STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

BARBARA S. CHAPMAN and CHRISTOPHER DRUZGALSKI, Charging Parties, v. CALIFORNIA FACULTY ASSOCIATION, Respondent.	Case No. SA-CO-62-H PERB Decision No. 1933-H December 21, 2007

Appearances: Barbara S. Chapman and Christopher Druzgalski, on their own behalf; Rothner, Segall & Greenstone by Bernhard Rohrbacher, Attorney, for California Faculty Association.

Before Shek, McKeag and Wesley, Members.

DECISION

WESLEY, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal of a Board agent's dismissal of an unfair practice charge filed by Barbara S. Chapman and Christopher Druzgalski (Charging Parties). The charge alleges that the California Faculty Association (CFA) violated the Higher Education Employer-Employee Relations Act (HEERA)[1] by interfering with Charging Parties' statutory rights and failing to fairly represent them.

Specifically, Charging Parties allege that CFA blocked implementation of certain grievance procedures, thus requiring its members to use a grievance procedure that does not provide the procedural standards required by Education Code section 89542.5. In addition, the charge alleges CFA interfered with Charging Parties' efforts to convince the Academic Senate

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

to implement certain grievance procedures. The Board agent found the charge to be untimely filed and dismissed the charge.

Based on a review of Charging Parties' appeal and the entire record in this case, the Board affirms the dismissal for the reasons discussed below.

BACKGROUND

Education Code section 89542.5 requires the California State University (CSU) to establish grievance and disciplinary action appeal procedures. Among other procedures, Education Code section 89542.5 provides for peer review and binding arbitration. Prior to October 2001, HEERA section 3572.5 authorized CFA and CSU to supersede the grievance requirements of Education Code section 89542.5 when negotiating a memorandum of understanding (MOU).

In October 2001, SB 1212[2] was enacted to modify the supersession provisions in HEERA. HEERA section 3572.5(b) requires that Education Code section 89542.5 procedures must, at a minimum, be included in the grievance procedure[3] negotiated by CFA and CSU. Under the terms of SB 1212, however, the parties may negotiate greater benefits or rights than those set out in Education Code section 89542.5. SB 1212 applied to MOUs entered into after January 1, 2002.

CFA and CSU were parties to a MOU effective July 1, 1998 through June 30, 2001. The MOU contained procedures for contract grievances (Article 10), faculty status grievances (Article 10) and disciplinary action appeals (Article 19). The contract grievance procedure included three steps: "Level I – Campus Level Review," "Level II – System Level Review,"

[2]Statutes of 2001, chapter 808.

[3]The grievance procedure herein refers to both grievance and disciplinary action appeal procedures.

and final and binding arbitration. The contract grievance procedure did not include peer review. However, the faculty status grievance procedure contained a peer review option.

When SB 1212 was enacted, CFA and CSU were engaged in negotiations over a successor agreement. In early 2002, the parties determined they were not going to quickly reach agreement on revisions to the grievance procedure to implement SB 1212. On March 3, 2002, CFA and CSU agreed to "extend the terms of Article 10 and 19 until such time as an agreement on SB 1212 implementation is reached or until the statutory bargaining process applicable to the SB 1212 implementation issue is completed."

CFA and CSU reached an agreement on the remainder of a successor contract, which was effective May 14, 2002 through June 30, 2004.[4] The MOU included the following statement as a footnote to Articles 10 and 19:

> At the time of this printing, Article 10 [and Article 19, respectively] is subject to negotiations as described in the Memorandum of Understanding 'SB 1212' contained in Appendix F. When negotiations are completed, an updated version of Article 10 [and Article 19] will be available.

Negotiations on the implementation of SB 1212 continued and eventually the parties reached impasse. On October 15, 2003, CFA filed an unfair practice charge alleging CSU had unlawfully insisted to impasse that CFA waive statutory rights. In essence, CFA and CSU disputed whether there could be limits on the authority of the arbitrator to resolve grievances.[5]

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[4]At some point CFA and CSU extended the MOU to June 30, 2005.

[5]Prior to SB 1212, the contractual grievance procedure, among other provisions, limited an arbitrator's authority to decide faculty tenure disputes to procedural matters and to circumstances when the decision of the campus president was arbitrary. In Trustees of the California State University (2006) PERB Decision No. 1823-H, the Board agreed with CFA that SB 1212 precluded limits on the authority of the arbitrator to decide the merits of these disputes. On September 26, 2007, the Court of Appeal reversed the Board's determination and directed the Board to vacate its decision. (Board of Trustees of California State University v. Public Employment Relations Board (2007) 155 Cal.App.4th 866 [66 Cal.Rptr.3d 389].)

Charging Parties are faculty members employed by CSU and are members of the bargaining unit exclusively represented by CFA.

On May 19, 2004, Christopher Druzgalski (Druzgalski) filed a grievance alleging a violation of various terms of the MOU. Druzgalski's contract grievance was processed pursuant to Article 10, which did not include peer review by a faculty review committee. Ultimately, CSU rejected the grievance in November 2004. In April 2005, CFA declined to submit the grievance to arbitration.

