

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



KAYE SAURER HERMANSON,
PASCAL OEVERING,
MICH YAMAOTO NELSON,
CHRISTINE E. JOSHEL,
DOUGLAS E. WALKER,
LESLIE SARA HASEGAWA,
CATHERINE ANN O'HARRA, JUN ZHAO,
HEATHER MERI OAKLEY,
JO ANN CHRISTINA,
SHARON WALKER STANFIELD,
GARY STEVEN DITTA,
PATRICIA FAY HASEGAWA,
JOSEPH B. STAGG, ANN BASILE NIEVES,
KATHLEEN J. DONNELLY, KATHY ALDERN,
VINEETA PRASAD, ADAM COREY COX,
CAROL Y. ENG, SUSAN W. BUTLER,
MARY MARGARET HAWLEY,
PAUL NORTHROP, SHERRY L. MCCANN,
CECELIA KEMPER, LAUREL A. DAVIS,
SVENJA DAEHNE, JAY SCOTT MURPHY,
RATCKO DRAGOMIR VASIC,
GAYLE MARIE CRISOSTO,
JUDITH BERECKZY, NGHIA NGUYEN,
DALE R. DISHAROON, LUCINDA G. BECK,
RICHARD SHERMAN,
JANICE HATCHELL COOPER,
SYLIVA ANN RAYNER, JANE CAROL HINES,
SANDRA DORIS BRAUN, JUDY SHARP,
LEANNE GILL, KATHLEEN L. JEE,
GARY HRADEK,
ANA ISABEL ALVAREZ-RETUERTO,
LAURA LEE KOENIG,
LAWRENCE GERALD STEPHANSON,
DENISE WEISMAN, VIRGINIA ANN MOORE,
PATRICIA A. CHAROS, ALISON JUNE WEIR,
BRADFORD LYNN COL WELL,

MILAGROS IBARDOLAZA,

Charging Parties,

v.

UPTE, CWA LOCAL 9119,

Respondent.

Case Nos. SA-CO-66-H,
SA-CO-67-H,
SA-CO-68-H,
SA-CO-69-H,
SA-CO-70-H,
LA-CO-290-H,
LA-CO-291-H, LA-CO-292-H,
LA-CO-293-H,
LA-CO-294-H,
LA-CO-296-H,
LA-CO-297-H,
LA-CO-298-H,
LA-CO-299-H, LA-CO-300-H,
LA-CO-301-H, LA-CO-302-H,
LA-CO-303-H, LA-CO-304-H,
LA-CO-305-H, LA-CO-306-H,
LA-CO-307-H,
LA-CO-308-H, LA-CO-309-H,
LA-CO-310-H, LA-CO-311-H,
LA-CO-312-H, LA-CO-313-H,
LA-CO-314-H,
SA-CO-72-H,
SA-CO-73-H, LA-CO-315-H,
LA-CO-316-H, LA-CO-317-H,
LA-CO-318-H,
SA-CO-76-H,
LA-CO-319-H, LA-CO-320-H,
LA-CO-321-H, SA-CO-77-H,
SF-CO-121-H, SF-CO-122-H,
SF-CO-123-H,
LA-CO-322-H,
LA-CO-324-H,
LA-CO-327-H,
LA-CO-328-H, LA-CO-329-H,
LA-CO-330-H, SA-CO-79-H,
LA-CO-332-H,
LA-CO-333-H

PERB Decision No. 1829-H

March 10, 2006

Appearances: Werner Witke, Representative, for Kaye Saurer Hermanson, et al. and National Right to Work Legal Defense Foundation, Inc. by Milton L. Chappell, Attorney, for Vineeta Prasad, Lucinda G. Beck, Sylvia Ann Rayner, Judy Sharp and Kathleen L. Jee; Leonard Carter by Kate Hallward, Attorney, for UPTE, CWA Local 9119.

Before Duncan, Chairman; Shek and McKeag, Members.

