

BACKGROUND

Hall is employed by the University of California at San Francisco (UC) as an Administrative Assistant III (AA III) in the Department of Dermatology (Department). The AA III classification is within the clerical and allied services bargaining unit (CX Unit) exclusively represented by CUE. Article 2, section E of the collective bargaining agreement (CBA) between UC and CUE requires UC to notify CUE in writing of any proposed reclassification that would remove a position or title from the CX Unit. CUE may challenge the reclassification in writing within 30 days of UC's notice. The parties must then meet to discuss the reclassification. If agreement is not reached, UC may commence PERB unit modification procedures.

On April 16, 2008, the Department approved reclassification of Hall's position from AA III to Analyst I, a classification outside the CX Unit. The following day, Robert Dale (Dale), a human resources analyst for the Department, notified the president of the CUE local in writing in accordance with the CBA that UC was proposing to reclassify Hall's position out of the CX Unit. A copy of the new job description for the reclassified position was attached to the letter.

On May 2, 2008, Mary Higgins (Higgins), secretary of the CUE local, handwrote the following on a copy of Dale's April 17, 2008 letter:

CUE does not agree to the removal from bu [bargaining unit].
We believe she is still doing bu work. CUE does agree and
encourages whatever salary increase that would be given, in fact,
be given. 5/2/08²

On June 10, 2008, Higgins met with UC Labor/Employee Relations Representative Michael Lum, Department Human Resources Director Stefanie Mott (Mott), and a "Staffing

² It is unclear from the record whether this notation was made in a meeting between UC and CUE or if it was written on the letter and returned to UC.

and Compensation person.”³ Hall was not informed of the meeting and did not attend. On June 13, Mott told Hall that CUE disagreed with the reclassification of Hall’s position.

On June 16 and 17, 2008, Hall and Higgins corresponded by email about CUE’s position on the reclassification. Higgins wrote Hall that CUE believed the work Hall performed as an AA III was bargaining unit work and that other Administrative Assistants in the CX Unit did the same type of work. Higgins also stated that she recommended UC pay Hall equivalent to the Analyst I salary. In response to further questioning, Higgins wrote that CUE and UC were currently litigating the issue before PERB and that this litigation would resolve the issue for Hall and other Administrative Assistants in the CX Unit.

Over the next several months, Hall attempted to meet with both CUE and UC staff to discuss her reclassification; no such meeting ever occurred. Also during this time, Hall sought a copy of CUE’s written rejection of her reclassification from both CUE and UC but neither provided one to her.

Hall filed the instant unfair practice charge on December 1, 2008. Hall amended the charge on January 23, 2009, and CUE filed a position statement on February 10, 2009. The Board agent dismissed the charge on March 23, 2009.

The Board agent found the charge failed to state a prima facie case that CUE breached its duty to fairly represent Hall because it alleged no facts showing that CUE’s disagreement over Hall’s proposed reclassification was arbitrary, discriminatory, or in bad faith. The Board agent also found the charge failed to state a prima facie case of discrimination because CUE’s

³ Based on a string of emails about scheduling the meeting, it appears Dale was the “Staffing and Compensation person.” These emails and a copy of Dale’s April 17, 2008 letter with Higgins’ handwritten comments were attached as exhibits to CUE’s position statement. In evaluating whether an unfair practice charge states a prima facie case, PERB is not required to ignore facts provided by the respondent and consider only the facts provided by the charging party. (*Service Employees International Union #790 (Adza)* (2004) PERB Decision No. 1632-M.)

disagreement over the reclassification was not an adverse action.⁴ On appeal, Hall makes the same allegations as in the amended charge and adds an allegation that CUE breached its duty of fair representation by not pursuing higher pay for Hall based on her working out of class.

DISCUSSION

1. Breach of Duty of Fair Representation

Hall alleged that CUE breached its duty of fair representation in violation of HEERA section 3578. To state a prima facie violation of this section, the charging party must allege facts showing that the exclusive representative's conduct was arbitrary, discriminatory or in bad faith. (*Coalition of University Employees (Buxton)* (2003) PERB Decision No. 1517-H.)

To establish that the exclusive representative's conduct was arbitrary, the charge:

must at a minimum include an assertion of sufficient facts from which it becomes apparent how or in what manner the exclusive representative's action or inaction was without a rational basis or devoid of honest judgment.

(*Reed District Teachers Association, CTA/NEA (Reyes)* (1983) PERB Decision No. 332, p. 9, quoting *Rocklin Teachers Professional Association (Romero)* (1980) PERB Decision No. 124.)

The burden is on the charging party to show how an exclusive representative abused its discretion, and not on the exclusive representative to show how it properly exercised its discretion. (*United Teachers – Los Angeles (Wyler)* (1993) PERB Decision No. 970.)

