

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



UNIVERSITY COUNCIL-AMERICAN)
FEDERATION OF TEACHERS,)
)
Charging Party,) Case No. LA-CE-252-H
)
v.) PERB Decision No. 806-H
)
REGENTS OF THE UNIVERSITY)
OF CALIFORNIA,) May 7, 1990
)
Respondent.)
_____)

Appearances: Lawrence Rosenzweig, Attorney, for University Council-American Federation of Teachers; Marcia J. Canning, Attorney, for Regents of the University of California.

Before Craib, Shank and Cunningham, Members.

DECISION

CUNNINGHAM, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the University Council-American Federation of Teachers (UC-AFT) of a Board agent's dismissal (attached hereto) of its charge against the Regents of the University of California (University). In its charge, UC-AFT alleged that the University unilaterally changed the criteria for the reappointment of bargaining unit members holding faculty lecturer positions at the University's Riverside and Santa Barbara campuses. This conduct was alleged to be in violation of section 3571(a), (b) and (c) of the Higher Education Employer-Employee Relations Act (HEERA or Act).¹ The Board agent

¹HEERA is codified at Government Code section 3560 et seq. Unless otherwise indicated, all statutory references are to the Government Code. Section 3571 states, in relevant part:

It shall be unlawful for the higher education

dismissed the charge for failure to state a prima facie case.

We have reviewed the dismissal and, finding it to be free of prejudicial error, adopt it as the decision of the Board itself. We further address an argument reiterated by UC-AFT on appeal, which we find was correctly rejected by the Board agent.

DISCUSSION

UC-AFT claims that an earlier decision by a PERB administrative law judge (ALJ) in University Council-American Federation of Teachers v. Regents of the University (1988) PERB Hearing Officer Decision No. HO-U-378-H is controlling in this case and requires issuance of a complaint. As the Board agent pointed out in response to this contention, PERB hearing officer decisions are nonprecedential decisions which are binding on the parties only with respect to the specific controversy involved.²

employer to:

(a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.

(b) Deny to employee organizations rights guaranteed to them by this chapter.

(c) Refuse or fail to engage in meeting and conferring with an exclusive representative.

²PERB Regulation 32215 states:

A Board agent shall issue a written proposed decision or submit the record of the case to the Board itself for decision pursuant to instructions from the Board itself. The Board shall serve the proposed decision on each party. Unless expressly adopted by the

Moreover, the Board agent correctly found that the case presented to the hearing officer is distinguishable from the present dispute, inasmuch as the earlier case involved only contractual provisions governing reappointment of lecturers after six years of service. The ALJ, in that case, found that conducting searches³ prior to faculty reappointments at six years or beyond was a violation of the terms of the memorandum of understanding (MOU). The critical contract language governing the dispute in Hearing Officer Decision No. HO-U-378-H is found at Article VII(C) which provides, in pertinent part:

C. Post Six Years of Service

1. Reappointments

a) Reappointments which commence at or beyond six (6) years of service at the same campus can be made only when the following criteria have been met:

- 1) there is a continuing or anticipated instructional need as determined by the University; or, there is a need for teaching so specialized in character that it cannot be done with equal effectiveness by regular faculty members or by strictly temporary appointees; and, if so found,

Board itself, a proposed or final Board agent decision, including supporting rationale, shall be without precedent for future cases.

³A "search" in this context comprises a competitive process whereby an incumbent's qualifications are measured against the qualifications of a university-generated pool of outside candidates.

2) the instructional performance appropriate to the responsibilities of the faculty/instructor in the unit has been determined by the University to have been excellent, based upon the criteria specified in Section E.

b) Provided that the criteria set forth in Section C.1.a) continue to be met, reappointments shall be made for three-year periods. . . .

(Emphasis added.)

The ALJ determined that, with respect to reappointment of post-six year faculty lecturers, the University's "sole discretion" pursuant to section (A)(9) of the MOU is subject to the limitations contained in section (C)(1)(a) because of the "except as provided herein" language of section (A)(9).⁴ Section (C)(1)(a) specifically provides for a two-step reappointment process, and, the ALJ held, the University's attempt to implement its "search" policy in connection with post-six-year reappointments altered the agreement such that it became a three-step process. The ALJ pointed out that "(w)hile the Union ultimately conceded to the University a wide degree of discretion regarding specification of criteria for reappointments during a unit member's first six years of service, it was able to achieve greater protections for longer term employees, including entitlement to a specific two-step process for reappointment under section C.1.a)." (Hearing Officer Decision No. HO-U-378-H,

⁴See page 1 of attached warning letter for text of (A)(9).

at p.34.)

