



**STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD**

TEAMSTERS LOCAL 2010,

Charging Party,

v.

REGENTS OF THE UNIVERSITY OF
CALIFORNIA,

Respondent.

Case No. SF-PE-5-H

PERB Decision No. 2756-H

March 1, 2021

Appearances: Beeson, Tayer & Bodine by Susan Garea, Attorney, for Teamsters Local 2010; Sloan Sakai Yeung & Wong by Timothy G. Yeung, Attorney, for Regents of the University of California.

Before Banks, Chair; Shiners, Krantz, and Paulson, Members.

DECISION

PAULSON, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Teamsters Local 2010 from the Office of the General Counsel's (OGC) dismissal of Teamsters' unfair practice charge against the Regents of the University of California. Teamsters' charge alleges that the University violated the Prohibition on Public Employers Deterring or Discouraging Union Membership chapter, Government Code section 3550 (PEDD),¹ when, in response to a Teamsters organizing flyer, it posted a document on its website which compared salary increases between represented and unrepresented staff, and then made a

¹ PEDD is codified at Government Code section 3550 et seq. Unless otherwise indicated, all statutory references are to the Government Code.

series of claims about the University's efforts to compensate, protect, and support unrepresented employees.

Having reviewed the parties' arguments and all underlying pleadings, and in light of the standard the Board articulated in *Regents of the University of California* (2021) PERB Decision No. 2755-H (*Regents*), we reverse the dismissal and remand to OGC to issue a complaint.

FACTUAL AND PROCEDURAL BACKGROUND²

Teamsters is the exclusive representative of several University bargaining units, and is seeking to organize the University's administrative professionals, most of whom are unrepresented.³ As part of its organizing efforts, Teamsters distributed a flyer describing the benefits of union representation. The flyer asserted that for fiscal years 2010-2011 through 2021-2022, Teamsters had negotiated 33 percent in compounded wage increases and that total was approximately three times greater than the

² In the present procedural posture, we assume that the charging party's factual allegations are true, and we view them in the light most favorable to the charging party. (*Cabrillo Community College District* (2015) PERB Decision No. 2453, p. 8 (*Cabrillo I*); *Cabrillo Community College District* (2019) PERB Decision No. 2622, p. 4.) We do not rely on the respondent's responses if they explicitly or implicitly create a factual conflict with charging party's factual allegations, even if the respondent's contrary responses are stated more persuasively or appear as though they may be backed up by more supporting evidence, when compared to the charging party's allegations. (*Cabrillo I, supra*, PERB Decision No. 2453, p. 8; *Salinas Valley Memorial Healthcare System* (2012) PERB Decision No. 2298-M, p. 13.)

³ On September 9, 2020, PERB granted Teamsters' petition to place approximately 1,000 University employees in the Administrative Officer 2 classification into an existing Teamsters-represented bargaining unit. PERB may take official notice of its own records and files. (*Bellflower Unified School District* (2017) PERB Decision No. 2544, p. 6, fn. 4.)

comparable total for unrepresented University employees during the same timeframe. The flyer also asserted that union-represented employees enjoy the following benefits: “Guaranteed Raises”; “Union Contract & Protections”; “Bargaining & Ratification by Members”; “Grievance Procedure”; and “Union Representation.” The flyer made corresponding assertions about unrepresented employees: “Raises when Management Feels like It”; “No Protections at Work”; “You have No Voice”; “No Rights”; and “You’re on Your Own.”

On November 26, 2018, the University published a document on its website (the November 26 posting) responding to Teamsters’ flyer, purportedly to ensure employees had “accurate information on these topics.” This document asserted that between fiscal years 2007-2008 and 2018-2019, unrepresented University employees received approximately 25 percent in non-compounded across-the-board wage increases while the Teamsters-represented clerical unit received only 23 percent in wage increases during the same timeframe. This document also disputed the statements in Teamsters’ flyer by claiming that: (1) “UC has a demonstrated commitment to paying market wages and providing regular pay raises to policy-covered employees”;⁴ (2) “UC has numerous policies to ensure equitable treatment and to protect employees’ rights”; (3) “There are numerous policies, procedures and personnel to ensure that employees’ concerns and complaints are taken seriously and addressed”; and (4) “Various personnel and programs exist to support and advocate

⁴ The University’s Personnel Policies for Staff Members set the terms and conditions of employment for unrepresented employees. (*Regents of the University of California* (1999) PERB Decision No. 1316-H, pp. 7-8.)

for employees, including HR and ombuds offices, employee assistance programs, and local staff assemblies and interest groups.”

