

Board agent dismissed her charge for failure to state a prima facie violation of HEERA.

The Board has reviewed the entire record, including the Board agent's warning and dismissal letters and Higgins' appeal,² and we hereby affirm the dismissal.

JURISDICTION

The Board finds that it has jurisdiction in this case for the following reasons: (1) Our review of the file indicates that Higgins' charge was timely filed; (2) Higgins is an employee and the University is an employer within the meaning of HEERA section 3562; (3) Higgins alleges a violation of HEERA section 3571(a); and (4) PERB is not required to defer this action under the parties' contractual grievance procedure.³

HIGGINS' APPEAL

Higgins appeals the dismissal on several grounds, which fall into two main categories. The first category consists of

²No response to the appeal was filed by the University.

³Higgins' charge alleged that the University discriminated against her in two ways: (1) by issuing her a negative performance evaluation, and (2) by eliminating a job duty. The contractual grievance and arbitration procedures were not available for either of those disputes for the following reasons:

- Disputes over negative ratings on a performance evaluation are expressly excluded from the contractual grievance procedure when, as in Higgins' case, the overall performance rating is satisfactory. (CBA Art. 10, sec. C.)
- Although removal of a job duty based on union affiliation was arguably grievable as a violation of Article 4.A.2 of the CBA, Higgins could no longer grieve it when she filed her unfair practice charge because the 30-day contractual deadline for presenting grievances had expired. Member Johnson concurs in the result and finds that PERB has jurisdiction based solely on the collective bargaining agreement's (CBA) non-binding arbitration clause with respect to the issues before PERB.

evidence that Higgins offers for the first time on appeal regarding the credibility of Betty Yalich (Yalich).⁴ In the second category, Higgins lists several errors that she believes the Board agent made in analyzing her case.⁵

DISCUSSION

New Evidence Raised on Appeal

Higgins' appeal contains new evidence to support prior allegations.⁶ PERB Regulation 32635⁷ describes the Board's scope of review on appeal. Regulation 32635 reads, in pertinent part:

(a) Within 20 days of the date of service of a dismissal, the charging party may appeal the dismissal to the Board itself.

⁴Higgins alleged that she requested a job description relevant to her charge prior to filing the charge, but the University claimed that no such job description existed. On appeal, Higgins alleges that she had recently asked for and received such a job description; she argues that this chain of events demonstrates the fifth factor in Novato Unified School District (1982) PERB Decision No. 210 (employer's failure to offer the employee justification at the time it took action or the offering of exaggerated, vague, or ambiguous reasons). However, she does not allege that the job description existed and was hidden from her at the time she originally requested it; although she hints that there was a bad motive on the University's part by mentioning Yalich's credibility, she does not make that accusation expressly.

⁵Briefly, they included her claim that the Board agent made the following errors: (1) Inadequately analyzing her evidence of "disparate treatment;" (2) Failing to accurately analyze a certain phone conversation, relative to the negative item on Higgins' performance evaluation; (3) Stating (in error) that Yalich had discussed the change in Higgins' job duty before implementing it; and (4) Erroneously concluding that Higgins had failed to prove the nexus element of a prima facie case.

⁶The new evidence, described above in the appeal, has "recently come to light" and relates to the inferences to be drawn from the University's failure to provide a job description before Higgins filed her charge.

⁷PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

(b) Unless good cause is shown, a charging party may not present on appeal new charge allegations or new supporting evidence. (Emphasis added.)

Interpreting this regulation, PERB has been reluctant to find that good cause existed to allow a party to raise new allegations or new evidence for the first time on appeal.⁸ The reason for this reluctance is stated in South San Francisco Unified School District, supra:

The purpose of PERB Regulation 32635(b) is to require the charging party to present its allegations and supporting evidence to the Board agent in the first instance, so that the Board agent can fully investigate the charge prior to deciding whether to issue a complaint or dismiss the case.

Furthermore, as the Board noted in California School Employees Association (LaFountain), supra. when a party has the opportunity to cure defects in his prima facie case at earlier stages and does not do so, the Board is reluctant to allow him to raise such facts or evidence later. Higgins' warning letter contained the standard language which stated that if there were any factual inaccuracies in the warning letter or any additional facts which would correct the deficiencies explained therein, she should amend the charge accordingly; she did not.

Since Higgins has not made any showing of good cause, we cannot consider the "new evidence" portion of her appeal.

⁸See, e.g., South San Francisco Unified School District (1990) PERB Decision No. 830; Association of California State Attorneys (Winston) (1992) PERB Decision No. 931-S; California School Employees Association (Watts) (1993) PERB Decision No. 1008; California State Employees Association (Hackett) (1993) PERB Decision No. 1012-S; California School Employees Association (LaFountain) (1992) PERB Decision No. 925. In all these cases, the Board found no good cause existed because no explanation was offered.

