STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA STATE UNIVERSITY EMPLOYEES UNION, Charging Party, v. TRUSTEES OF THE CALIFORNIA STATE UNIVERSITY (SAN MARCOS), Respondent.	Case No. LA-CE-1039-H PERB Decision No. 2195-H August 12, 2011

Appearance: Marc D. Mootchnik, University Counsel, for Trustees of the California State University (San Marcos).

Before McKeag, Dowdin Calvillo and Huguenin, Members.

DECISION

DOWDIN CALVILLO, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Trustees of the California State University (San Marcos) (CSU), to a proposed decision by an administrative law judge (ALJ). The ALJ determined that CSU violated section 3571(a) of the Higher Education Employer-Employee Relations Act (HEERA)[1] by retaliating against an employee for having engaged in protected activities.

The Board has reviewed the proposed decision and the entire record in light of the relevant law. Based upon this review, the Board finds that the complaint should have been dismissed based upon the parties' settlement agreement entered into prior to the hearing in this

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

matter. Accordingly, the Board reverses the ALJ's proposed decision and dismisses the case for the reasons set forth below.

FACTUAL BACKGROUND[2]

On May 20, 2008, the California State University Employees Union (CSUEU) filed an unfair practice charge with the Board alleging that CSU: (1) unilaterally transferred bargaining unit work to non-bargaining unit employees; and (2) interfered with protected rights exercised by employee and CSUEU bargaining representative Cesar Aguilar (Aguilar). CSUEU subsequently amended the charge to add the allegation that CSU also retaliated against employee Rafael Lopez (Lopez) for having engaged in protected activities by filing a police report against him after he filed several grievances. On October 27, 2008, the PERB Office of the General Counsel issued a complaint on the allegations of interference concerning Aguilar but issued a partial dismissal letter dismissing the allegations of unilateral transfer of work and retaliation against Lopez.

On November 17, 2008, CSUEU appealed the partial dismissal to the Board. While that appeal was pending before the Board, on September 25, 2009, the parties attended a settlement conference before a PERB Board agent. During that conference, the parties entered into a written settlement agreement. The caption of the settlement agreement lists both the instant case and another unfair practice charge filed by CSUEU, Case No. LA-CE-1062-H. The settlement agreement stated, in relevant part:

> 7. Unfair Practice Charges Before PERB
>
> In consideration of the foregoing, CSUEU hereby withdraws Unfair Practice Charge Nos. LA-CE-1039-H and LA-CE-1062-H with prejudice.

[2] Only those facts relevant to the issues addressed in this decision are set forth herein.

> This Settlement Agreement does not constitute an admission of wrongdoing, contract or statutory violation, or liability on the part of any party to this agreement.
>
> This Settlement Agreement represents a full and complete resolution of the claims and disputes between the parties based upon the above-referenced matter.
>
> This Settlement Agreement shall not be precedential and shall only apply to CSUSM.

Neither party requested that the appeal from partial dismissal then pending before the Board be withdrawn.

On October 15, 2009, the Board issued its decision on the appeal from partial dismissal, *Trustees of the California State University (San Marcos)* (2009) PERB Decision No. 2070-H (*San Marcos I*).[3] In that decision, the Board affirmed the dismissal of the unilateral transfer of work allegation but remanded the matter to the Office of the General Counsel for issuance of a complaint on the retaliation allegation involving Lopez. The General Counsel issued a complaint on November 10, 2009 alleging that CSU violated HEERA section 3571(a) by retaliating against Lopez.[4]

On December 9, 2009, CSU filed a motion to dismiss the complaint on the basis that the charge was settled in its entirety on September 25, 2009. The ALJ denied the motion on June 21, 2010, finding that PERB lacked jurisdiction to enforce or interpret the parties' agreement and that the parties did not clearly intend to include the Lopez matter in their agreement.[5]

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[3] At the time it issued its decision, the Board panel was not aware of the parties' settlement discussions or the existence of the September 25, 2009 settlement agreement.

[4] The complaint issued on November 10, 2009 did not include the allegations set forth in the prior complaint in the same case issued on October 27, 2008.

[5] On September 7, 2010, the ALJ denied a subsequent motion to dismiss on the basis that CSU's conduct was privileged.

A hearing was held before the ALJ on October 6, 2010. On December 3, 2010, the ALJ issued a proposed decision finding that CSU violated HEERA section 3571(a) by retaliating against Lopez for having engaged in protected activity.

