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IN ARBITRATION PROCEEDINGS PURSUANT TO
AGREEMENT BETWEEN THE PARTIES

In the Matter of a Controversy Between:)
)
)
COALITION OF UNIVERSITY EMPLOYEES) Arbitrator's
) File No. 04-217-LA
)
and)
)
) ARBITRATION
) OPINION AND AWARD
UNIVERSITY OF CALIFORNIA) (December 23, 2005)
)
[Re: Classification Grievances,)
Nos. BK-CU-2249-03, OP-CU-2260,)
SF-CU-2271-03])
_____)

Appearances: Ari Krantz (Leonard Carder), attorney for the Coalition of University Employees; M. D. Moye and Holly A. Lee (Hanson, Bridgett, Marcus, Vlahos & Rudy), attorneys for the University of California.

INTRODUCTION

This dispute arises under a labor agreement between the Coalition of University Employees and the University of

California. At issue, are alleged violations of the agreement concerning the reclassification of employees and positions from bargaining unit to non-unit status. The University denies that any violation of the labor agreement has occurred.

The undersigned was selected by the parties to conduct a hearing and issue a binding arbitration award. The hearing was held on August 24 through 26, 2005 in Oakland, California. At the hearing, the parties were afforded an opportunity to present testimony and documentary evidence. The case was deemed submitted for decision upon receipt of the final posthearing brief on November 30, 2005.

ISSUES

The parties were unable to agree on a statement of the issues submitted for resolution, but stipulated that the arbitrator could frame the issues based on their respective statements, and the evidence and argument submitted. (Tr. 8, 40-42.) The arbitrator has determined that the issues to be resolved are the following:

1. Did the University violate Article 2.E of the labor

agreement by reclassifying unit employees and positions to non-unit status: (a) without timely notice to the Union or without Union consent; and, b) without pursuing a unit modification petition to the California Public Employment Relations Board?

2. Did the University violate Article 2.E by granting increased pay to an employee while a reclassification proposal was pending, and later stop the increased pay, while the proposal remained pending?

3. If a violation is found, on either or both of the issues set forth above, what will be the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE 2.E RECLASSIFICATION FROM UNIT TO NON-UNIT STATUS

In the event the University determines that a position or title should be reclassified or designated for exclusion from the unit, or the University intends to replace a major portion of a bargaining unit position with a position in a classification outside of the unit, the University shall notify CUE in writing at least thirty (30) calendar days prior to the proposed implementation. If CUE determines to challenge the University's proposed action, it shall notify the University in writing within thirty (30) calendar days from the date on which the University's notice was mailed, and the proposed effective date will be extended by thirty (30) calendar days. During such an extension, the parties will meet and discuss the University's proposed action, the University may commence, PERB unit modification procedures, as outlined under PERB regulations.

Until the bargaining unit assignment is either agreed to by the parties or finally resolved through the PERB unit modification procedures, (1) the affected position(s) or title(s) shall remain in the unit and shall remain covered by all provisions of this agreement, (2) the University may, in compliance with Article 45- Wages, Section D, Other Increases, of this Agreement, increase compensation for the affected position(s) or title(s), and (3) the duties associated with the proposed reclassification may be assigned to the affected employee(s).

FACTUAL ANALYSIS.

1. Employment and Contract Setting

This case involves grievances by the Coalition of University Employees concerning the University's handling of the reclassification process. The grievances are consolidated for this arbitration. The Union has been the exclusive representative since 1997 of a statewide bargaining unit covering more than 15,000 clerical and support employees. (Tr. 81-82, 361-362.) The Union succeeded AFSCME as the bargaining agent for the unit, with AFSCME having been certified in 1983.

In particular, the Union alleges that the University has violated Article 2.E by reclassifying unit employees and positions to non-unit status. Many, although not all of the

instances cited by the Union involve the redesignation of work from the Administrative Assistant III class to a non-unit Administrative Specialist or Administrative Analyst position at higher rates of pay.

The Union's grievances, filed at the Berkeley and San Francisco campuses, and for the Office of the President, allege that violations of the contract's reclassification provision are an ongoing problem affecting a number of individuals. (CUE Exhs. 18, 40, 44.) The grievances also challenge alleged comments by University representatives regarding employee status and Union responsibilities that, according to the Union, constitute disparagement of the Union and interfere with its rights. These interference allegations were resolved by a partial settlement prior to evidence being offered at the hearing, and no longer are at issue. (Jt. Exh. 1; Tr. 11.)¹

¹ The partial settlement states, in relevant part:

The University agrees that in responding to any request by an employee affected by a reclassification that UC has proposed to CUE, where such request relates to the status of their pending reclassification, the University's managers will provide the following response: "Pursuant to the procedures under the Collective Bargaining Agreement, CUE and the University are discussing the proposed reclassification and are attempting to resolve any areas of concern."

