United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: April 21, 1992

TO : Victoria E. Aguayo, Regional Director
Region 21

FROM : Robert E. Allen, Associate General Counsel
Division of Advice 177-1683-5000
280-9410

SUBJECT: San Diego State University Foundation
Case 21-CA-28463

This case was submitted for advice as to whether, under the jurisdictional tests of NLRB v. Natural Gas Utility District of Hawkins County, 402 U.S. 600 (1971), and Res-Care, Inc., 280 NLRB 670 (1986), the Employer either is a political subdivision exempt from Board jurisdiction or alternatively does not retain sufficient control over the employment conditions of its employees to enable it to engage in meaningful bargaining with the Union.

FACTS

The California State University system was created directly by the State of California in its Education Code. San Diego State University ("University") is a single-campus institution of higher education and, as part of the state system, is exempt from NLRA jurisdiction. In 1943, six citizens created the San Diego State University Foundation ("Foundation"), a private, non-profit California corporation to serve the University principally in obtaining, developing and administering grants and contracts for faculty research and education projects. In this regard, it receives and administers non-state appropriated funds on behalf of the University.

The Foundation's original Articles of Incorporation set forth the Foundation's purpose and legal rights to do business, identify the six individuals who created the Foundation as having addresses at the University, and designate those individuals as the temporary Board of Directors[1] until the authorized number and qualifications

[1] Hereinafter referred to as the "Board."

of directors, voting rights, etc. are set forth in the Foundation's By-Laws.

The number and composition of the Board as required in the By-Laws are five ex-officio directors (the University President, the Vice Presidents of Academic Affairs and of Business and Financial Affairs, the Dean of Student Affairs and the Associated Student Body President) and eight directors elected by a two-thirds majority of the Board (four University faculty members recommended by the University Senate for three-year terms, one individual who serves a one-year term, and three individuals who serve three-year terms), all of whom are first nominated by the University President. No ex-officio director may be removed absent a change in the By-Laws; however, an elected director may be removed by a two-thirds vote of the entire number of authorized directors. The By-Laws further provide for corporate officers as follows: the University President serves as Board President, the Vice President is nominated by the President, the Secretary and Treasurer are elected by the Board from among its members. These corporate officers then appoint a General Manager who serves as Assistant Secretary. The By-Laws also set forth corporate officers' duties and provide that the Board shall meet in accordance with state "open meeting" regulations.

At the time the Foundation was created there were no state laws establishing or regulating such auxiliary organizations. In 1959 (and at various times thereafter) the State of California amended its Educational Code at Title 3 and its Administrative Code at Title 5 to regulate existing, and permit the creation of future, auxiliary organizations. These Code enactments were the result of an investigation revealing financial misconduct by such organizations and reflect the State Legislature's interest in ensuring financial integrity and operations consistent with good public policy.[2]

The state Education Code amendments provide, as relevant herein, for fiscal accountability of auxiliary organizations to the System Trustees and the State

---

[2] California Administrative Code, Title 5, Section 42401.1.

Director of Finance through the university president. Thus, the university president "shall be responsible for ascertaining that all expenditures are in accordance with policies of the trustees, the propriety of all expenditures, and the integrity of the financial reporting made by auxiliary organizations."[3] Subsection 89900(c) also requires "the governing board of each auxiliary organization to provide salaries, working conditions and benefits, for the full-time employees of each auxiliary organization which are comparable to those provided California State University employees performing similar services. . . ." (Emphasis supplied.) Subsection 89903 regulates auxiliary organizations formed pursuant to this article in the size and composition of their boards of directors. Subsection 89911 provides that any obligation of an auxiliary organization which has been authorized by the System Trustees is an obligation of the State of California. Although Subsection 89920 requires auxiliary organization boards to conduct their business in public meetings, Subsection 89923 provides for closed sessions to consider certain matters, including "collective bargaining." Subsection 89925 provides that each auxiliary organization shall establish provisions for election of officers and board members.

