

free of prejudicial error, the Board adopts them as the decision of the Board itself.

The Board hereby AFFIRMS the Board agent's partial dismissal in Case No. LA-CE-365-H.

Members Caffrey and Garcia joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD



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



May 24, 1993

Edward R. Purcell, Labor Consultant
California Faculty Association
5933 W. Century Boulevard, Suite 216
Los Angeles, CA 90045

Re: **NOTICE OF PARTIAL DISMISSAL**
California Faculty Association v. Trustees of the California
State University; Unfair Practice Charge No. LA-CE-365-H
(First Amended Charge)

Dear Mr. Purcell:

I indicated to you, in my attached letter dated May 11, 1993, that certain 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 which 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 May 21, 1993, the allegations would be dismissed.

I have not received either an amended charge or a request for withdrawal. Therefore, I am dismissing those allegations which fail to state a prima facie case based on the facts and reasons contained in my May 11, 1993 letter.

Right to Appeal

Pursuant to Public Employment Relations Board regulations, you may obtain a review of this dismissal of certain allegations contained in the charge by filing an appeal to the Board itself within twenty (20) calendar days after service of this dismissal. (Cal. Code of Regs., tit. 8, sec. 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 p.m.) or sent by telegraph, certified or Express United States mail postmarked no later than the last date set for filing. (Cal. Code of Regs., tit. 8, sec. 32135.) Code of Civil Procedure section 1013 shall apply. The Board's address is:

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

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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. (Cal. Code of Regs., tit. 8, sec. 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 Cal. Code of Regs., tit. 8, sec. 32140 for the required contents and a sample form.) The document will be considered properly "served" when personally delivered or deposited in the first-class mail, postage paid and properly addressed.

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. (Cal. Code of Regs., tit. 8, sec. 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
Deputy General Counsel

By
Regional Director

Attachment

cc: William G. Knight

PUBLIC EMPLOYMENT RELATIONS BOARD



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



May 11, 1993

Edward R. Purcell, Labor Consultant
California Faculty Association
5933 W. Century Boulevard, Suite 216
Los Angeles, CA 90045

Re: **WARNING LETTER**

California Faculty Association v. Trustees of the California State University; Unfair Practice Charge No. LA-CE-365-H
(First Amended Charge)

Dear Mr. Purcell:

The above-referenced unfair practice charge was filed by the California Faculty Association (CFA) with the Los Angeles Regional Office of the Public Employment Relations Board (PERB or Board) on March 10, 1993. The First Amended Charge was filed on April 2, 1993. As amended, the charge alleges that the Trustees of the California State University (CSU) violated Government Code section 3571(e) by its untimely request for factfinding, and violated section 3571(b), (c) and (e) by its unilateral implementation of a Family Care Leave Policy. This letter addresses only the allegation concerning the request for factfinding.

Investigation of the charge revealed the following facts. CFA is the exclusive representative of CSU's Unit 3 - Faculty. In 1991, certain counselor positions were transferred from Unit 4 - Academic Support into Unit 3. In April 1992, CFA and CSU began negotiating revisions to the Unit 3 contract applicable to these employees. The parties reached an initial impasse in these negotiations, and PERB appointed a mediator for the dispute on or about August 24, 1992.¹

On or about October 15, 1992, the mediator certified the issues in dispute as appropriate for factfinding. The parties held one additional bargaining session, on December 2, 1992, but no agreement was reached. On December 7, 1992, CFA sent a letter to CSU stating that CFA did not believe factfinding was necessary and that CFA would not request factfinding. The December 7 letter further indicated CFA would assume CSU was waiving its right to request factfinding unless a request was made by December 20, 1992. By letter dated December 15, 1992, CSU

¹PERB Case No. LA-M-2322-H.

informed CFA that it still desired to reach agreement on the outstanding issues but was not waiving its right to request factfinding. CFA responded by letter of December 17, 1992, indicating they would honor a factfinding request if made by January 7, 1993, but would assume CSU was waiving its right to request factfinding if it did not do so by that date. By letter dated December 24, 1992, CSU reiterated its position that it would not waive the right to later request factfinding.

On January 21, 1993, CFA sent a letter to CSU expressing its belief that the statutory impasse procedures had been exhausted, and that the Employer's last, best offer was in effect. On January 27, 1993, CSU sent a letter to CFA and PERB requesting factfinding in the dispute.² CFA communicated its opposition to the request by letter to PERB dated February 1, 1993. CFA's basis for opposition was further communicated by letter dated February 2, 1993. On February 2, 1993, PERB advised CFA that the factfinding request had been accepted and that a letter had been issued concerning selection of a chairperson for the factfinding panel. On February 6, 1993, CFA submitted a letter to the Board attempting to appeal the decision to approve the factfinding request. By letter dated February 24, 1993, PERB advised CFA that the February 6 letter could not be accepted as an administrative appeal.

