

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



THOMAS E. HALE, GEORGE LEWIS,)
PAUL F. MURPHY, BERNARD STRICKMEIER,)
)
Charging Parties,) Case No. LA-CO-16-H
)
v.) PERB Decision No. 693-H
)
CALIFORNIA FACULTY ASSOCIATION,) July 26, 1988
)
Respondent.)
_____)

Appearances; Paul F. Murphy, on behalf of Charging Parties.
Before Hesse, Chairperson; Porter, Craib and Shank, Members.

DECISION AND ORDER

This case is before the Public Employment Relations Board (Board) on appeal by Charging Parties of the Board agent's dismissal, attached hereto, of their charge that the Respondent violated section 3571.1, subdivision (b) of the Higher Education Employer-Employee Relations Act. We have reviewed the dismissal and, finding it to be free of prejudicial error, adopt it as the Decision of the Board itself.

The unfair practice charge in Case No. LA-CO-16-H is hereby DISMISSED WITHOUT LEAVE TO AMEND.

By the Board

PUBLIC EMPLOYMENT RELATIONS BOARD

Los Angeles Regional Office
3530 Wilshire Blvd., Suite 650
Los Angeles, CA 90010-2334
(213)736-3127



January 29, 1988

Paul Murphy
Mathematics Department
California Polytechnic State University
San Luis Obispo, California 93407

Re: LA-CO-16-H, Thomas E. Hale, George Lewis, Paul Murphy,
and Bernard Strickmeier v. California Faculty Association
DISMISSAL OF UNFAIR PRACTICE CHARGE

Dear Mr. Murphy:

The above-referenced unfair practice charge, filed on October 29, 1987, alleges that a field representative of the California Faculty Association (Association) made false statements about Charging Parties and that the Association failed to resolve their complaints about the matter, thereby interfering with Charging Parties' rights guaranteed by the Higher Educational Employer-Employee Relations Act (HEERA). This conduct is alleged to violate Government Code section 3571.1(b) of the HEERA.

I indicated to you in my attached letter dated January 20, 1988 that the above-referenced charge did not state a prima facie case. You were advised that if there were any factual inaccuracies or additional facts which would correct the deficiencies explained in that letter, you should amend the charge accordingly. You were further advised that unless you amended the charge to state a prima facie case, or withdrew it prior to January 27, 1988, it would be dismissed.

I have not received either a request for withdrawal or an amended charge and am therefore dismissing the charge based on the facts and reasons contained in my January 20, 1988 letter. In our telephone conversation of today, January 29, 1988, you confirmed with me that an amended charge will not be filed.

Right to Appeal

Pursuant to Public Employment Relations Board regulations, you may obtain a review of this dismissal of the charge by filing an appeal to the Board itself within twenty (20) calendar days

after service of this dismissal (California Administrative Code, title 8, section 32635(a)). To be timely filed, the original and five copies of such appeal must be actually received by the Board itself before the close of business (5:00 p.m.), or sent by telegraph, certified or Express United States mail postmarked no later than the last date set for filing. Code of Civil Procedure section 1013 shall apply. (See section 32135.) The Board's address is:

Public Employment Relations Board
1031 18th Street
Sacramento, CA 95814

If you file a timely appeal of the refusal to issue a complaint, any other party may file with the Board an original and five copies of a statement in opposition within twenty calendar days following the date of service of the appeal (section 32635(b)).

Service

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding, and a "proof of service" must accompany each copy of a document served upon a party or filed with the Board itself. (See section 32140 for the required contents and a sample form.) The document will be considered properly "served" when personally delivered or deposited in the first-class mail postage paid and properly addressed.

Extension of Time

A request for an extension of time in which to file a document with the Board itself must be in writing and filed with the Board at the previously noted address. A request for an extension must be filed at least three calendar days before the expiration of the time required for filing the document. The request must indicate good cause for and, if known, the position of each other party regarding the extension, and shall be accompanied by proof of service of the request upon each party (section 32132).

January 29, 1988
Dismissal of UPC/LA-C0-16-H
Page 3

Final Date

If no appeal is filed within the specified time limits, the dismissal will become final when the time limits have expired.

Sincerely,

JOHN SPITTLER
Acting General Counsel

By
DONN GINQZA
Regional Attorney

Attachment

cc: Glenn Rothner, Esq.