On February 22, 2019, Teamsters filed the instant charge, alleging that the University’s November 26 posting violated PEDD section 3550 by deterring or discouraging public employees from becoming Teamsters members or supporting Teamsters. On October 2, 2019, OGC dismissed Teamsters’ charge for failing to identify any statements in the University’s communication that did not fall within the protection of the safe harbor for non-coercive speech set by section 3571.3 of the Higher Education Employer-Employees Relations Act (HEERA).⁵

On October 28, 2019, Teamsters appealed OGC’s dismissal, arguing OGC applied the wrong standard and failed to consider a timely amended charge.⁶ Teamsters requested that if the matter was not remanded to cure the procedural defect, the case be either held in abeyance until resolution of three unfair practice charges filed against the University by Teamsters and several other unions (“*Janus*

⁵ HEERA is codified at section 3560 et seq.

⁶ Teamsters filed an amended charge by the deadline OGC established, and the record does not reflect why OGC’s dismissal failed to recount that fact or, apparently, consider the amended filing. In any event, Teamsters’ amended charge expands on its legal argument without providing additional facts that would necessitate further investigation, and we find that a complaint was warranted even absent the amendment. (See *Hartnell Community College District (2015)* PERB Decision No. 2452, p. 55 [finding it unnecessary to remand charge for further investigation because the charge and supporting documents contained sufficient information to state a prima facie case].) Accordingly, we do not remand this matter on procedural grounds and instead address the merits of the appeal.

letter cases”),⁷ or consolidated with these cases for purposes of oral argument on the meaning of PEDD section 3550.⁸

On March 3, 2020, the Board granted the request for combined oral argument in the *Janus* letter cases and the instant matter. The Board provided the following direction to the parties:

“The Board invites argument as to whether it should apply its longstanding interference standards in evaluating alleged violations of Government Code § 3550, and, if not, what standards the Board should apply, including any potential defenses. In your argument, please address the following two questions and any others you believe are relevant:

“1. What statutory construction best describes the relationship (if any) between § 3550 in the PEDD and § 3571.3 in HEERA?

“2. When interpreting the terms “deter” and “discourage,” what is the relevance (if any) of (a) the definition of “deter” in subdivision (a) of § 16645; (b) the employer’s motive; (c) the truthfulness or misleading nature of the employer’s communication or conduct; (d) the specific context in which the communication or conduct occurred; and (e) any other potentially relevant circumstances.

⁷ *American Federation of State, County & Municipal Employees Local 3299 v. Regents of the University of California*, Case No. SF-CE-1188-H; *University Professional and Technical Employees, Communication Workers of America, Local 9119 v. Regents of the University of California*, Case No. SF-CE-1189-H; and *Teamsters Local 2010 v. Regents of the University of California*, Case No. SF-CE-1192-H.

⁸ PERB consolidated the *Janus* letter cases for purposes of formal hearing. When Teamsters filed the instant appeal, the *Janus* letter cases were pending before the Board on exceptions and cross-exceptions, which included the University’s request for oral argument. Later, all parties joined the request for oral argument.

“In answering the above questions, please discuss whether the same or different standards should apply in the two contexts presently before the Board. First, we seek input on the standards for determining whether an employer has violated § 3550 while communicating with unrepresented employees during a union organizing campaign. Second, we seek input on the standards for assessing allegations that an employer violated § 3550 through a mass communication to represented employees, and we specifically seek input on the extent to which the outcome may be influenced by an employer’s compliance with § 3553.”

The Board held oral argument via a publicly viewable video-teleconference on July 23, 2020, and advocates appeared on behalf of each party.⁹ The Board issued its decision in the *Janus* letter cases on March 1, 2021. (*Regents, supra*, PERB Decision No. 2755-H.)

DISCUSSION

In resolving an appeal of a dismissal, we review OGC’s decision de novo. (*Lake Elsinore Unified School District* (2018) PERB Decision No. 2548, p. 6, fn. 5; *City of San Jose* (2013) PERB Decision No. 2341-M, p. 47.) At this stage of the case, a charging party’s burden “is not to produce evidence, but merely to allege facts that, if proven true in a subsequent hearing, would state a prima facie violation.” (*County of Santa Clara* (2013) PERB Decision No. 2321-M, p. 13, fn. 8.) When reviewing a charge, PERB does not resolve conflicting factual allegations; material factual conflicts

⁹ The Board initially scheduled the argument to occur in-person in April 2020 but rescheduled several times and ultimately conducted the argument remotely due to the COVID-19 pandemic.

must be resolved based upon evidence presented at a formal hearing. (*Sacramento City Unified School District* (2010) PERB Decision No. 2129, p. 7.)

