



July 20, 2023

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Board of Trustees
North Orange County Community College District
1830 W. Romneya Drive
Anaheim, CA 92801-1819

Re: July 25, 2023, Regular Meeting – Resolution 23/24-02, Item No. 6.a.4-5

Dear Board Members:

United Faculty-NOCCCD/CCA/CTA/NEA (UF) has learned that the Board of Trustees of the North Orange County Community College District (District) intends to consider adoption of Resolution 23/24-02, “Electing to Adopt to Maintain and Confirm the Neutrality of the North Orange County Community College District Towards its Students, Staff, Faculty, Managers, Administrators, Stakeholders, and Community Members.” I write to bring to your attention UF’s concern that Resolution 23/24-02 would likely be deemed an improper infringement on important rights under the Educational Employment Relations Act (EERA) and the U.S. Constitution. Additionally, the failure to give UF notice and an opportunity to bargain over the impacts and effects of these policies constitutes an improper unilateral change and bad faith bargaining. For these reasons, discussed below in greater detail, UF urges you to vote “no” on the motion to adopt Resolution 23/24-02.

The Proposed Adoption of Resolution 23/24-02 is an Improperly Overbroad Infringement on EERA and Free Speech Rights

As you know, under the EERA, UF is the recognized employee organization of academic employees of the District. The proposed adoption of Resolution 23/24-02 would mandate that:

[T]he Board of Trustees that the North Orange County Community College District does not allow any religious, ethnic, racial, political, or sexual orientation group flags and banners to be flown, affixed, or displayed on the district's public properties, and that only, the American flag, the flag of the State of California, Flags of the United States Armed Forces, the Prisoner of War flag, and any North Orange County Community College District, Fullerton College, Cypress College, or North Orange Continuing Education branded flags or banners containing official names, abbreviations, logos, mascots, or seals, in their traditional colors, shall be flown, affixed, or displayed

The broad nature of the language used in the resolution is likely to be interpreted by employees as prohibiting display of union-related materials. The Public Employment Relations Board (PERB) has held:

A restriction on the right to display union insignia and messages regarding working conditions is presumptively invalid; an employer may prohibit employees from displaying union insignia and messages in the workplace only if 'special circumstances' exist justifying the prohibition. [*Regents of the University of California* (2018) PERB Decision No. 2616-H, p. 10; *State of California (Department of Parks and Recreation)* (1993) PERB Decision No. 1026-S, p. 4;] The special circumstances test, adopted from *Republic Aviation Corp. v. NLRB* (1945) 324 U.S. 793, seeks to balance employees' statutory right to freely voice their perspectives and employers' duty to provide important public services. (*Regents, supra*, PERB Decision No. 2616-H, p. 10; [*East Whittier School District* (2004) PERB Decision No. 1727, pp. 9-11.]

(*City of Sacramento* (2020) PERB Decision No. 2702-M, p. 9.)

In order for the District to permissibly impose such a broad prohibition that could reasonably be interpreted to include union materials, the District would need a special circumstance justifying the need to infringe on employees' right to express support for their Union. (*East Whittier School District, supra*, PERB Dec No 1727, pp. 10-11.) The Board's proposed resolution does not expressly state a justification for this broad prohibition on employee speech, and no justification is self-evident or apparent. Thus, the proposed language of Resolution 23/24-02 could reasonably be interpreted by District employees to prohibit speech that is protected under the EERA because it restricts the right of UF and its bargaining unit members to express support for an employee organization in a manner that does not interfere with the District's educational programs.

Beyond rights protected under EERA related to collective bargaining, this resolution could also be interpreted as impermissibly infringing on more general free speech rights of public employees. The U.S. Supreme Court recently addressed the First Amendment rights of public employees and issued a decision with a markedly expanded recognition of these rights, even when an employee is on duty. In *Kennedy v. Bremerton School District*, 597 U.S. __ (2022), a district suspended a high school football coach who refused to stop engaging in public prayer on the fifty yard line after football games. The Court held that despite the fact that the coach was clearly on duty at the time of his speech activity, “treating everything teachers and coaches say in the workplace as government speech subject to government control” impermissibly restrains government-employee speech. (Slip op. at 17.) With such a restriction on free speech, “a government entity normally must satisfy at least ‘strict scrutiny,’ showing that its restrictions on the [employee’s] protected rights serve a compelling interest and are narrowly tailored to that end.” (Slip op. at 19.) Here, the Board’s proposed Resolution 23/24-02, which fails to define the term “flag” or “banner,” can be interpreted to categorically prohibit virtually any kind of speech within the confines of one’s workplace. Moreover, the resolution’s wholesale ban on “any religious, ethnic, racial, political, or sexual orientation group flags and banners” would likely be found by a court to be impermissibly overbroad. While displaying a message in an employee’s workspace would clearly be a matter of personal expression rather than one of district expression, the District’s absolute prohibition of any such displays improperly restricts employees from being able to engage in free expression of any kind and is not supported by a compelling District need.

According to the recitals in Resolution 23/24-02, the resolution is being proposed because “the district does not want to open the door for partisan, controversial, radical, or racist groups to ask for their flags and banners to be flown.” However, “[i]n order for ... school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.” *Adcock v. Board of Education*, 10 Cal.3d 60, 67-68 (1973) (quoting *Tinker v. Des Moines School Dist.*, 393 U.S. 503, 508-509). See also *Los Angeles Teachers Union, etc., v. Los Angeles City Bd. Of Ed.*, 71 Cal.2d 551, 560 (rejecting the district’s stated interest in prohibiting on-campus political speech in order to promote harmony and avoid division amongst teachers). The Board’s resolution, which can reasonably be interpreted to apply to most displays in the workplace, is unlikely to meet this justification.

Unilateral Change/ Bad Faith Bargaining

Additionally, the District’s adoption of this revised policy would further violate EERA by failing to give UF notice and an opportunity to bargain over the policy as it is applied to bargaining unit members. Because Resolution 23/24-02 sets out a prohibition on conduct in the workplace, violation of which could lead to discipline, the policy affects

the terms and conditions of employment. It is thus a change in policy on a mandatory subject of bargaining that the District cannot unilaterally implement without properly engaging in the meet-and-negotiate process with UF as the recognized employee organization for academic employees in the District.

We urge the Board to consider the serious exposure to liability that this proposed Resolution 23/24-02 will bring to the District.

Sincerely,

Christie Diep
President, United Faculty

cc. (by email only): Chancellor Byron D. Clift Breland
Frank Oppedisano, CTA UniServ Staff
Seija Rohkea, President, Adjunct Faculty United, Local AFT 6106
Dashiel Johnson, Executive Director, Adjunct Faculty United
Pamela Spence, President & Union Steward CSEA Chapter #167
Emma Lopez, CSEA