PUBLIC EMPLOYMENT RELATIONS BOARD

Los Angeles Regional Office
3530 Wilshire Blvd. Suite 650
Los Angeles, CA 90010-2334
(213) 736-3127



January 20, 1988

Paul Murphy
Mathematics Department
California Polytechnic State University
San Luis Obispo, California 93407

Re: LA-CO-16-H, Thomas E. Hale, George Lewis, Paul Murphy,
and Bernard Strickmeier v. California faculty Association

Dear Mr. Murphy:

The above-referenced unfair practice charge, filed on October 29, 1987, alleges that a field representative of the California Faculty Association (Association) made false statements about Charging Parties and that the Association failed to resolve their complaints about the matter, thereby interfering with Charging Parties' rights guaranteed by the Higher Educational Employer-Employee Relations Act (HEERA). This conduct is alleged to violate Government Code section 3571.1(b) of the HEERA.

My investigation revealed the following facts. Eileen Sullivan is a Regional Service Coordinator with the Association and has responsibility for representing employees in the bargaining unit in grievance matters. In this capacity, Sullivan represented Alfred Bachman in a grievance challenging the refusal of the Mathematics Department of the California Polytechnic State University, San Luis Obispo (University) to promote him.

An arbitration was scheduled for September 26, 1986 in connection with the grievance. Prior to this date, Philip S. Bailey, Dean of the School of Science and Mathematics, met with Charging Parties on September 16, 1986 for the purpose of preparing for the arbitration and possible settlement negotiations.

According to a chronology of events prepared by Charging Parties from notes of Dr. Murphy and submitted to the Association (Attachment 5 to charge), Charging Parties were discussing their testimony as potential witnesses. Charging Parties allege that they kept confidential all discussions from

¹Thomas E. Hale is Chair of the Mathematics Department, George M. Lewis and Paul E. Murphy are Professors of Mathematics, and H. Bernard Strickmeier is Chair of the Mathematics Department Peer Review Committee.

this meeting concerning the Bachman case. Dean Bailey contacted Dr. Murphy again on September 17 to discuss the status of the negotiations and solicited comments concerning the possible settlement. On September 18, Dean Bailey informed Dr. Murphy that Eileen Sullivan had called a representative for the University, Tom Trager, and alleged that Charging Parties had "used threats and intimidation in order to influence the selection of [the] 1986-87 School Peer Review Committee." Charging Parties denied and continue to deny that they had had any contacts with others concerning the School Peer Review Committee. Sullivan allegedly repeated her charges against Charging Parties in settlement discussions with Dean Bailey on September 19. Sullivan, according to Bailey, had charged that some members of the Mathematics Department, with some degree of involvement by Charging Parties, were calling members of other departments in an effort to influence the election of "anti-Bachman" members to the School Peer Review Committee. This activity and other unspecified activities were allegedly described by the terms "Bachman bashing," "gutter slime," "threatening," and "tampering." Sullivan is alleged to have made similar statements to Dr. Hale on September 30, 1986.

In a letter dated October 9, 1986 to Edward R. Purcell, General Manager of the Association, George Lewis complained that Sullivan slandered him in the settlement negotiations. Purcell responded in a letter dated October 22, 1986 stating that he had discussed the matter with "several principals" and failed to accept Lewis¹ characterization of Sullivan's conduct as involving slander.

In a letter to Purcell, dated January 22, 1987, Charging Parties demanded Sullivan be reprimanded and reassigned to another campus. They claimed that Sullivan's use of slander violated their academic freedom "to exercise [their] professional judgement in a personnel action without fear of retaliation, harassment [sic] and intimidation by a union staff member who might disagree with that judgement." Charging Parties attached to this letter a September 26, 1986 letter from Dean Bailey to Sullivan in which Bailey challenged Sullivan to substantiate her charges after noting he had asked the Charging Parties to respond to Sullivan's statements, some of which are quoted in the letter. Paul B. Worthman, Associate General Manager of the Association, responded in a letter dated February 4, 1987, promising to investigate their charges.

In a letter dated April 27, 1987 from the Charging Parties to Purcell, the Charging Parties claim that the Association had failed to investigate the charges against Sullivan. They also acknowledge that Purcell had indicated to them that the source of information serving as the basis for Sullivan's statements was other faculty members of the department. Purcell responded to this letter in his own dated April 29 in which he claims to

have reviewed the documentation provided to him by the Charging Parties and promises to consider any other material submitted.

In addition, Charging Parties complained to the Association in a letter dated April 28, 1987 that student evaluations of other members of the department, including at least one of the Charging Parties, was presented in support of Bachman's request for reconsideration of the promotion decision by the School Peer Review Committee. They intimated that Sullivan was involved in this breach of confidentiality and demanded that her involvement be investigated.

In another letter to Purcell from H. Bernard Strickmeier dated April 28, 1987, Purcell is chastized for failing to make an on-site investigation and for curtailing Worthman's investigation.