CSU'S EXCEPTIONS

CSU asserts the following exceptions to the ALJ's proposed decision:

1. The matter was fully settled by the parties and must therefore be dismissed;

2. The alleged adverse action of filing a police report was absolutely privileged under Civil Code section 47(b);

3. CSU was prejudiced by a change in the theory advanced by CSUEU to support its claim that Lopez engaged in protected activities; and

4. The finding of retaliation was not supported by the evidence.[6]

DISCUSSION

Pursuant to PERB Regulation 32320(a),[7] PERB has the discretion to allow the withdrawal of a charge and complaint and to vacate the underlying proposed decision. (*ABC Unified School District* (1991) PERB Decision No. 831b (*ABC School District*); *Orange Unified School District* (2001) PERB Decision No. 1437 (*Orange School District*).) PERB Regulation 32320(a), provides, in pertinent part:

> (a) The Board itself may:
>
> (1) Issue a decision based upon the record of hearing, or
>
> (2) Affirm, modify or reverse the proposed decision, order the record re-opened for the taking of further evidence, or take such other action as it considers proper.

[6] In addition, CSU takes exception to several of the ALJ's factual findings. CSUEU did not file a response to CSU's exceptions.

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

When faced with a request to withdraw a case that has reached the Board itself, the Board reviews the request to determine whether granting it would effectuate the purposes of the governing statute. (*Trustees of the California State University* (2003) PERB Decision No. 1514-H (*Trustees*); *City of Lompoc* (2007) PERB Decision No. 1879-M; *Orange School District*; *ABC School District*.)

This case bears a striking similarity to *Office of the Santa Clara County Superintendent of Schools* (1982) PERB Decision No. 233a (*Santa Clara Superintendent*). In that case, the parties agreed, as part of a complete settlement of two unfair practice charges, to withdraw both cases from PERB. While the charging party requested withdrawal of one of the charges, the respondent inadvertently neglected to withdraw its exceptions to a proposed decision regarding the other charge, and a Board decision issued. On reconsideration, the Board dismissed the remaining complaint and charge and vacated both its prior decision and that of the hearing officer, finding that the settlement agreement was not repugnant to the purposes of the governing statute and was consistent with the Board's longstanding policy favoring settlement.

Here, although CSUEU has not joined in CSU's request to dismiss this case, the settlement agreement very clearly states that the parties have settled the dispute that formed the basis of the instant unfair practice charge and agreed to withdraw the charge with prejudice, and that the agreement represents a full and complete resolution of the claims and disputes between the parties based upon that charge. (*Trustees*; *Orange School District*.) Nothing in the agreement indicates any intention to exclude from its scope the issues that were then pending on appeal before the Board. Moreover, CSUEU has not filed any opposition to CSU's exceptions. One of the express purposes of HEERA is "the development of harmonious and cooperative labor relations." (HEERA, § 3560(a).) It is the Board's policy to favor voluntary

settlement of disputes. (*Dry Creek Joint Elementary School District* (1980) PERB Order No. Ad-81a; *Santa Clara Superintendent.*) Therefore, given the parties clear agreement that the charge in this case would be withdrawn, the Board concludes it effectuates the purposes of HEERA to permit withdrawal of the unfair practice charge, dismiss the complaint with prejudice, and vacate the proposed decision.[8]

In reaching this decision, we are mindful of HEERA section 3563.2(b), which states:

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

It is a fundamental rule of statutory construction that the intent of the Legislature should be examined in order to effectuate the purpose of the law. (*Long Beach Community College District* (2003) PERB Decision No. 1564 (overruled in part on other grounds, *Long Beach Community College District* (2009) PERB Decision No. 2002), citing *Moyer v. Workmen's Comp. Appeals Bd.* (1973) 10 Ca1.3d 222, 230 (*Moyer*).) In determining intent, it is important to examine the language of the statute and to give effect to each word. (*Moyer* at p. 230.) However, it is also a fundamental rule of statutory construction that a statute must be construed in context, "keeping in mind the nature and obvious purpose of the statute where they appear." (*Id.* at p. 230.) "[T]he various parts of a statutory enactment must be harmonized by considering the particular clause or section in the context of the statutory framework as a whole." (*Id.* at p. 230.)

Section 3563.2 sets forth PERB's jurisdiction to investigate and remedy unfair practices under HEERA. Subdivision (a) of section 3563.2 authorizes any employee, employee organization, or employer to file an unfair practice charge with PERB, subject to the limitation

[8] Given our determination, the Board need not and does not address the remaining issues raised in the exceptions.

that PERB shall not issue a complaint based upon an alleged unfair practice occurring more than six months prior to the filing of the charge. Subdivision (b) further provides both that PERB lacks the authority to enforce agreements between the parties and that PERB is prohibited from issuing a complaint on a charge based on an alleged violation of an agreement that would not also constitute an unfair practice.

