

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



STEVE DAYACAP VENTURA, et al.,

Charging Parties,

v.

STATE EMPLOYEES TRADES COUNCIL
UNITED,

Respondent.

Case No. LA-CO-493-H

PERB Decision No. 2069-H

October 5, 2009

Appearances: Allen D. Rutherford, for Steve Dayacap Ventura, Noe Duran and Allen D. Rutherford; Leonard Carder by Jennifer Keating, Attorney, for State Employees Trades Council United.

Before Dowdin Calvillo, Acting Chair; Neuwald and Wesley, Members.

DECISION

NEUWALD, Member: This case comes before the Public Employment Relations Board (PERB or Board) on appeal by Steve Dayacap Ventura, Noe Duran, and Allen D. Rutherford (Ventura, Duran, and Rutherford or Charging Parties) of a Board agent's dismissal of their unfair practice charge. The charge filed on October 9, 2008, alleged that the State Employees Trades Council United (SETC) violated the Higher Education Employer-Employee Relations Act (HEERA)¹ by: (1) refusing to produce a financial report; (2) retaliating against Charging Parties for not participating in a sympathy strike; (3) breaching the duty of fair representation by supporting a reduction in Charging Parties' salary; and (4) violating the

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

Memorandum of Understanding (MOU). Charging Parties alleged that this conduct constituted a violation of HEERA sections 3571.1(b) and (e), 3578 and 3587.²

The Board reviewed the entire record including the unfair practice charge, the amended charge, SETC's position statements, the warning and dismissal letters, Charging Parties' appeal, and SETC's response to that appeal. Based on this review, the Board affirms in part and reverses in part the dismissal of the charge. As such, the Board remands this case to the General Counsel's Office to process the charge in accordance with this decision.

BACKGROUND

Charging Parties are employed at the University of California at San Diego (University) as elevator mechanics. SETC is the exclusive representative of a bargaining unit at the University, which includes the elevator mechanic classification. SETC and the University are parties to an MOU that expired on September 30, 2008. Article 37 of the expired MOU states that SETC "agrees that there shall be no strikes, including sympathy strikes, or concerted activities which would interfere with the operations of the University."

SETC and the University jointly oversee an elevator mechanics' apprenticeship program for University employees. Under the program, SETC and the University appoint members to the Joint Apprenticeship and Training Committee (JATC), which administers the program. The JATC is comprised of two persons appointed by the University and two craftspersons appointed by SETC.

In February 2008, the University and SETC agreed to provide Ventura and Duran Temporary Certified Competent Conveyance Mechanics permits (temporary permits). At the

² Charging Parties did not appeal the Board agent's findings regarding the breach of fair representation and failure to provide a financial statement. The Board, therefore, does not address the breach of the duty of fair representation allegation. For reasons discussed below, the Board does address the allegation of SETC failing to provide a financial report.

time, both Ventura and Duran were employed as apprentice elevator mechanics. The temporary permits allowed Ventura and Duran to perform the duties of a journey-level elevator mechanic and receive comparable salary.

Beginning on July 14, 2008, the American Federation of State, County, and Municipal Employees (AFSCME), a union representing another University bargaining unit, engaged in a weeklong demonstration at various campuses of the University. One of the sites where AFSCME representatives were picketing was the Gillman parking structure at the University. On July 18, 2008, SETC representative Eduardo Rosales (Rosales) informed Rutherford that SETC members would be meeting at the Gillman parking structure during lunchtime in support of AFSCME's demonstration. Rosales requested that Rutherford attend and that he wear his SETC t-shirt. Rutherford expressed reluctance to Rosales about participating and ultimately did not attend the July 18, 2008 demonstration.

On September 6, 2008, SETC circulated to its members the agenda for the next JATC meeting, scheduled for September 8, 2008.³ One item on the agenda was "Improper Apprentice Pay Step Placement @ Mechanic rate without approval." Believing that this item affected Charging Parties Ventura and Duran, Rutherford requested to meet with SETC representative and JATC member Pat Hallahan (Hallahan).

During a September 8, 2008, SETC general membership meeting, Rutherford questioned why SETC was acting against the interests of Ventura and Duran. After the meeting, Charging Parties met with SETC representatives Hallahan, Rosales, John Conner, and James Reader (Reader). SETC stated that it would seek to reduce the salaries of Ventura and Duran to maintain the integrity of the apprenticeship program. SETC stated that it would do so

³ The JATC meeting was rescheduled to October 2, 2008, because one of its members, University representative Phil Oliveri (Oliveri), was unable to attend.

during the next scheduled JATC meeting in October 2008. SETC did not at the time describe how reducing Ventura and Duran's salaries benefited the apprenticeship program as a whole.