The California Administrative Code, Title 5, Subchapter 6, Subsection 42401, implementing the Education Code, provides that auxiliary organization activities "are essential to the educational program of a campus, including service functions, and are an integral part of the campus program and shall be so operated." The president of each campus is "responsible for the educational effectiveness, academic excellence, and general welfare of the campus" and shall require each auxiliary organization to periodically submit its program and budget for review. "Should the president determine that any program or appropriation planned" is not consistent with System Trustees' or campus policies, the program or appropriation "shall not be implemented." (Subsection 42402.) The Administrative Code requires that "adequate records" be available to System Trustees and the State Department of Finance, the periodic

---

[3] California Education Code Chapter 7, Part 55, Division 8, Title 3, Subsection 89900(b).

submission of operations and financial status to the System Trustees and that annual required audits performed by a certified public accountant be submitted to System Trustee Chancellor, State Department of Finance and published (Subsections 42404 and 42408). Auxiliary organizations are required to provide their full-time employees with salaries, working conditions and benefits comparable to those provided campus employees performing substantially similar services (Subsection 42405). Subsection 42602 requires newly-created auxiliary organizations, or those in existence prior to, but desiring to make a substantial change after, April 1, 1967 to have a board composed of administration and staff, faculty, noncampus personnel and students, with a size sufficient to accommodate membership from the categories required. Since the Foundation was in existence prior to 1967 and there is no evidence that it has substantially changed its board composition after that date, the composition of its Board is not controlled by this requirement.

Pursuant to Subsection 42501, the Foundation and the System Trustees executed an operating agreement by the University President, and the Foundation's General Manager. The stated purpose of the Agreement is to comply with the requirements in the Education and Administration Codes. The function of the Foundation is specifically described in the agreement as complying with the operational and fiscal oversight mandated by the Education and Administration Codes.

The Foundation is exempt from federal income and Social Security taxes and has its own employees and Employment Handbook. The terms and conditions of employment differ substantially from those of the University employees, despite the statutory requirement of comparability for full-time employees. Thus, the Foundation, through its General Manager and Director of Personnel Services, provides a formal hearing "for some circumstances" while the University has a formal grievance and arbitration procedure, makes its own hiring and firing decisions, and maintains initial wage rates, leave of absence, promotion, layoff, evaluation, vacation, and overtime provisions different from those provided to University employees.

The evidence indicates that over the last several years the Foundation has ceased employing individuals with indefinite or lengthy contract terms and instead employs individuals under successive nine-month contracts. Thus, the Foundation may no longer be subject to the comparability requirement of state law inasmuch as full-time employee is defined as one with a contract term exceeding three years. In this regard, the Foundation no longer offers the State retirement package which apparently is available to full-time employees under the statute, but rather furnishes a package through a private company.

The University President has exercised his oversight authority on rare occasions and only with regard to economic issues. In 1980 the California Court of Appeals[4] upheld the University President's right to veto the planned salary increase to an auxiliary organization's part-time employees. In that case, the veto was consistent with the University President's stated goals of equitable and comparable treatment of campus employees and was patently relevant to the "general welfare of the campus" within the meaning of the Administrative Code. Although the auxiliary organization had argued that comparability did not apply to other than full-time employees, the judge held that the University President had an interest sufficient to apply comparability throughout the range of employees on campus. During the 1985 budget year, the University President reversed the Foundation's plan to hold salaries at the prior year's level and required the Foundation to implement a five percent increase consistent with the increase granted to similarly-employed University instructors. In 1983, a full-time Foundation employee won the right to a discharge hearing, as provided to University employees, under the comparability provisions of the statute.[5] The University President could have intervened, required the Foundation provide such a

---

[4] Associated Students of San Diego State University, etc. v. Thomas B. Day, etc., et al., 4 Civ. No. 22169.

[5] James G. Coppernoll v. Board of Directors of San Diego State University Foundation, Inc., 138 Cal. App. 3d 915; 188 Cal. Rptr. 394 (Jan. 1983).

hearing, and avoided this litigation. Instead, he withheld his oversight authority with regard to comparability affecting the general welfare of the campus in this instance.

ACTION

We conclude that, because the evidence does not establish that the Foundation is a governmental entity exempt from Board jurisdiction under Section 2(2) or that an exempt entity controls the employment conditions of the Foundation's employees so as to divest the Foundation of the ability to engage in meaningful bargaining, the Board would assert jurisdiction over the Foundation, and the Region should determine the merits of the charge.