Without waiving its right under HEERA to manage its workforce and assign work and its obligation as an employer, the University agrees that its managers will

Under the initial labor agreement between the Union and the University, the University was permitted to reclassify an employee after advising the Union, regardless of whether the Union agreed. (CUE Exh. 1, Art. 2; Tr. 73-74.) This contract language was challenged by the Union in 2001 in unfair labor practice proceedings before the PERB. (CUE Exh. 2.) Essentially, the Union charged that the contract provision amounted to an impermissible intrusion on the PERB's unit determination authority. After a complaint was issued, a settlement was reached in 2002 which favored the official PERB unit modification procedure, absent Union consent. (CUE Exh. 3.)

The basic approach of the PERB settlement was carried over into a successor collective bargaining agreement. (Jt. Exh. 2, Art. 2; Tr. 77-79.) The contract language in Article 2.E, quoted above, was in effect at the time the present grievances were filed. It is undisputed that, during the relevant negotiations,

not make any statement other than the foregoing, nor purport to blame one party or the other for any delay in the processing of the reclassification nor threaten or state to either the employee or the Union that the Union's decision to challenge a proposed reclassification could result in removal of employees' job duties/responsibilities. The parties also agree that managers shall not blame one party or the other for delays in reclassification in those cases where the reclassification has not yet been proposed to CUE. Rather, in such an instance, a manager should respond to any inquiry by informing the employee that the reclassification has not yet been proposed to CUE.

there was no discussion by the University of allowing the employer to reclassify employees by removing bargaining unit work without timely notice to the Union, without Union consent, and without going through the PERB's unit modification process.

As acknowledged by the University's former chief negotiator, the contract establishes the exclusive procedure to be followed by the University in reclassification situations, apart from going through the PERB. (Tr. 352-358.) Her successor testified to the same effect. (Tr. 333-334.) In the next round of contract negotiations in 2004, the University offered a proposal that essentially reverts to the procedure previously used, prior to the PERB challenge, permitting the University to move forward with a unit reclassification or exclusion, even if discussions with the Union are taking place, or if recourse to the PERB remains an option. (CUE Exh. 4.)

As background to this dispute, for a number of years and into the current round of bargaining, the Union has urged the University to resume active use of a bargaining unit classification titled Administrative Assistant IV. (See, e.g., CUE Exh. 6, pp. 10-11, 21-23; Tr. 185-186.) This classification was used by University campuses into the 1980s, but its use since then has been largely dormant throughout the University system,

except for the Davis campus. (Tr. 82-84, 331-332; CUE Exhs. 11-13.) In lieu of relying on the Assistant IV classification, the University in a number of situations has developed a non-unit Administrative Specialist or Analyst classification. In some instances, CUE has approved reclassifications to these non-unit titles. (Tr. 103-104.)

At present, both sides are engaged in unit modification and unfair labor practice proceedings with the PERB involving the University's practice with respect to the Assistant IV and Administrative Specialist classifications. (CUE Exhs. 7-9; Tr. 67-68, 267-268, 334.) While the PERB cases have similarities to issues in this grievance arbitration, the primary questions in arbitration involve the Union's objective to insure that the proper contract procedure is followed. In keeping with this distinction, the Union concedes that the PERB has the ultimate decision-making authority for the proper unit allocation for any disputed position reclassification. (Tr. 56-57.)

2. Facts Giving Rise to the Dispute

The Union presented a number of examples from the Berkeley and San Francisco campuses demonstrating, in its view, violations of the labor agreement.

In one class of cases, the Union pointed to reclassification proposals that were advanced, but then not pursued once the Union asked questions or raised objections about the proposed reclassifications. At the Berkeley campus, a reclassification involving Maria Tulfo from an Administrative Assistant III to an Administrative Specialist position was proposed, and the Union objected, but the University did not present the issue to the PERB. (CUE Exhs. 19 (p. 9), 25, 31-33; Tr. 147-151.) Instead, the University posted an Administrative Specialist position, and Ms. Tulfo was hired. As conceded by University correspondence, her duties were not changed during or after the recruitment process for her new position. (CUE Exh. 32; also see Tr. 197.)