DECISION

DUNCAN, Chairman: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Kaye Sauer Hermanson, et al. (Charging Parties) of a Board agent's dismissal of their unfair practice charges.¹ The charges alleged that UPTE, CWA Local 9119 (UPTE) violated the Higher Education Employer-Employee Relations Act (HEERA)² and PERB Regulation 32994(b)³ by failing to timely request an impartial hearing regarding the agency fee amount after Charging Parties timely objected to the amount indicated in the notice sent by UPTE.

The Board has reviewed the entire record in this matter, including the unfair practice charges, the response by UPTE to the charges, the warning and dismissal letters, the appeal filed by the Charging Parties and the statement of objection to the appeal filed by UPTE.

The Board finds the Board agent acted outside the scope of her duties making a factual determination for the responding party without any authority as a basis for the finding.

Further, the Board agent's determination was outside the power of the Board itself and in excess of the Board's powers and cannot stand. We therefore remand this case to the Office of the General Counsel for issuance of a complaint, as set forth below.

¹The unfair practice charge filed by Jo Ann Christina (Case No. LA-CO-294-H) was withdrawn on February 27, 2006.

²HEERA is codified at Government Code section 3560, et seq.

³PERB regulations are codified at California Code of Regulations, title 8, section 31001, et seq.

DISCUSSION

The agency fee payers in this case objected to the amount of agency fees as indicated in the notice received from UPTE in 2004. The parties agree the notices were sent on September 3 and 7, 2004. Under PERB Regulation 32994(b)⁴ the agency fee payer has 30 days to object to the fee from the date it is sent by the exclusive representative. At the end of the 30 days allowed for objection, the exclusive representative then has 45 days to request an impartial hearing on the issue.

Even though the regulation clearly states that the objection shall be made not later than 30 days after the distribution of the notice, the Board agent determined that UPTE could change the timeline and allow the objectors additional time to file objections before the 45 days to request a hearing would begin to run. The Board agent gives no authority for her determination that UPTE can change the parameters of the regulation. Allowing this dismissal to stand would create an underground regulation and would be outside the powers conferred on PERB by law.

⁴PERB Regulation 32994(b) states, in part:

Each exclusive representative that has an agency fee provision shall administer an Agency Fee Appeal Procedure in accordance with the following:

- (1) A agency fee objection shall be initiated in writing and shall be filed with an official of the exclusive representative who has authority to resolve agency fee objections.
- (2) An agency fee objection shall be filed not later than 30 days following distribution of the notice required under Section 32992 of these regulations.
- (3) Within 45 days of the last day for filing an objection under Section 32994(b)(2) of these regulations and upon receipt of the employee's agency fee objection, the exclusive representative shall request a prompt hearing regarding the agency fee before an impartial decisionmaker.

Nowhere in that regulation or any other PERB regulation is there any language indicating that PERB has delegated to the exclusive representative or even the Board agent the authority to change the parameters of a regulation at will. PERB certainly cannot delegate authority it does not have to the exclusive representative through a Board agent.

By allowing this the Board agent created an underground regulation to allow a longer period for objections than that set forth by statute. PERB does not have the discretion or authority to change the parameters of a regulation specifically delineating the time period in which one must act.

In *Dyna -Med, Inc. v. Fair Employment & Housing Commission* (1987) 43 Cal.3d 1379, 1389 [241 Cal.Rptr. 67] (Dyna-Med), the California Supreme Court held that an administrative agency may not create a remedy the Legislature has withheld.

In Dyna-Med, the sole question was whether that agency had the authority to award punitive damages. The majority concluded that the Fair Employment and Housing Committee (FEHC) did not have authority to award punitive damages. The court "declined to grant the FEHC a power not conferred by an enabling statute, in particular observing that '[a]n administrative agency cannot by its own regulations create a remedy which the legislature has withheld.'" (American Federation of Labor and Congress of Independent Organizations v. Unemployment Insurance Appeals Board (1996) 13 Cal.4th 1017, 1035 [56 Cal.Rptr.2d 109] (AFL-CIO) citing Dyna-Med.)