There exists a material difference between the facts presented to the ALJ in Hearing Officer Decision No. HO-U-378-H and the facts presented by UC-AFT's charge in the current case. The parties agreed in their MOU to treat the reappointment of longer term (i.e., six years or beyond) faculty lecturers in such a way that the University would have limited discretion in the decision-making process. In contrast, the provisions of the MOU pertaining to the reappointment of lecturers with less than six years of service⁵ are not susceptible to an interpretation that places the same limitations upon the University's discretion. Therefore, the earlier PERB determination is not applicable to the present controversy and cannot be binding on these parties as argued by UC-AFT.

ORDER

Based on the entire record in this case, it is ORDERED that the unfair practice charge in Case No. LA-CE-252-H is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Craib and Shank joined in this Decision.

⁵See page 3 of attached warning letter.

PUBLIC EMPLOYMENT RELATIONS BOARD



Sacramento Regional Office
1031 18th Street, Room 102
Sacramento, CA 95814-4174
(916) 322-3198



December 22, 1989

Lawrence Rosenzweig
2001 Wilshire Blvd., Suite 600
Santa Monica, CA 90403

Re: University Council - American Federation of Teachers v.
Regents of the University of California
Unfair Practice Charge No. LA-CE-252-H
DISMISSAL LETTER

Dear Mr. Rosenzweig:

You have filed a charge on behalf of the American Federation of Teachers (AFT) in which you allege that the University of California (University) unilaterally imposed a search requirement concerning faculty lecturers seeking reappointment at its Riverside and Santa Barbara campuses. By such conduct, you allege that the University violated sections 3571(a), (b) and (c) of the Higher Education Employer-Employee Relations Act (HEERA).

I indicated to you in my attached letter dated November 21, 1989, that allegations contained in the charge did not state a prima facie case. You were advised that if there were any factual inaccuracies or additional facts that would correct the deficiencies explained in that letter, you should amend the charge. You were further advised that unless you amended these allegations to state a prima facie case, or withdrew them prior to November 29, 1989, the charge would be dismissed.

On November 28, 1989, you requested and I granted an extension of the dismissal date to December 5, 1989. On November 30, 1989, you communicated your objections to me with respect to the warning letter. During our conversation, you stated that you did not allege in the charge a change in past practice, and that the warning letter's reliance on Marysville Joint Unified School District (1983) PERB Decision No. 314 was therefore misplaced.

On December 4, 1989, you filed a First Amended Charge. The First Amended Charge is essentially the same as the original charge, except you have added the fact that UC Riverside and UC Santa Barbara had already engaged in affirmative action searches prior to appointing the present incumbent employees to their positions.

The First Amended Charge still does not allege a prima facie case. It realleges that Charging Party learned in November 1988, that searches were being required of lecturers with between three and six years of service at UC Riverside; and in January 1989, with respect to lecturers at UC Santa Barbara who taught beyond two years, but less than six years.

In conversations with the regional attorney, you stated that the University had not earlier conducted searches attendant to the reappointment of such lecturers. You argued that these searches are not authorized by Article VII of the MOU. Article VII(9) provides, however, that reappointment decisions are to be made at the sole discretion of the University, except as provided in other parts of Article VII. While Article VII contains limitations on the University's evaluation procedures, it does not limit its ability to conduct a competitive search prior to the reappointment of individuals who have served less than six years. Thus, the "sole discretion" language is controlling, and the searches at issue were not prohibited by the contract. The fact that the University has not before conducted searches outside the context of an initial affirmative action search, does not change this result. Pursuant to Marysville Joint Unified School District, supra, "Where the contractual language is clear and unambiguous, it is unnecessary to go beyond the plain language of the contract itself to ascertain its meaning." For these reasons, the charge is dismissed.

Right to Appeal

Pursuant to Public Employment Relations Board regulations, 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 (California Administrative Code, title 8, section 32635(a)). To be timely filed, the original and five copies of such appeal must be actually received by the Board itself before the close of business (5:00 p.m.) or sent by telegraph, certified or Express United States mail postmarked no later than the last date set for filing (California Administrative Code, title 8, section 32135). Code of Civil Procedure section 1013 shall apply. The Board's address is:

Public Employment Relations Board
1031 18th Street
Sacramento, CA 95814

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 calendar days following the date of service of the appeal (California Administrative Code, title 8, section 32635(b)).