Under the test in Hawkins County, supra, the Employer is exempt from the Act's coverage if it meets either of two requirements. The Board must first determine whether or not the employer is created directly by the state, so as to constitute departments or administrative arms of the government. The Foundation here apparently contends that it was created directly by the State of California through the Education Code. However, it is clear that the Code does not create auxiliary organizations, but merely recognizes their existence and regulates their operations only to ensure that their financial affairs are consistent with good public policy. Accordingly, the Foundation does not meet this part of the Hawkins County test.

The second prong of the Hawkins County test requires that the employer be "administered by individuals who are responsible to public officials or to the general electorate."[6] The Board has distinguished between employers who are responsible to the public and those who are not based upon whether the board of director's composition is established by "choice" or by "law." For example, in Economic Security Corporation of Southwest Area,[7] the Board concluded that a majority of the employer's board of directors was legally responsible "to

---

[6] 402 U.S. at 604-605.

[7] 299 NLRB No. 68, slip op. at 5 (August 24, 1990).

the general electorate" where federal and state statutes mandated that one-third of the board members be elected public officials and one-third of the members be "representative of the poor" and chosen in "an election by the poor . . . ." On the other hand, in Jefferson County Community Center v. NLRB,[8] the court held that a majority of the employer's board of directors was not "responsible to public officials or the general electorate" because, to the extent that the board was accountable to public officials, the board's composition was established "not by statute but by the bylaws of the corporation . . . ."[9]

The Foundation's Board composition is set forth in its By-Laws and differs from the Education Code provisions regarding auxiliary organization board composition. Because the Foundation's Board composition pre-dated, and has not been significantly altered since, the 1959 Code enactment, the Foundation is not legally required to comply with the Code's composition requirements. Therefore, to the extent that the Foundation's Board consists of public officials or individuals who are accountable to public officials, that accountability is by choice, i.e. set forth in its By-Laws, rather than by law. Moreover, the majority of the Board is elected by current Board members and, under the By-Laws, are not individuals who are accountable to public officials. Therefore, under Hawkins County, the Foundation is an employer within the definition of Section 2(2) of the Act. We next examine whether the University, an exempt entity, exerts such control over the employment conditions of the Foundation's employees that the Foundation cannot engage in meaningful collective bargaining under Res-Care.

In Res Care, the Board did not assert jurisdiction even though the employer had complete control over hiring, firing, demotions, transfers, and grievances.

---

[8] 732 F.2d 123, 125-26 (10th Cir. 1984).

[9] Id. at 125 fn. 3. Accord: Southwest Texas Public Broadcasting Council, 227 NLRB 1560, 1562 (1977); Crestline Memorial Hospital Assn. v. NLRB, 668 F.2d 243, 245 (6th Cir. 1982).

The Board limits its examination in such cases to the issue of whether an employer's labor relations is subject to the control of an exempt entity, and it is irrelevant whether the exempt entity controls such other items as the nature of services to be performed by the employer, procedures and standards in the workplace, or other operational matters relating to the management of the employer's services.[10] As to labor relations, it held that, "if an employer does not have the final say on the entire package of employee compensation, i.e., wages and fringe benefits, meaningful bargaining is not possible."[11] The employer in Res-Care operated a job corps program under a cost-plus contract with the United States Department of Labor (DOL). DOL provided all funds for this program, including funds for employee compensation, and as a condition of receiving such funds, the employer was required to submit, and receive line-by-line DOL approval of, a detailed budget. Through this process, DOL approved the initial amounts for wages and benefits of the employer's employees, wage ranges and benefit levels proposed by the employer, and any change in wage rates, benefit levels, or personnel policies. Thus, the Board noted that DOL effectively imposed "direct limits on employee compensation that constitute control of employment relations," and did not rely on the fact that DOL placed "an effective ceiling on such expenditures by limiting Res-Care's total budget."[12]

Conversely, in Long Stretch Youth Home, Inc.,[13] the Board asserted jurisdiction over the employer because the state agency did not control specific wage and benefit levels. Thus, the employer's funding was not directly linked to the wage and benefit levels proposed in the total budget submitted to the state agency. The Board held that even though the state agency essentially imposed a ceiling on wage and benefit levels through its

---

[10] 280 NLRB at 674 fn. 22.

[11] Id. at 674.

[12] Id. at fn. 22.