In AFL-CIO, the issue was whether an administrative law judge, acting on authority of the Unemployment Insurance Appeals Board had the authority to grant interest on a payment of retroactive unemployment insurance benefits. The Supreme Court noted that nowhere does the Unemployment Insurance Code grant administrative law judges or the board the express authority to award interest on an administrative benefit award. (Id at p. 1022.)

Just as in those cases, nowhere in HEERA or PERB regulations is there any express authority to allow the Board agent to decide that the exclusive representative does not have to follow the letter of the regulation. There is nothing even impliedly authorizing a grant of the power to change regulation timelines to the Board, a Board agent or one of the parties. As noted above in Dyna- Med, if the Legislature did not give a power to an agency, the agency cannot add it. That is the situation here. The Board agent has determined that the exclusive representative does not have to follow the parameters of a specific regulation. Changing the regulation through the Board agent is outside the powers of the Board. The Charging Parties have met their burden in presenting a prima facie case of a violation of PERB Regulation 32994(b) by UPTe.

ORDER

The unfair practice charges in Case Nos. SA-CO-66-H, SA-CO-67-H, SA-CO-68-H, SA-CO-69-H, SA-CO-70-H, LA-CO-290-H, LA-CO-291-H, LA-CO-292-H, LA-CO-293-H, LA-CO-294-H, LA-CO-296-H, LA-CO-297-H, LA-CO-298-H, LA-CO-299-H, LA-CO-300-H, LA-CO-301-H, LA-CO-302-H, LA-CO-303-H, LA-CO-304-H, LA-CO-305-H, LA-CO-306-H, LA-CO-307-H, LA-CO-308-H, LA-CO-309-H, LA-CO-310-H, LA-CO-311-H, LA-CO-312-H, LA-CO-313-H, LA-CO-314-H, SA-CO-72-H, SA-CO-73-H, LA-CO-315-H, LA-CO-316-H, LA-CO-317-H, LA-CO-318-H, SA-CO-76-H, LA-CO-319-H, LA-CO-320-H, LA-CO-321-H, SA-CO-77-H, SF-CO-121-H, SF-CO-122-H, SF-CO-123-H, LA-CO-322-H, LA-CO-324-H, LA-CO-327-H, LA-CO-328-H, LA-CO-329-H, LA-CO-330-H, SA-CO-79-H, LA-CO-332-H and LA-CO-333-H are REMANDED to the Office of the General Counsel for a complaint to issue.

Member McKeag joined in this Decision.

Member Shek's concurrence begins on page 6.

SHEK, Member, concurring: I agree with the majority opinion that the Public Employment Relations Board (PERB or Board) agent's dismissal, based on her interpretation of PERB Regulation section 32994(b), was in error. The undisputed facts show that the UPTE, CWA Local 9119 (UPTE) distributed written notices to non-member agency fee payers on September 3, and 7, 2004, pursuant to PERB Regulation section 32992(c)(1). Pursuant to Section 32994(b)(2), an agency fee objection shall be filed not later than 30 days following distribution of the notice, on or before October 7, 2004. Section 32994(b)(3) provides that within 45 days of the last day for filing an objection under Section 32994(b)(2) and upon receipt of the employee's agency fee objection, the exclusive representative shall request a prompt hearing regarding the agency fee before an impartial arbitrator. Thus, UPTE had until November 22, 2004, 45 days from October 7, 2004, to request a hearing. UPTE accepted agency fee objections filed on or before October 19, 2004, and submitted a hearing request to the American Arbitration Association (AAA) on December 3, 2004. UPTE's request for hearing was filed beyond the 45-day period. Kaye Saurer Hermanson, et al. (Charging Parties) have therefore established a prima facie case of an unfair practice violation under Section 32994(b)(3). Their unfair practice charges should be remanded to the Office of the General Counsel for the issuance of a complaint.

In its response to the charge, UPTE raised the defense that there were other charges that were time-barred because they were filed beyond six months of November 22, 2004, the date Charging Parties contended the referral to AAA should have occurred. Since the Board agent did not address this defense in the dismissal of the charge, I would refer the issue to the Office of the General Counsel for further investigation.