Eventually, following Ms. Tulfo's recruitment, the Union gave its consent. However, this consent was not a ratification of University actions. Rather, it was provided after University officials stated that the employer would not discuss the proposal with the Union, nor pursue unit modification with the PERB, without running the risk of employees losing some of their duties or pay increases they possibly deserved. (Tr. 160-161, 177-181, 190-191, 201-203.) Presumably, a blanket response of this nature potentially interferes with Union rights under Article 2.E, and is precluded in the future based on the prehearing partial settlement by the parties, quoted above. (Jt. Exh. 1.)

In a second instance involving an employee named Annie Mar at the San Francisco campus, a similar pattern was evident. The University proposed a reclassification for Ms. Mar from an Assistant III to an Analyst title. (CUE Exh. 41; Tr. 224-231.) The Union objected, urging that a reclass to a unit position with higher pay was warranted, not a non-unit assignment. According to the Union's witness, the University at first advised that it would take the reclassification proposal to the PERB, but then shifted its approach, even though an interim settlement was considered that would have raised her pay pending the outcome at PERB. However, without going to the PERB, without posting the position, and without notice to the Union, Ms. Mar was reassigned to the Analyst class. The reclassification proposal by the University was never formally withdrawn. No duties involving Ms. Mar's position were changed. (Also see Tr. 298-301; compare CUE Exh. 41 with UC Exh. 3 (Job No. 11424).)

Other examples arising after the filing of the grievances were offered at the arbitration. Although the Union did not amend the grievances to cover these specific instances, they are offered by the Union to demonstrate ongoing problems in the application of Article 2.E. (Tr. 402-406.) In one situation, an employee named Francesco Brofferio was moved from a unit position to a non-unit position without any notice to the Union, and

without a substantial change in duties or his former position being filled. (CUE Exhs. 35-36; Tr. 155-159, 166-168, 195-196.)

Similarly, in another example of recent University action, four accountant positions were filled by unit employees who previously performed essentially the same work in the bargaining unit, although a new college degree qualification was added. (UC Exhs. 4-7; Tr. 231-234, 276-279, 289-292, 369-374.) The change was made without notice to the Union, and without filling the vacancies created by the change. The University's contentions that these employees are distinguishable because of the new qualification, or because of the need for additional professional accountants on staff, only begs the question of whether these distinctions justify a reclassification, much less bypassing the contractual procedure.

In a third post-grievance situation, involving the reclassification of eight employees on the human resources staff at the San Francisco campus, the University maintains that reliance on this example should be rejected because of an implied waiver by the Union permitting the reclassification after the Union's initial objection. (Tr. 235-238, 304-306, 311-320; UC Exh. 8; CUE Exh. 51.) In the arbitrator's view, there was sufficient time and information provided by the University to

support a finding of a Union waiver as to this aspect of its case. Although there was an initial delay caused by supervisory misconduct toward a Union representative that ended an early meeting on the University's proposed action, later efforts by the employer to alert the Union were received with only partial, belated, and, ultimately, inadequate responses.

Turning to the second issue framed for this proceeding, evidence was offered regarding Charlotte Lee Pinsky, a San Francisco employee. (Tr. 120-121.) The University proposed Ms. Pinsky's reclassification, but placed the proposal on hold after the Union raised questions about it. (CUE Exhs. 46-50; Tr. 122-138, 247-248.) The reclassification for Ms. Pinsky was never formally withdrawn. (Also see UC Brief, P. 14.) Instead, for a portion of time the proposal was in abeyance, Ms. Pinsky was paid a stipend. This stipend represented an increase in pay comparable to what the University proposed for the reclassification. However, after covering a six month period, Ms. Pinsky's stipend was stopped. Ms. Pinsky's core duties before, during, and after the reclassification proposal remained largely the same, although some aspects became more complex. (Tr. 125, 131-132.) Ms. Pinsky still is a unit employee.

DISCUSSION

The Union contends that the University has systematically violated Article 2.E by disregarding the required contractual procedure for reclassifying unit employees and positions to non-unit status, and, in so doing, by interfering with or denying Union and employee rights under the labor agreement. The University denies that any violation has occurred, and instead maintains that its actions are consistent with its management prerogative to establish new classifications. For the reasons that follow, the Union's grievances will be sustained.

First, the Union's interpretation of Article 2.E is consistent with PERB precedent.² As the PERB has held, absent consent between the employer and the exclusive representative, the PERB's unit modification procedure is the sole method for removing work from a bargaining unit by reclassifying the employees doing the work of one position to non-unit status. In this respect, neither the PERB nor the arbitrator is determining that an employer is precluded from developing and posting a new position classification provided it involves new duties not

² See, e.g., Regents of the University of California (1989) PERB Decision No. 722; Hemet Unified School District (1990) PERB Decision No. 822; Modesto City School District (1991) PERB Decision No. 884.

previously and largely performed by a bargaining unit position. (Tr. 51-56, 70-71.) Adoption of such a new classification remains an employer prerogative.³ However, the decision to establish or fill a new classification doing non-unit work differs from a situation in which unit work has evolved but has not been eliminated, as in the examples presented in this case.