[13] 280 NLRB 678 (1986).

control over the total budget, it did not set "specific limits on employee compensation expenditures."[14]

In subsequent cases, the Board has asserted jurisdiction where an employer exercises a degree of control over wages and benefits beyond the mere administration of a compensation package set forth in a contract. Thus, the Board has continued to draw distinctions between contracts which incorporate a specific wage schedule[15] and those that set a ceiling for the total budget.[16]

In Career Systems Development Corp.,[17] the Board asserted jurisdiction over the employer despite the fact that it had to seek state approval to shift funds from other budget areas into a general salary category. The Board found it significant that the employer was free to allocate funds within the general salary category among employees and managers as it chose. This absence of control over the general expenditure accounts by the exempt entity was not found to be a "final, practical say over wages and benefits"[18] equivalent to the control retained in Res-Care.

Similarly, in Community Interactions-Bucks County, Inc.,[19] the Board asserted jurisdiction over an employer which was not permitted to change approved budget amounts for wages, except that it could shift up to 5 percent of one line item to another budget line item without approval of the governmental entity. Even though the employer in Community Interactions was more restricted than the employer in Career Systems in exercising

---

[14] Id. at 682 n. 14.

[15] PHP Healthcare Corp., 285 NLRB 182 (1987).

[16] Community Transit Services, Inc., 290 NLRB 1167 (1988).

[17] 301 NLRB No. 59 (January 30, 1991).

[18] Id. slip op. at 2.

[19] 288 NLRB 1029 (1988).

discretion over its budget, the Board held that this cost-shifting ability enabled the employer to shift budgeted appropriations to cover collectively-bargained increases in wage and benefit levels.[20]

Moreover, in Community Transit Services, Inc.,[21] the Board asserted jurisdiction over an employer whose contract with a governmental entity effectively precluded meaningful bargaining by the employer over wages. The Board noted that the employer retained control over most other bargainable subjects, including health and life insurance, vacations, paid holidays, overtime, sick and annual leave, stock ownership plans, and personnel matters. According to the Board, Res-Care was never intended to require an employer to have control over every economic term and condition of employment before the Board can assert jurisdiction.[22] The Board also noted that in Res-Care, the government entity retained pervasive control over a much wider range of terms and conditions of the employment relationship, i.e., DOL required approval of all personnel policies involving compensatory-time, overtime, severance pay, holidays, vacations, etc.[23]

Here, unlike the employer in Res-Care and PHP Healthcare, the Foundation is self-supporting in the sense that its funding is not dependent on the University's approval of specific budget items related to employee compensation. Additionally, the Education and Administrative Codes, which regulate the Foundation's operations to some extent, are primarily concerned with avoiding fiscal mismanagement and keeping operations and expenditures consistent with public policy. This leaves the Foundation with great flexibility in hiring, firing and setting employment conditions of its employees, as

---

[20] Id. at 1032.

[21] 290 NLRB 1167, 1169 (1988).

[22] Id. at 1170 n. 5. Accord: Ebon Research Systems, 302 NLRB No. 116, slip op. at 11-14 (April 30, 1991).

[23] 290 NLRB at 1169 n. 3.

these must be only "comparable" to those of University employees to maintain the "general welfare of the campus." As noted above, the Foundation clearly has exercised flexibility in the area of labor relations, since its initial wage levels, benefits and personnel policies vary significantly from those of the University.[24] Moreover, the University President has intervened on behalf of the state only twice in the Foundation's working conditions, and has limited this intervention to the area of wage increases, to reverse Foundation decisions that he found to be adverse to the "general welfare" of the campus. The propriety of such intervention or lack thereof pursuant to the state Codes is reviewable by the courts and, as discussed above, in 1983 a discharged employee was required to seek court assistance to secure a hearing under the comparability section of the Education Code. In our view, this constitutes evidence that the University President could have exercised his authority to affect a benefit other than wages but has consistently chosen not to do so. Finally, even if the Foundation's wage increases are subject to total state control through the University President, such control is not a sufficient basis on which the Board would decline to assert jurisdiction. See Community Transit Services, supra.

Based on the foregoing, we conclude that the University does not exercise substantial control over wages and benefits and, thus, the Foundation can engage in meaningful collective bargaining. Accordingly, jurisdiction should be asserted, and the merits of the charge investigated.

R.E.A.

---

[24] See Career Systems Development, supra; Community Interactions, supra.