In November 2004, Barbara Chapman (Chapman) exchanged numerous emails with CFA officials regarding the status of the implementation of SB 1212. Chapman asserted that CFA had prohibited faculty from exercising their right to peer review and binding arbitration of grievances. Chapman believed that SB 1212 removed the grievance procedure from the scope of representation thus prohibiting CFA from negotiating with CSU over the terms of a grievance procedure. Chapman contended that after SB 1212 was enacted, peer review was exclusively within the purview of the Academic Senate where grievances would be heard by faculty review committees established by the Academic Senate.

In a December 13, 2004 letter to Chapman, CFA Director of Representation, Edward Purcell (Purcell), described CFA's ongoing efforts to reach agreement with CSU on the implementation of SB 1212. He stated that CFA had filed an unfair practice charge involving the dispute. Purcell reported that as negotiations progressed, CFA and CSU reached a tentative agreement to give employees the option of two different grievance procedures, including one that incorporated the provisions of Education Code section 89542.5. CFA stated that this represented a higher level of benefits as allowed by SB 1212 by giving employees a choice of grievance procedures. However, Purcell told Chapman that CFA and CSU had not concluded the grievance procedure negotiations.

In January 2005, Chapman informed the Academic Senate of the requirements of SB 1212, opining that it had an obligation to form faculty review committees to review faculty grievances. Thereafter, CFA President, John Travis, addressed the Academic Senate and reported that CFA continued to bargain with CSU over implementation of SB 1212. The Academic Senate later advised Chapman that it would not consider implementation of SB 1212 as the grievance procedure was a negotiable subject outside the purview of the Academic Senate.

Chapman and Druzgalski filed their unfair practice charge on March 11, 2005. On September 28, 2005, the Board agent dismissed the charge as untimely filed.

CHARGING PARTIES' APPEAL

Charging Parties contend the charge is timely because they did not become aware of CFA's opposition to implementation of the statutory grievance procedures until receiving Purcell's December 13, 2004 letter. Charging Parties contend this was their first indication that CFA had deliberately delayed restoration of faculty due process rights.

Furthermore, Charging Parties contend CFA processed Druzgalski's grievance within the statutory limitations period using procedures that violated his right to peer review. They further assert that CFA interfered with Chapman's efforts to convince the Academic Senate to implement SB 1212 when CFA informed academic senators that CFA continued to negotiate changes to the grievance procedure. Alternatively, Charging Parties claim that CFA's conduct demonstrates a continuing violation.

Regarding the substance of their charge, Charging Parties contend CFA interfered with employee rights by blocking peer review of faculty grievances. They cite Druzgalski's grievance as an example where Druzgalski was denied peer review and arbitration of his grievance. Charging Parties also believe CFA breached its duty of fair representation by

requiring employees to use a grievance procedure that did not meet minimum statutory standards, failing to inform employees of their rights under SB 1212, and by bargaining over faculty rights that were not within the scope of representation.

In response to the appeal, CFA believes the Board agent correctly found the charge untimely filed. Even on the merits of the charge, however, CFA contends the Charging Parties have not alleged facts that state a prima facie case of interference or a breach of the duty of fair representation.

DISCUSSION

Initially, we must decide whether the charge was filed within the statutory limitations period. HEERA section 3563.2(a) prohibits PERB from issuing a complaint with respect to "any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge." The limitations period begins to run once the charging party knows, or should have known, of the conduct underlying the charge. (Gavilan Joint Community College District (1996) PERB Decision No. 1177.) A charging party bears the burden of demonstrating that the charge is timely filed. (Tehachapi Unified School District (1993) PERB Decision No. 1024; State of California (Department of Insurance) (1997) PERB Decision No. 1197-S.)

On March 3, 2002, CFA and CSU entered into an agreement to maintain the existing grievance procedure while they continued to negotiate implementation of SB 1212. On May 14, 2002, CFA and CSU reached agreement on the remainder of the terms and conditions of employment. The May 14, 2002 agreement included a statement that the parties continued to negotiate the implementation of SB 1212. It stated that the provisions of the revised grievance procedure would be added when negotiations were completed. Clearly, Charging Parties knew or should have known on or soon after May 14, 2002 that CFA had not

implemented the terms of SB 1212.[6] The charge was filed on March 11, 2005, nearly three years after the MOU was effective.

Furthermore, on May 19, 2004, Druzgalski filed his grievance under Article 10, a procedure that did not include peer review. Simply by reviewing the grievance article in the MOU, Druzgalski knew or should have known his grievance would be processed under a procedure that did not include consideration by a faculty review committee. As the date of the grievance also falls outside the statutory limitations period, the allegations that CFA interfered with employee rights and breached its duty of fair representation by failing to implement SB 1212 is untimely filed.[7]

An unfair practice allegation may still be considered to be timely filed if the alleged violation is a continuing one. To establish a continuing violation a charging party must demonstrate that the violation has been revived by subsequent unlawful conduct within the statutory limitations period. (San Dieguito Union High School District (1982) PERB Decision No. 194; UCLA Labor Relations Division (1989) PERB Decision No. 735-H.) However, a continuing violation will not be found where the employer's conduct during the limitations period constituted an unfair practice only by its relation to the original offense. (El Dorado Union High School District (1984) PERB Decision No. 382 (El Dorado UHSD).)