On October 2, 2008, SETC and the University held the rescheduled JATC meeting. At the meeting, University representative Dan Wyman and SETC representative Hallahan had a disagreement over the extent to which SETC agreed to Ventura and Duran being given journey-level work assignments. The discussion became heated and Oliveri left the meeting. Oliveri stated to Ventura and Duran that they did not need to remain at the meeting if they wanted to leave. Hallahan informed Ventura and Duran that if they did not remain at the meeting, they could be removed from the JATC apprenticeship program.

Ventura and Duran were questioned about their qualifications for being in the apprenticeship program, any related academic coursework they completed, and any on-the-job training they received under the supervision of a journeyman elevator mechanic. Afterwards, the SETC members of the JATC voted to reduce Ventura and Duran's salary by 25 percent.⁴ Ventura and Duran were allowed to keep their temporary permits which authorized them to continue to work independently on journey-level job assignments.

SETC's fiscal year ends December 31. On September 9, 2008, Rutherford e-mailed Linda Chang (Chang), secretary treasurer for SETC and requested to view the SETC annual report. Chang never responded. On September 18, 2008, Bob Moore, SETC paint shop steward/UCSD painter, and Reader, SETC lock shop steward/UCSD locksmith, separately approached Rutherford and told Rutherford to telephone Rosales for the annual report. Rutherford explained to that he would like to view the annual report to get an idea of the cost

⁴ According to the first amended charge, the University members of the JATC did not vote for the salary reduction. It is unclear from the record whether the employees' salary was ever reduced.

of the apprentice program to SETC relative to the overall union budget. Rosales replied that “the 2007 SETC-United Annual Report [was] unavailable because it [was] still at the auditor, but [that he did] have some quarterly reports from like 2006 that [Rutherford could] see.” Rutherford requested that Rosales send him what he could get. Rutherford never received anything.

After the charge was filed, Rutherford received the third quarterly report for 2008. On November 25, 2008, Rutherford e-mailed Chang. He thanked her for sending the third quarterly report for 2008 and asked her when the fiscal year ended. Additionally, he requested the 2007 annual report. Later that day, Chang e-mailed Rutherford back and informed him that the report for 2007 was not yet completed. She further stated that she would forward it to him upon receipt. Rutherford has yet to receive the annual report.

APPEAL AND RESPONSE

Charging Parties allege that they established a prima facie case regarding the allegations of retaliation and violation of the MOU. SETC argues, on the other hand, that Charging Parties failed to state a prima facie case. Additionally, SETC argues that the appeal does not meet the requirements of PERB Regulation 32635.⁵

DISCUSSION

PERB Regulation 32635

We first address the issue as to whether Charging Parties complied with PERB Regulation 32635 which governs review of dismissals. Specifically, PERB Regulation 32635(a) states, in part:

⁵ PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

The Appeal shall:

- (1) State the specific issues of procedure, fact, law or rationale to which the appeal is taken;
- (2) Identify the page or part of the dismissal to which each appeal is taken;
- (3) State the grounds for each issue stated.

The Board has held that compliance with regulations governing appeals is required to afford the respondent and the Board an adequate opportunity to address the issues raised, and noncompliance will warrant dismissal of the appeal. (*Oakland Education Association (Baker)* (1990) PERB Decision No. 827; *United Teachers-Los Angeles* (1989) PERB Decision No. 738.)

In their appeal, Charging Parties allege that the Board agent erred in determining that Charging Parties failed to state a prima facie case of retaliation. Charging Parties also allege that the Board agent erred in failing to enforce the MOU. We find that Charging Parties sufficiently placed SETC, as well as the Board, on notice of the issues raised on appeal. Therefore, we do not dismiss the appeal for failure to comply with PERB Regulation 32635(a) and address the issues raised on appeal.