Second, the negotiating history supports the Union's allegations of a violation. As demonstrated by submissions from related PERB proceedings, the Union several years ago challenged the University's authority to act unilaterally in reclassifying positions. After this challenge, a settlement was reached, and new contract language was adopted. As confirmed by the University's former chief negotiator, the new language carefully structured the way in which the University can pursue reclassifications, with ultimate recourse to the PERB for disputed instances such as those presented in this arbitration.

Here, abundant evidence was offered that in several instances the University at first sought to follow the established and required reclassification approach, but then shifted gears once the Union raised questions or expressed

³ Alum Rock Unified School District (1983) PERB Decision No. 322.

concerns. By then posting non-unit positions and hiring unit incumbents into the positions, or by doing so without even a posting, all without recourse to the PERB, the University violated the labor agreement since the duties for the affected positions, whether vacant or not, either did not change or remained largely the same. As stated in Article 2.E of the contract, the Union's entitlement to notice and an opportunity to discuss the matter arises when "the University determines that a position or title should be reclassified or designated for exclusion from the unit or the University intends to replace a major portion of a bargaining unit position with a position in a classification outside the unit."

Third, the University's rationale of a management prerogative to undertake its alternative approach would effectively, as the Union argues, swallow the contractual rule. As stated in Article 15 of the agreement dealing with management rights, the University's prerogatives are preserved, "except as otherwise provided in this Agreement"; in this case, Article 2.E. If approved, the University's approach would allow it to accomplish the same end result without recourse to the contractual procedure requiring notice to the Union, an opportunity to confer, and, if needed, unit modification approval by the PERB.

In this context, an arbitrator is precluded from construing the agreement in a fashion that would eliminate a protective benefit secured by the Union and clearly spelled out in the contract. Nor is the Union compelled, as the University suggests, to file a unit modification petition with the PERB to recapture work it believes was improperly transferred from the bargaining unit. Although that avenue is available, possible recourse to the PERB does not preempt the Union's exercise of its right to enforce the contractual reclassification procedure.

Fourth, similar reasoning applies to the second issue, which concerns the University's failure to follow the contractual procedure in a way that, while leaving a bargaining unit employee in place, nevertheless interferes with employee rights and benefits. In the case of Ms. Pinsky, the University proposed a reclassification, but then let the matter sit without any subsequent formal action. Meanwhile, Ms. Pinsky was provided extra pay covering a six month period, as is permitted under the contractual authorization to increase pay pending a reclassification proposal. However, not long after the stipend was implemented, it was abruptly stopped without any resolution of the reclassification request. While the University is free to withdraw a reclassification proposal, assuming it is acting in good faith after fair notice to the Union and after entertaining

Union comments, the present situation does not fall within the scope of such leeway. Rather, the facts as to Ms. Pinsky instead amount to an abuse of the University's discretion, and interfere with the Union's right to participate in the reclassification process by penalizing an affected employee.

AWARD

Based on the testimony and documentary evidence, and the findings and conclusions set forth above, the undersigned renders the following Award:

1. The Union's grievances will be sustained based on the University's violation of Article 2.E of the labor agreement by reclassifying or designating for exclusion from the bargaining unit, or by replacing a major portion of a unit position with a position in a classification outside the unit, without notifying the Union or without the Union's consent, and without utilizing the unit modification procedures of the Public Employment Relations Board.

2. The University will cease and desist from failing to abide by Article 2.E of the labor agreement.

3. The University will restore the status quo ante by returning to the Union's bargaining unit all position reclassifications considered in this decision, except for:

a) Position placement to which the Union agrees as an alternative to restoration; and,


b) Human Resources personnel changes at the University's San Francisco campus to which the Union impliedly waived any opposition; and,

c) Unit modifications approved by the Public Employment Relations Board.

4. Restore the pay level previously paid to Charlotte Lee Pinsky while the University's reclassification proposal remains pending, retroactive to the cessation of payments in July 2003, with the pay level continuing until the University complies with the procedural requirements of Article 2.E.

5. Pursuant to the stipulation of the parties, the undersigned will retain jurisdiction to resolve any disputes over implementation of the Award, including any disputes arising under the partial settlement between the parties that is identified as Joint Exhibit 1.

Date: December 23, 2005



BARRY WINOGRAD
Arbitrator