On May 5, 1987, Charging Parties wrote another letter to Purcell taking issue with previous statements of Purcell and demanding completion of the investigation of Sullivan.

Finally, in a letter dated September 23, 1987, Worthman expresses his regret that the settlement negotiations on the Bachman matter did not resolve their concerns and that the matter will be arbitrated. He defers any further discussion of the complaints until the arbitration is completed.

Charging Parties contend that based upon Worthman's September 23, 1987 letter, the Association has indicated it has no intention of fulfilling its promise to investigate the Sullivan matter because the issues in Bachman's arbitration are unrelated to the charges against Sullivan. By failing to intercede in the matter they claim the Association has allowed Sullivan to interfere with Charging Parties' rights guaranteed by the HEERA, namely, the right to participate in the peer review process and to exercise academic freedom. It is contended that these rights are guaranteed by Government Code sections 3561(b) and (c).

Based on the facts described above, the charge as presently written fails to state a prima facie violation of the HEERA for the reasons which follow.

Interference with Guaranteed Rights

In determining whether a prima facie violation of section 3571.1(b) of the HEERA has been stated, PERB will analyze the case according to the principles applicable for violations of 3571(a), the parallel provision prohibiting employer interference and reprisals. Service Employees International Union, Local 99 (Kimmitt) (1979) PERB Decision No. 106. Although Kimmitt arose under the Educational Employment

Relations Act (EERA), the statutory provisions regarding interference under the EERA and HEERA have been treated similarly. Regents of the University of California (1983) PERB Decision No. 308-H. In order to state a prima facie violation for interference, the Charging Parties must allege facts demonstrating that the Association's conduct tends to or does result in some harm to rights of Charging Party guaranteed by the HEERA. Carlsbad Unified School District (1979) PERB Decision No. 89.

As a preliminary matter, the allegation that the Association interfered with Charging Parties' rights through its defamatory statements appears to be barred by the six month statute of limitations. Government Code 3563.2(a). These statements were made in September 1986 and the charge was filed on October 29, 1987, nearly one year later. Although the statute of limitations may be tolled under one of several exceptions, there are no facts to indicate that the only one applicable to this case, the doctrine of equitable tolling, could be recognized here. The injured party must have more than one legal remedy available and pursue the alternative one in reasonable good faith. San Dieguito Union High School District (1982) PERB Decision No. 194. Writing letters and requesting an investigation from the Association would not appear to satisfy this requirement, since the Association is not a judicial body or other tribunal.

Charging Parties contend that Government Code sections 3561(b) and (c) create substantive rights guaranteed by the HEERA.²

²Section 3561(b) provides:

The Legislature recognizes that joint decisionmaking and consultation between administration and faculty or academic employees is the long-accepted manner of governing institutions of higher learning and is essential to the performance of the educational missions of these institutions, and declares that it is the purpose of this chapter to both preserve and encourage that process. Nothing contained in this chapter shall be construed to restrict, limit or prohibit the full exercise of the functions of the faculty in any shared governance mechanisms or practices, including the Academic Senate of the University of California and the divisions thereof, the Academic Senates of the California State

Although it is not clear that these provisions do create any rights redressable through the unfair practice procedure, even assuming arguendo that they do, the statements made would not constitute a violation of the HEERA. The test for whether statements constitute interference or coercion depends upon whether, under the existing circumstances, they reasonably tend to interfere or coerce in the exercise of guaranteed rights, not whether the employee subjectively perceives the statements in that manner. Clovis Unified School District (1984) PERB Decision No. 389. Since Sullivan has not threatened to take any adverse action against Charging Parties and has no direct authority to affect their employment status as a consequence of their participation or non-participation in the peer review process, there is no reasonable tendency to interfere with such activity. In the context of an advocate stating her position in settlement negotiations, allegedly false or exaggerated statements would not appear to carry such authority within the wider academic community so as to significantly deter individuals from continuing to participate in peer review. In addition, the facts alleged do not indicate that Sullivan intended for her statements to be republished to other members of the faculty or even to Charging Parties. Nor do they indicate that the statements were in fact republished to other third parties or that the reasonable and probable consequence of

(footnote 2, con't)

University, and other faculty councils, with respect to policies on academic and professional matters affecting the California State University, the University of California, or Hastings College of the Law. The principle of peer review of appointment, promotion, retention, and tenure for academic employees shall be preserved.