The PEDD provides that “[a] public employer shall not deter or discourage public employees or applicants to be public employees from becoming or remaining members of an employee organization, or from authorizing representation by an employee organization, or from authorizing dues or fee deductions to an employee organization.” (§ 3550.) “Deter or discourage” means to tend to influence an employee’s free choice regarding whether or not to (1) authorize union representation, (2) become or remain a union member, or (3) commence or continue paying union dues or fees. (*Regents, supra*, PERB Decision No. 2755-H, p. 21.) The test for “tends to influence” is objective; it is a charging party’s prima facie burden to show that the challenged conduct or communication is reasonably likely to deter or discourage employee free choice, not that the conduct actually did deter or discourage. (*Id.* at p. 24.) Further, and as particularly relevant here, section 3550 creates a new and more robust protection that is not subject to the free speech safe harbor of HEERA section 3571.3. (*Id.* at pp. 28, 33.)

Where a charging party shows employer conduct tended to influence employee decisions about whether or not to authorize union representation, become or remain a union member, or commence or continue paying union dues or fees, the burden then shifts to the employer to plead and prove a business necessity as an affirmative defense. (*Regents, supra*, PERB Decision No. 2755, pp. 35-36.) The degree of likely influence dictates the employer’s burden. (*Ibid.*) PERB will resolve such an asserted

defense by weighing the tendency to deter or discourage against the employer's asserted business necessity. (*Ibid.*)

By its plain language, section 3550 applies broadly to employer conduct toward "public employees or applicants." The statute restricts an employer's influence over employee decisions whether or not to authorize union representation, become or remain a union member, or commence or continue paying union dues or fees "irrespective of whether employees are exclusively represented by a union." (*Regents, supra*, PERB Decision No. 2755-H, p. 39.) Indeed, employee decisions whether or not to authorize representation occur frequently when employees are unrepresented.¹⁰ Although *Regents, supra*, PERB Decision No. 2755-H involved communications to represented employees, the plain language of the statute suggests no reason a different test would necessarily apply where, as here, the employer's conduct or communication is directed toward unrepresented employees.¹¹

Under the standard set out in *Regents*, Teamsters' unfair practice charge states a prima facie case that the University's November 26 posting tends to influence employee free choice. The University circulated the communication during an

¹⁰ While that is the most common circumstance in which such decisions arise, decisions whether or not to authorize representation may also occur when employees seek to decertify their existing exclusive representative and choose a new representative or no representative.

¹¹ Different factors or differing emphases may be in play when assessing potential likely influence on employee free choice, as well as an employer's asserted business necessity during an organizing campaign. For instance, at the formal hearing in this matter, the parties may litigate the truthfulness or misleading nature of their respective communications. But, as with communications to represented employees, the scope and weight of relevant contextual factors will develop through case law.

organizing campaign in direct response to Teamsters' communication seeking employee support. The November 26 posting suggested that Teamsters' wage increases are less substantial than unrepresented clerical employees' wage increases, and that unrepresented employees already have sufficient job protections, thereby tending to influence employee decisions on union membership and support.

To the extent the University alleges that its November 26 posting was necessary to respond to Teamsters' flyer, we consider that an affirmative defense. The University raised such a defense in its response to the charge, but sufficient material factual disputes exist to warrant a hearing on the merits. For example, Teamsters' charge alleges the University's posting is inaccurate and misleading, while the University alleges its posting is both accurate and necessary to counter the Teamsters' purportedly misleading flyer. A hearing also will give the parties the opportunity to present evidence of the context in which the University's communication was made and received, an important consideration in determining a PEDD section 3550 violation. (*Regents, supra*, PERB Decision No. 2755-H, pp. 24, 36.) Thus, the formal hearing process is the appropriate venue for Teamsters to prove its case, and the University to present its affirmative defense, viz. to demonstrate that its asserted business necessity outweighs the tendency of its communication to influence employee free choice.

Assuming the factual allegations in the charge are true and viewing them in the light most favorable to Teamsters, we find Teamsters' charge alleged a prima facie case that the University's November 26 posting deterred or discouraged public employees in violation of the PEDD. Accordingly, a complaint must issue.

ORDER

The dismissal of the unfair practice charge in Case No. SF-PE-5-H is REVERSED. This matter is REMANDED to the Office of the General Counsel to issue a complaint alleging that the Regents of the University of California's November 26, 2018 posting deterred or discouraged public employees from authorizing union representation and/or becoming union members in violation of PEDD section 3550.

Chair Banks and Members Shiners and Krantz joined in this Decision.