Analysis

Impasse procedures under the Higher Education Employer-Employee Relations Act (HEERA)³ are set forth at sections 3590 through 3594. Section 3591 provides in pertinent part:

If the mediator is unable to effect settlement of the controversy within 15 days after his appointment and the mediator declares that factfinding is appropriate to the resolution of the impasse, either party may, by written notification to the other, request that their differences be submitted to a factfinding panel. Within five days after receipt of the written request, each party shall select a person to serve as its member of the factfinding panel. The board shall, within five days after such selection,

²PERB Case No. LA-F-457-H.

³HEERA is found at Government Code section 3560 et seq. All statutory references herein are to the Government Code.

select a chairman of the factfinding panel.
(Emphasis added.)

In order to implement and carry out its responsibilities concerning factfinding, PERB has adopted regulations,⁴ including the following:

32797. Appointment of a Factfinder Under EERA and HEERA. Not sooner than 15 days after the appointment of a mediator by the Board, or not sooner than 15 days after the parties have attempted to resolve their dispute through a mediation procedure on which they have mutually agreed, the Board shall appoint a person to chair a factfinding panel, if:

(a) The mediator has filed a written declaration that factfinding is appropriate to the resolution of the dispute with the regional office, and

(b) Either party has requested, by written notification to the other, that their differences be submitted to a factfinding panel. A copy of the written request shall be filed with the regional office.
(Emphasis added.)

Thus, HEERA and PERB regulations set forth two conditions for the initiation of factfinding: (1) a declaration by the mediator that factfinding is appropriate to the resolution of a dispute, and (2) the request of either party for the dispute to proceed to factfinding. Pursuant to HEERA and PERB regulation 32798,⁵ PERB

⁴PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

⁵ 32798. Appointment of Person to Chair Factfinding Panel Under EERA and HEERA. The Board may appoint the person on whom the parties mutually agree or provide a list containing an odd number of names to the parties, from which the parties may select the person who shall be appointed by the Board. If the parties are unable to mutually agree upon a person to chair the factfinding panel, the Board shall select and appoint the chairperson.

must appoint a factfinding panel chairperson within 10 days of the time it is in receipt of both a factfinding request and the mediator's certification, unless the parties have otherwise agreed. HEERA specifies a minimum amount of time (15 days) which must toll after the parties reach an initial impasse and before factfinding may be requested, but is otherwise silent on the question of timing of a factfinding request.

Your position relies primarily on application of the reasoning found in Oak Grove Union School District (1984) PERB Decision No. HO-U-205 (Oak Grove), a non-precedential decision. However, even were this decision precedential, the facts of the instant case are significantly different than those considered by the hearing officer in Oak Grove. In Oak Grove, unlike this case, the assigned mediator had declined to certify the dispute as appropriate for factfinding. Also, in Oak Grove, the party to the dispute (the exclusive representative) who eventually requested factfinding had at an earlier time expressed a belief that factfinding would be useless, and it was on this basis -- not the time delay -- that the hearing officer ruled that the exclusive representative had waived its right to request factfinding.

Support for your position is also not found in Modesto City Schools (1983) PERB Decision No. 291. In that decision, the Board expressly held that the statutory impasse procedures are exhausted only when factfinding has been conducted, a report issued and parties' consideration of the report "provides no basis for settlement or movement that could lead to settlement." (Id.)

Finally, the assertion that CSU's conduct should be construed as constituting a waiver of its statutory right to request factfinding⁶ is contrary to both the facts of the case and Board precedent. CSU expressly reserved its right to request factfinding in its letters of December 15 and 24, 1992. CFA's assertion of an implied waiver because deadlines unilaterally set

⁶The evidence of CSU conduct which, according to CFA, demonstrates a waiver by inaction, consists entirely of the time which lapsed between the mediator's letter of certification and the request later made for factfinding, plus the lack of action by the deadlines imposed by CFA. The record, which reflects that a bargaining session was held on December 2, 1992 and that a request for factfinding was made on January 27, 1993, simply does not support this assertion.

by CFA were not met cannot override this evidence. Even without CSU's express reserving of its rights, a waiver would not have been as readily inferred from the facts of this case as CFA would assert. As noted in San Francisco Community College District (1979) PERB Decision No. 105, the Board

will not readily infer that a party has waived its right under [the Act]; we will find a waiver only when there is an intentional relinquishment of these rights, expressed in clear and unmistakable terms, (p. 17; footnotes omitted.)

Conclusion

For these reasons the allegation that CSU violated Government Code section 3571(e) by making an untimely request for factfinding, as presently written, does not state a prima facie case. If there are any factual inaccuracies in this letter or additional facts which 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 Second 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 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 May 21, 1993, I shall dismiss the above-described allegation from your charge. If you have any questions, please call me at (916) 322-3198.

Sincerely,


Les Chisholm
Regional Director