Section 3561(c) provides:

It is the policy of the State of California to encourage the pursuit of excellence in teaching, research, and learning through the free exchange of ideas among the faculty, students, and staff of the University of California, Hastings College of the Law, and the California State University. All parties subject to this chapter shall respect and endeavor to preserve academic freedom in the University of California, Hastings College of the Law, and the California State University.

her conduct would be that the statements would be republished to persons other than the Charging Parties and her immediate audience.

An additional reason for concluding that the statements do not violate the HEERA is that Government Code section 3571.3 provides that:

The expression of any views, arguments, or opinions or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute, or be evidence of, an unfair labor practice under any provision of this chapter, unless such expression contains a threat of reprisal, force, or promise of benefit. . .

This provision would serve to protect such statements as "gutterslime," "Bachman bashing," and the like, since no facts are alleged to indicate accompanying threats or inducements.

Also, under precedential authority, PERB has ruled that speech by union activists is protected so long as it is related to matters of legitimate concern to employees as employees and is not so "opprobrious, flagrant, insulting, defamatory, insubordinate, or fraught with malice" (Mt. San Antonio Community College District (1982) PERB Decision No. 224) as to cause "substantial disruption of or material interference with school activities." (Richmond Unified School District (1979) PERB Decision No. 99; Rancho Santiago Community College District (1986) PERB Decision No. 602) In Rancho Santiago, PERB found to be protected statements charging the employer with falsifying teacher evaluations for purposes of political retaliation, invading privacy, and administrative meddling to break up faculty departments. Id. Although these free speech rule cases do not specifically address the scope of protected speech when statements are made by a union official against other members of the bargaining unit, they do recognize the general proposition that speech in the context of union activities is accorded **generous protection**. In the specific context of grievance activities this notion has also been recognized to promote important **statutory** purposes. It has been held pursuant to the Labor Management Relations Act that statements made by grievance representatives during the processing of a grievance are privileged and cannot support a libel action because **were** it otherwise, "the likelihood of the attainment of peaceful adjustments or disposition of the issues involved between [the parties] through the conference or bargaining processes would be greatly decreased." General Motors Corporation v. Mendicki, 367 F.2d 66 [63 LRRM-2257] (10th Cir. 1966)

Breach of Duty of Fair Representation

The charge also fails to state a prima facie violation under the theory of a breach of the duty of fair representation to the extent that the Association may have failed to discipline Sullivan. A labor organization can breach its duty of fair representation by engaging in conduct toward its Members that is arbitrary, discriminatory or in bad faith. Rocklin Teachers Professional Association (Romero) (1978) PERB Decision No.

124. However, this duty extends only to "activities that have a substantial impact on the relationships of unit members to their employers . . ." and does not apply to those " . . . activities which do not directly involve the employer or which are strictly internal union matters." Service Employees International Union, Local 99 (Kimmitt), supra. It is claimed that the injury to Charging Parties in allowing Sullivan to continue in her post is that it interferes with their right to participate in peer review activities. However, the selection of the peer review committee is outside the scope of representation and is hence not a matter upon which these employees rely upon their exclusive representative in dealings with their employer. Government Code section 3562(r). There are no other facts to indicate that the failure to discipline Sullivan has any substantial impact on Charging Parties' relationship to their employer.

Finally, even if a duty is owed to discipline a grievance representative, Charging Parties have failed to allege sufficient facts to demonstrate that the Association has acted in an "arbitrary, discriminatory or bad faith manner." They allege that the Association reneged on Northman's promise to "thoroughly investigate the matter." They insist that Purcell failed to give them an adequate opportunity to defend themselves because he was not forthcoming with the details surrounding the alleged peer review tampering. However, they acknowledge that the Association has solicited written documentation of their complaints, has reviewed the material, and has discussed the matter with "several principals." Without more, the fact that they are dissatisfied with the manner in which the investigation was conducted, or the lack of corrective action, or that Purcell decided the investigation was complete, demonstrate arbitrary, discriminatory or bad faith conduct. Moreover, Northman's final communication does not unequivocally evidence an intent to close the matter.

For these reasons, the charge as presently written does not state a prima facie case. If you feel that there are any factual inaccuracies in this letter or any additional facts which would correct the deficiencies explained above, please amend the charge accordingly. The amended charge should be prepared on a standard PERB unfair practice charge form clearly labeled First Amended Charge, contain all the facts and

LA-CO-16-H
January 20, 1988
Page 8

allegations you wish to make, and be signed under penalty of perjury by the charging party. The amended charge must be served on the respondent and the original proof of service must be filed with PERB. If I do not receive an amended charge or withdrawal from you before January 27, 1988, I shall dismiss your charge. If you have any questions on how to proceed, please call me at (213) 736-3127.

Sincerely,

DONN GINOZA
Regional Attorney