De Novo Review

It is well established that in deciding appeals, PERB reviews the entire record de novo and is free to reach different factual and legal conclusions than those in the decision being appealed. (*Woodland Joint Unified School District* (1990) PERB Decision No. 808a; *Santa Clara Unified School District* (1979) PERB Decision No. 104.) The Board has also held that it is not constrained from considering sua sponte legal issues not raised by the parties when necessary to correct a mistake of law. (*Apple Valley Unified School District* (1990)

PERB Order No. Ad-209a; *Mt. Diablo Unified School District* (1983) PERB Decision No. 373; *Fresno Unified School District* (1982) PERB Decision No. 208.) HEERA section 3563(h) provides that the Board shall have the power and duty to investigate unfair practice charges and take any action and make any determinations as the Board deems necessary to effectuate the policies of this chapter. Additionally, PERB Regulation 32320(a)(2) provides that the Board may take such other action as it considers proper in reaching a decision. The language of these provisions provides authority that the Board is not precluded from reviewing unappealed matters. (See *Rio Hondo Community College District* (1979) PERB Decision No. 87.)

Retaliation

In the present case, the appeal was limited to Charging Parties' allegations of retaliation and violating the MOU. We find that the Board agent correctly determined that Charging Parties failed to establish that SETC retaliated against Ventura and Duran by voting to reduce their salaries. To establish a prima facie case of retaliation, the charging party must show that: (1) the employee exercised rights under HEERA; (2) the respondent had knowledge of the exercise of those rights; (3) the respondent took adverse action against the employee; and (4) the respondent took the action *because of* the exercise of those rights. (*Novato Unified School District* (1982) PERB Decision No. 210 (*Novato*); *San Leandro Police Officers Assn. v. City of San Leandro* (1976) 55 Cal.App.3d 553 (*San Leandro*)). HEERA protects employees' rights to either participate in the activities of employee organizations or to refrain from participating in such activities. (HEERA, § 3565.) In this case, Charging Parties failed to establish that Ventura and Duran engaged in protected activity. There are no facts alleged that

Ventura and Duran ever affirmatively declined to participate in the July 18, 2008 demonstration.

Even if Ventura and Duran decided not to participate in the July 18, 2008 demonstration, Charging Parties failed to establish that SETC was aware of Ventura and Duran's decision. Charging Parties contend that "[i]t would have been readily apparent to any of the few SETC members present at the demonstration that none of the elevator department employees were present." However, to prove the knowledge element of the prima facie case, Charging Parties must establish "actual knowledge." (*Los Angeles Community College District* (2004) PERB Decision No. 1668.) "[A]ctual knowledge" means that the relevant individual or entity actually knew of the fact in question or was otherwise "clearly informed" of that fact. (*State of California (Department of Youth Authority)* (2000) PERB Decision No. 1403-S; *Victor Valley Union High School District* (1986) PERB Decision No. 565.) Charging Parties do not demonstrate that any SETC representative actually knew whether Ventura and Duran rejected SETC's request that they support AFSCME's demonstration.

In addition, Charging Parties failed to demonstrate a nexus between Charging Parties' "decision" not to participate in the July 18, 2008 demonstration, and SETC's vote to reduce the salaries of Ventura and Duran. Generally, adverse actions occurring within two months of protected activities meet the timing element of nexus. (See *Mountain Empire Unified School District* (1998) PERB Decision No. 1298.) However, suspicious timing, without more, is insufficient to demonstrate the requisite nexus. (*Moreland Elementary School District* (1982) PERB Decision No. 227.)

Facts establishing one or more of the following additional factors must also be present:

(1) the respondent's disparate treatment of the employee (*State of California (Department of*

Transportation) (1984) PERB Decision No. 459-S); (2) the respondent's departure from established procedures and standards when dealing with the employee (*Santa Clara Unified School District* (1979) PERB Decision No. 104; *San Leandro*); (3) the respondent's inconsistent or contradictory justifications for its actions (*State of California (Department of Parks and Recreation)* (1983) PERB Decision No. 328-S; *San Leandro*); (4) the respondent's cursory investigation of the employee's misconduct (*City of Torrance* (2008) PERB Decision No. 1971-M; *Coast Community College District* (2003) PERB Decision No. 1560); (5) the respondent's failure to offer the employee justification at the time it took action or the offering of exaggerated, vague, or ambiguous reasons (*County of San Joaquin (Health Care Service)* (2001) PERB Order No. IR-55-M); (6) the respondent's animosity towards union activists (*Jurupa Community Services District* (2007) PERB Decision No. 1920-M; *Cupertino Union Elementary School District* (1986) PERB Decision No. 572); or (7) any other facts that might demonstrate the respondent's unlawful motive. (*North Sacramento School District* (1982) PERB Decision No. 264; *Novato*.)

While *Novato* and its progeny concerned employer discrimination, PERB has held that the same standard applies to allegations of employee organization discrimination. (*California School Employees Association & its Chapter 36 (Peterson)* (2004) PERB Decision No. 1683.)