PERB has interpreted section 3563.2(b) and identical language under the Educational Employment Relations Act (EERA)[9] to prohibit PERB from issuing a complaint based upon an alleged breach of an agreement unless the breach would also constitute an unfair practice. (*Regents of the University of California* (1990) PERB Decision No. 849-H; *Regents of the University of California* (2010) PERB Decision No. 2105-H; *Clovis Unified School District* (1986) PERB Decision No. 597 (*Clovis*).) Thus, in *Clovis* the Board upheld the dismissal of a charge alleging that the respondent violated EERA section 3541.5(a), (b), and (c) by failing to comply with a settlement agreement reached in an earlier unfair practice case, finding that the charge failed to establish that the alleged breach amounted to a change in policy having a generalized effect or continuing impact upon the terms and conditions of employment of bargaining unit members so as to constitute an unlawful unilateral change. (*Ibid.*, citing *Grant Joint Union High School District* (1982) PERB Decision No. 196.) Similarly, in *State of California (Department of Developmental Services)* (1996) PERB Decision No. 1150-S, the Board upheld the dismissal of a charge alleging that the respondent breached an agreement settling a grievance, finding no change in policy.

Given PERB's longstanding interpretation of section 3563.2(b), we believe that the prohibition against enforcing agreements between the parties must be read in the overall context of PERB's authority to issue an unfair practice complaint. Thus, construing both

[9] EERA is codified at section 3540 et seq.

clauses of section 3563.2(b) together, we conclude that the purpose of including this prohibition was to give effect to the second clause of section 3563.2(b) prohibiting PERB from issuing a complaint based upon an alleged breach of an agreement that would not also constitute an unfair practice. We find nothing in that section, however, that would limit PERB's authority to honor the terms of the parties' agreement, reached before a Board agent, to terminate all proceedings before PERB. We further find this construction to be consistent with the discretion vested in PERB under PERB Regulation 32320(a) to allow the withdrawal of an unfair practice charge when to do so would effectuate the purposes of EERA.

The dissent argues that the majority's recognition of the parties' withdrawal violates the prohibition against enforcing settlement agreements set forth in HEERA section 3563.2. We respectfully disagree. As discussed above, we conclude that the limitation against enforcing settlement agreements set forth in HEERA section 3563.2(b) simply does not apply to this case, where no party has requested that PERB issue a complaint based upon an alleged breach of a settlement agreement, nor is any party asking PERB to enforce the substantive terms of a settlement agreement by providing relief external to PERB's own procedures. Thus, PERB is not enforcing the terms of a settlement agreement in violation of HEERA section 3563.2(b). Instead, CSU has simply asserted, as a defense to the complaint issued by PERB on remand following the issuance of *San Marcos I*, that the underlying charge has been withdrawn pursuant to the parties' agreement reached utilizing the Board's own settlement procedures.[10] Honoring this agreement validates the Board's settlement process, is consistent with our mission to promote harmonious labor relations and is within our authority pursuant to PERB

[10] In its answer to the complaint, CSU alleged that the complaint and the allegations therein are moot.

Regulation 32320(a). (*Santa Clara Superintendent*; *City of Lompoc* (2007) PERB Decision No. 1879-M.)

ORDER

It is hereby ORDERED that the unfair practice charge and complaint issued in Case No. LA-CE-1039-H is hereby WITHDRAWN WITH PREJUDICE; the complaint is DISMISSED WITH PREJUDICE; and the proposed decision issued on December 3, 2010 is hereby VACATED.

Member McKeag joined in this Decision.

Member Huguenin's dissent begins on page 10.

HUGUENIN, Member, dissenting: The rule adopted today by the majority is one-sided. Under this rule, the Public Employment Relations Board (PERB) may enforce only portions of parties' settlement agreements, not their entire agreement. I explain.

Settlement agreements between parties to unfair practice cases are a trade: withdrawal by a charging party of its charge allegations in exchange for either performance or promise, or both, by the respondent. Under the rule the majority announces today, PERB will continue to tell charging parties that it cannot enforce the performance or promise due from the respondent, except where the respondent's failure or refusal to perform independently constitutes an unfair practice under our statutes. Such cases are rare indeed, as most settlement agreements do not contain promised performance of sufficient scope that failure or refusal amounts to a unilateral change under our case law. Thus, under the rule the majority adopts today, PERB will give a respondent the benefit of its bargain by dismissal of a charge, but refuse a charging party the benefit of its bargained for exchange. This is one-sided, lacking the evenhandedness that should be PERB's hallmark.

In my view, PERB should adhere to its prior consistent construction of our statutes and refuse to enforce settlement agreements for either side, or alternatively, in reliance on ample legislative history, PERB should declare that the restriction on enforcing agreements of the parties was intended by the Legislature to apply only to collective agreements, rendering unfair practice settlement agreements fully enforceable by PERB.