PUBLIC EMPLOYMENT RELATIONS BOARD



Sacramento Regional Office
1031 18th Street, Room 102
Sacramento, CA 95814-4174
(916) 322-3198



November 21, 1989

Lawrence Rosenzweig
2001 Wilshire Boulevard, Suite 600
Santa Monica, CA 90403

Re: University Council - American Federation of Teachers v. Regents of the University of California
Unfair Practice Charge No. LA-CE-252-H
WARNING LETTER

Dear Mr. Rosenzweig:

In this charge, the American Federation of Teachers (AFT) alleges that the University of California (University) unilaterally imposed a search¹ requirement concerning faculty lecturers seeking reappointment at its Riverside and Santa Barbara campuses. By this conduct, AFT alleges that the University violated sections 3571(a), (b) and (c) of the Higher Education Employer-Employee Relations Act (HEERA).

The charge and my investigation revealed the following facts. AFT represents the non-tenured faculty members within the University system. It negotiated its first memorandum of understanding with the University in July 1986. Reappointments made after an incumbent's second, third, fourth, and fifth years of service are governed by Article VII of the parties' (1987-90) contract, which provides, in pertinent part:

Article VII. APPOINTMENT

A. General Provisions

.

9. All appointment and reappointment decisions shall be made at the sole discretion of the University except as provided herein and shall not be subject to Article XXXIII. Grievance Procedure except for procedural violations. (Emphasis added)

¹ A "search" refers to a process by which incumbents seeking reappointment are required to compete against a University generated pool of applicants. According to the University, searches are an integral part of its affirmative action program.

B. Initial Appointment and Reappointment

1. Appointment and Reappointment

- a) Normally, the initial appointment shall be for a period of service of one (1) academic year or less...
- b) Reappointment(s) during the first six (6) years of service at the same campus may be for a period of up to three (3) academic years.
- c) The duration of the appointment or reappointment shall be at the sole discretion of the University, except as provided in this Article.

2. Evaluation

- a) Any reappointment shall be preceded by an evaluation of the performance of the faculty/instructor in the unit which shall be undertaken in accordance with each campus' applicable review procedure in effect at the time.
- b) As soon as possible prior to the initiation of an evaluation faculty/instructors in the unit shall be notified of the purpose, timing, criteria, and procedure that will be followed.
- c) Evaluations of individual faculty/instructors in the unit for reappointment are to be made on the basis of demonstrated competence in the field and demonstrated ability in teaching and other assigned duties which may include University co-curricular and community service. Reappointment to the senior rank requires, in addition, service of exceptional value to the University.
- d) Faculty/instructors in the unit may provide letters of assessment from others including departmental

faculty/instructors in the unit to the department chair, the chair's equivalent or other designated official as part of the evaluation process.

The charge alleges that, on or about November 15, 1988, Richard Wattenberg, the AFT President at U.C. Riverside, was informed by the administration that it intended to require lecturers seeking reappointment who had taught between three and six years, to participate in a competitive process whereby the incumbent's qualifications would be compared with those of outside candidates solicited by the University. Similarly, at the University's Santa Barbara campus, AFT representatives were informed by the University that, pursuant to its policy, lecturers seeking reappointment beyond six quarters (two years) would be required to participate in a competitive search process. AFT alleges that requiring searches at such intervals is not consistent with the past practice.

Discussion

For the reasons which follow, the charge as currently alleged, does not state a prima facie case.

Article VII(A)(9) provides that all reappointment decisions of the University shall be made at its sole discretion of the "except as provided herein." Thus, the language grants the University wide discretion, except as it is limited by specific provisions in the contract governing reappointment. Although the contract sets forth procedures for an incumbent's evaluation, it in no manner contains language limiting the University's ability to conduct an academic search. Thus, it is clear that the union, by agreeing to Article VII, gave the University a wide degree of discretion concerning a lecturer's reappointment during his or her first six years of service. In light of the clear contractual language, extrinsic evidence of past practice is not relevant. Marysville Joint Unified School District (1983) PERB Decision No. 314².

² It should be noted that the charge suggests that Administrative Law Judge Manuel Melgoza's decision in University Council-American Federation of Teachers v. Regents of the University of California (1988) Unfair Practice Case No. LA-CE-205-H instructs the issuance of a complaint in the instant case. Decisions of PERB hearing officers, however, are nonprecedential decisions which are binding on the parties only with respect to the specific controversy involved. Moreover, this decision is inapposite inasmuch as it interpreted contractual language governing the reappointment process for lecturers who had completed six years of service.

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 any additional facts that would correct the deficiencies explained above, please amend the charge accordingly. 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 must be signed under penalty of perjury by the charging party. The amended charge must be served on the respondent and the original proof of service must be filed with PERB. If I do not receive an amended charge or withdrawal from you before November 29, 1989, I shall dismiss your charge. If you have any questions, please call me at (916) 322-3198.

Sincerely,

Jennifer A. Chambers
Regional Attorney
JAC