Charging Parties assert they did not learn of CFA's opposition to the implementation of SB 1212 until receiving Purcell's December 13, 2004 letter. Charging Parties do not allege a

[6]Although we do not need to reach the merits of this allegation, clearly CFA had no authority to unilaterally modify the grievance procedure absent an agreement with CSU.

[7]Assuming Charging Parties are alleging CFA breached its duty of fair representation when it refused to submit Druzgalski's grievance to arbitration in April 2005, this allegation does not state a prima facie case. Charging Parties have not alleged facts that CFA's decision declining to arbitrate the grievance demonstrated bad faith, discrimination or arbitrary conduct. (United Teachers of Los Angeles (Collins) (1982) PERB Decision No. 258; Reed District Teachers Association, CTA/NEA (Reyes) (1983) PERB Decision No. 332.)

lack of awareness that CFA had not implemented SB 1212. Rather, they contend that this was when they learned that CFA was opposed to the requirements of SB 1212. This argument is unavailing. First, Purcell's letter does not express opposition to the requirements of SB 1212. Just the opposite, Purcell described CFA's ongoing efforts to reach an agreement with CSU to incorporate the mandatory provisions of Education Code section 89542.5 into the grievance procedure. Furthermore, the statute of limitations runs from the discovery of the conduct constituting the unfair practice, not from the discovery of the legal significance of the alleged unlawful conduct. (Fairfield-Suisun Unified School District (1985) PERB Decision No. 547.) In March 2002, CFA and CSU agreed to extend the existing grievance procedures and this was expressly reflected in the May 2002 MOU. There has been no change in CFA's efforts to implement SB 1212. The fact that Charging Parties received a bargaining update from CFA within the statutory limitations period does not make this allegation timely filed. A similar argument was expressly rejected by the Board in State of California (Department of Corrections) (2003) PERB Decision No. 1559-S (Department of Corrections).

In Department of Corrections, the charging party alleged that his allegations were continuous violations occurring between April 1, 2000 through July 1, 2002. The charging party argued, among other things, that because he unsuccessfully requested information on July 1, 2002, his charge, filed on December 21, 2002 was timely filed. The Board found, however, that it was "clear that he was aware of these issues in November and December 2000 and cannot argue that they are a continuing violation just because he requested information about them again in July 2002." Citing other Board decisions, the Board stated in Department of Corrections that "a violation is not timely where the State's conduct during the limitations period relates back to the original offense. [Citations]" Here, CFA's December 13, 2004 letter providing a bargaining update relates back to the charging party's original allegations that CFA

failed to implement SB 1212, a failure that charging parties knew or should have known about in May, 2002.

Charging Parties also contend that CFA's continued use of a grievance procedure that does not include all of the Education Code section 89542.5 provisions demonstrates a continuing violation.

In 2002, when it was unable to reach an agreement with CSU on the implementation of SB 1212, CFA and CSU agreed to extend the existing grievance procedure while negotiations continued. During the period described in the charge, CFA continued to operate under the existing grievance procedure as it had been unable to reach an agreement with CSU over revisions to the grievance procedure.

As explained by the Board in El Dorado UHSD, "for a continuing violation, new conduct independent of the original conduct must occur during the limitations period." There is no evidence that CFA's conduct during the time in question independently constituted an unfair practice. Thus, Charging Parties have not established a continuing violation. As discussed above, Charging Parties knew or should have known shortly after the effective date of the May 2002 MOU that CFA had not incorporated the provisions of SB 1212. Because the unfair practice charge was filed nearly three years after the MOU was effective, we find this allegation was not timely filed.

Finally, Charging Parties allege CFA's communication with the Academic Senate interfered with their efforts in January 2005 to convince the Academic Senate that it was responsible for review of faculty grievances. This allegation, while timely filed, does not state a prima facie case.

To state a prima facie case of interference, a charging party must establish that the respondent's conduct tends to or does result in some harm to employee rights granted under

HEERA. (State of California (Department of Developmental Services) (1983) PERB Decision No. 344-S; Carlsbad Unified School District (1979) PERB Decision No. 89; Service Employees International Union, Local 99 (Kimmett) (1979) PERB Decision No. 106.) A violation may only be found if HEERA provides the claimed rights.

HEERA section 3565 grants employees the right to participate in the activities of their employee organization or to refuse to join the employee organization or participate in its activities. HEERA section 3562(f)(2) expressly excludes the Academic Senate from the definition of employee organization. Thus, rights involving faculty participation in the Academic Senate are not covered by HEERA. Charging Parties have not demonstrated that CFA interfered with their protected rights under HEERA when CFA informed the Academic Senate that it continued to negotiate with CSU over implementation of SB 1212.

ORDER

The unfair practice charge in Case No. SA-CO-62-H is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Shek and McKeag joined in this Decision.