In this case, Charging Parties do not provide facts demonstrating the presence of other factors suggesting a nexus, such as disparate treatment, departure from established procedures and standards, or inconsistent or contradictory justifications. Accordingly, Charging Parties do not demonstrate the necessary nexus between Charging Parties alleged protected activity and SETC's decision to reduce Ventura and Duran's salaries. Therefore, Charging Parties failed to demonstrate a prima facie case and this allegation is dismissed.

Violation of MOU

Charging Parties also failed to demonstrate that SETC violated HEERA by violating the MOU. HEERA section 3563.2(b) states:

The board shall not have authority to enforce agreements between the parties, and shall not issue a complaint on any charge based on alleged violation of such an agreement that would not also constitute an unfair practice under this chapter.

HEERA section 3571.1(c) makes it unlawful for an exclusive representative to refuse to meet and confer with the university employer. A unilateral change in an established policy, such as that set forth in an MOU, may demonstrate a violation of the statutory duty to meet and confer in good faith. However, the duty to bargain in good faith under HEERA is owed only between the exclusive representative and the employer. (*Oxnard School District (Gorcey and Tripp)* (1988) PERB Decision No. 667.) Therefore, because the union's duty to bargain in good faith is owed to the employer and not to the individual employees, individual employees do not have standing under HEERA to allege that a union has breached that duty. (*Oxnard Educators Association (Gorcey and Tripp)* (1988) PERB Decision No. 664.) This allegation is hereby dismissed.⁶

Failure to Produce a Financial Report

Although Charging Parties did not appeal the Board agent's dismissal of the allegation that SETC failed to provide Rutherford a copy of the financial report, we sua sponte address the allegation regarding Rutherford's right to financial statements because we disagree with the

⁶ In the absence of an allegation of an independent theory for an unfair practice, a complaint cannot issue merely to enforce compliance with a contract. (*Los Rios College Federation of Teachers, CFT/AFT, Local 2279 (Deglow)* (1991) PERB Decision No. 896; *Regents of the University of California* (1990) PERB Decision No. 849-H [because there has been no demonstration of any other unfair practice, PERB does not have the authority to remedy an alleged violation of the contract].)

Board agent's determination that Charging Parties must establish that they requested documents constituting a "balance sheet and operating statement."

HEERA section 3587 states in its entirety:

Every recognized or certified employee organization shall keep an adequate itemized record of its financial transactions and shall make available annually, to the board and to the employees who are members of the organization, within 60 days after the end of its fiscal year, *a detailed written financial report* thereof in the form of a balance sheet and an operating statement, certified as to accuracy by the president and treasurer or comparable officers. In the event of failure of compliance with this section, any employee within the organization may petition the board for an order compelling such compliance, or the board may issue such compliance order on its motion. [Emphasis added.]

Under HEERA section 3587, Charging Parties are entitled to a "financial report." The financial report is required to include "a balance sheet and an operating statement." Charging Parties do not need to demonstrate whether SETC's annual financial report or its quarterly reports qualify as "a balance sheet and an operating statement." Rather, all Charging Parties must do is request the "financial report." It is the recognized or certificated employee organization that must have a financial report in the form of a balance sheet and an operating statement.

The fact that Charging Parties did not utilize the specific verbiage of "financial report" does not change our conclusion. On September 9, 2008, Rutherford requested a copy of the SETC annual report. He again requested a copy of the financial document on November 25, 2008. SETC informed Rutherford that the 2007 annual report was still being audited and was not complete. It is clear that SETC understood Charging Parties to have requested the financial report specified in HEERA section 3587. As such, Charging Parties requested a financial report as provided for under HEERA section 3587.

As explained above, Charging Parties were entitled to SETC's financial report under HEERA section 3587. The failure to provide the financial report, therefore, denied Charging Parties the rights guaranteed by HEERA section 3587.

HEERA section 3587 grants the Board the authority to issue a compliance order. We find that the appropriate remedy is to remand this case to the General Counsel's Office to process the charge in accordance with the Board's decision herein.

ORDER

The unfair practice charge in Case No. LA-CO-493-H is hereby REMANDED to the General Counsel's Office for processing the charge in accordance with the discussion above regarding the allegations that State Employees Trades Council United failed to provide Allen D. Rutherford with a financial report as required by the Higher Education Employer-Employee Relations Act section 3587.

The Board AFFIRMS the dismissal of all the other allegations.

Acting Chair Dowdin Calvillo and Member Wesley joined in this Decision.