfg. Co. (1966) 160 NLRB 334, 340 [32 LRRM 1617, 1620].)

PERB has held that although accurate reporting of the status of negotiations or the nature of the proposals exchanged is permissible, an employer must refrain from a campaign of communications to sway the views of the employees while maintaining an inflexible position at the negotiating table. Such conduct bypasses and undermines the exclusive representative. (Muroc Unified School District, supra, PERB Decision No. 80 at 25; see also California State University (1989) PERB Decision No. 777-H, at 2-4 (CSU).

An employer may not communicate proposals to employees before first submitting them to the exclusive representative, seek to bargain directly with employees, or invite them to abandon their representative to achieve better terms directly from the employer. (See United Technologies Corp. (1985) 274 NLRB 1069, 1074 [118 LRRM 1556].) Nor may the employer engage in a campaign to disparage the exclusive representative's negotiators so as to drive a wedge between union representation and the bargaining unit employees. (See Safeway Trails. Inc. (1977) 233 NLRB 1078, 1081-1082 [96 LRRM 1614].)

The alleged misstatements by Strafaci do not appear to rise to the level of a "campaign to disparage" SUPA. The comments by Strafaci when viewed by a participant in negotiations, may seem obstructionist, but they are not so detailed as those in CSU where the Chancellor informed the CSU workforce that despite ongoing negotiations with unions, the employer intended to implement salary increases and referenced the effective date and the exact percentage. The Board upheld the Hearing Officer who found that the comments by the Chancellor in her "Wrap-Up" did cross the "fine line" of employer free speech by suggesting it was the sole authority of the employer to impose salary increases and their timing.

Those facts are not alleged here. Rather, it is asserted by CSU that negotiations were delayed three months at SUPA's request rather than it being announced as a mutual understanding. The other alleged misstatements may be viewed as "spin" that may reflect that CSU is eager to get an agreement or SUPA wants to negotiate further. Neither statement is pejorative or states SUPA is responsible for there not being a new agreement.

None of the other indicia of bad faith are specifically alleged in the charge. Without that information, a case for totality of circumstances is not established either.

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 September 2, 2005, I shall dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Roger Smith
Labor Relations Specialist

RCS