“A union's duty of fair representation extends to contract negotiations, contract administration, and other activities which have a substantial impact upon the relationship of unit members to their employer.” (*United Teachers of Los Angeles (Valadez, et al.)* (2001) PERB Decision No. 1453.) Acting as the representative of the entire bargaining unit sometimes requires the exclusive representative to place the interest of the majority over that

⁴ Because Hall's appeal does not challenge the Board agent's dismissal of the discrimination allegation, we do not address this allegation further.

of individual employees. As the United States Supreme Court stated in *Ford Motor Co. v. Huffman* (1953) 345 U.S. 330, 338:

Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion.

Thus, an exclusive representative does not breach its duty of fair representation by taking a position that is unfavorable to an individual unit member but beneficial to the bargaining unit as a whole. (*California School Employees Association & its Chapter 379 (Dunn)* (2009) PERB Decision No. 2028; *Castro Valley Unified School District* (1980) PERB Decision No. 149.)

That is exactly what happened here. According to Higgins' handwritten notes of May 2, 2008, on Dale's April 17 letter, and her emails to Hall on June 16 and 17, 2008, CUE refused to agree to the reclassification of Hall's position to Analyst I because it believed Hall was performing bargaining unit work. As Higgins explained to Hall in one of those emails, CUE believed UC was trying to reclassify Administrative Assistants to Analyst I positions "in an attempt to weaken the union." Higgins also informed Hall during this email exchange that UC and CUE were currently litigating similar proposed reclassifications before PERB.⁵

An exclusive representative has an interest in ensuring that bargaining unit work is not removed from the bargaining unit. (See *Rialto Unified School District* (1982) PERB Decision No. 209 [holding transfer of work out of bargaining unit is a mandatory subject of bargaining in part because "diminution of unit work by transferring functions weakens the collective

⁵ The appropriate unit placement of six UC Administrative Assistant positions is currently before the Board on exceptions to an administrative law judge's proposed decision in Case Nos. SF-UM-620-H and SF-UM-621-H.

strength of employees in the unit and their ability to deal effectively with the employer and can affect the viability of the unit itself”].) Consequently, the charge fails to establish that CUE’s decision to oppose the reclassification of Hall’s position out of the CX Unit “was without a rational basis or devoid of honest judgment.”

Hall nonetheless argues that CUE’s decision was not based on an honest judgment because it never “reviewed any job description or compared job descriptions for Administrative Assistant III and Analyst I.” Dale’s April 17, 2008 letter to the CUE local president stated that a copy of the new job description for the reclassified position was attached. The charge alleged no facts from which PERB could conclude that the job description was not attached to the letter or that CUE did not review the job description before deciding to oppose the reclassification.

The charge also fails to allege any facts showing that CUE’s decision was discriminatory. Indeed, based on Higgins’ emails to Hall, it appears that CUE took the same position with regards to other proposed reclassifications of Administrative Assistants to Analyst I positions. Nor does the charge establish that CUE acted in bad faith. In fact, CUE recommended that UC pay Hall the salary she would have received had CUE agreed to the reclassification. For these reasons, the charge failed to state a prima facie case that CUE breached its duty to fairly represent Hall.⁶

⁶ Hall also contends that CUE was required to negotiate with UC over her reclassification instead of merely opposing it. The duty to bargain in good faith 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.)

2. New Allegations on Appeal

Hall's appeal contains new allegations not presented to the Board agent. "Unless good cause is shown, a charging party may not present on appeal new charge allegations or new supporting evidence." (PERB Reg. 32635(b).)⁷ "The purpose of PERB Regulation 32635(b) is to require the charging party to present its allegations and supporting evidence to the Board agent in the first instance, so that the Board agent can fully investigate the charge prior to deciding whether to issue a complaint or dismiss the case." (*Regents of the University of California* (2006) PERB Decision No. 1851-H.) The Board has not found good cause to consider new allegations presented on appeal when the evidence underlying the allegations was available to the charging party prior to the dismissal of the charge and the appeal fails to explain why the allegations could not have been made to the Board agent during the investigation. (E.g., *California School Employees Association & its Chapter 183 (Richards)* (2004) PERB Decision No. 1716; *University of California (Lawrence Berkeley Laboratory)* (1993) PERB Decision No. 998-H.)

Hall alleges for the first time in her appeal that CUE breached its fiduciary duty to her by failing to pursue higher compensation for the out of class work she was performing. The amended charge alleged that Higgins asked Hall in a December 1, 2008 email whether Hall wanted CUE to pursue a higher salary for her. Thus, it is clear that Hall knew as of that date that CUE had not taken action on increasing her compensation. Because Hall knew of CUE's alleged breach prior to filing her amended charge, we find no good cause to consider this new allegation on appeal.

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

ORDER

The unfair practice charge in Case No. SF-CO-170-H is hereby DISMISSED
WITHOUT LEAVE TO AMEND.

Members McKeag and Wesley joined in this Decision.