Prima Facie Case

The remainder of Higgins' appeal constitutes an attempt to address the deficiencies in her case by challenging the Board agent's analysis. For example, Higgins claims that the Board agent "did not deal with the disparate treatment" element, as evidenced by her statement in the amended charge that Dr. Stephen Cohen (Cohen) had ordered her on occasion "to call up some companies and yell at them." It is not clear how this allegation, even if true, constitutes "disparate treatment" for purposes of the Novato test, since she does not allege that other people were treated differently by Cohen; nor does she specify how that is retaliatory behavior; nor does she provide the nexus element. Higgins' statement of the incidents still falls short of establishing a prima facie case.

Higgins also claims that the Board agent "misanalyzed" her words that led to the rudeness complaint. Review of the file does not reveal any evidence that his analysis was incorrect or unreasonable; hence, we conclude that she simply disagrees with the Board agent's characterization of the event.⁹

Finally, Higgins offers a "common denominator" theory, urging the Board to infer retaliatory intent from the mere fact that since many of the same people communicated frequently during

⁹Higgins' appeal also claims that the Board agent was misinformed regarding whether Yalich discussed the change in job duty with her before implementing it. Even if the Board agent misinterpreted the actual order of events, it did not affect the validity of the dismissal, because it is not the notice or lack of notice that was at issue. Rather, what the Board agent was assessing was whether Higgins had successfully established a retaliatory motive by reciting this chain of events. We agree that she had not.

the course of business, they shared information about Higgins and acted upon it. Although a vague implication emerges of concerted activity, merely placing persons in common situations does not, without more, establish either that they shared information or that they retaliated against Higgins. It was her obligation to allege those facts, and she has not done so.

ORDER

The Board hereby AFFIRMS the Board agent's dismissal of the unfair practice charge in Case No. SF-CE-392-H.

Member Johnson joined in this Decision.

Chair Blair's concurrence and dissent begins on page 7.

BLAIR, Chair, concurring and dissenting: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Mary G. Higgins (Higgins) of a Board agent's dismissal of her unfair practice charge. In her charge, Higgins alleged that the Regents of the University of California violated section 3571(a) of the Higher Education Employer-Employee Relations Act (HEERA)¹ by issuing her a negative performance evaluation and eliminating a job duty. I concur in the determination that Higgins failed to allege facts sufficient to establish a prima facie case. I would, therefore, affirm the Board agent's dismissal of Higgins' unfair practice charge.

I join Member Johnson in expressly rejecting Member Garcia's unsupported theory on PERB's jurisdiction as contrary to Board precedent. Member Garcia asserts that PERB has jurisdiction in this case because Higgins failed to comply with the 30-day contractual time frame to file a grievance. In Eureka City School District (1988) PERB Decision No. 702, the Board held that PERB does not obtain jurisdiction to consider a dispute which is subject to the contractual grievance and arbitration

¹HEERA section 3571 states, in pertinent part:

It shall be unlawful for the higher education employer to do any of the following:

- (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.

procedure where the grievant failed to meet contractual time lines.

PERB properly has jurisdiction in this case because Article 4, section E.2. of the effective collective bargaining agreement prohibits the parties from submitting the subject of this dispute to final and binding arbitration. (Lake Elsinore School District (1987) PERB Decision No. 646.)

PUBLIC EMPLOYMENT RELATIONS BOARD



San Francisco Regional Office
177 Post Street, 9th Floor
San Francisco, CA 94108-4737
(415) 557-1350



April 11, 1994

Mary G. Higgins

Re: **DISMISSAL OF UNFAIR PRACTICE CHARGE/REFUSAL TO ISSUE COMPLAINT**

Mary G. Higgins v. Regents of the University of California
Unfair Practice Charge No. SF-CE-392-H

Dear Ms. Higgins:

The above-referenced unfair practice charge, filed on December 16, 1993 and amended on February 8, 1994, alleges that the Regents of the University of California (University) discriminated against Mary Higgins by issuing her a negative performance evaluation and eliminating a job duty. This conduct is alleged to violate Government Code section 3571(a) of the Higher Education Employer-Employee Relations Act (HEERA).

I indicated to you, in my attached letter dated January 28, 1994, 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. You were further advised that, unless you amended the charge to state a prima facie case or withdrew it prior to February 7, 1994, the charge would be dismissed. You were granted an extension to file an amended charge. On February 8, 1994, you filed an amended charge.

The amended charge contained additional information in response to the deficiencies noted in the attached letter dated January 28, 1994 letter. With regard to the first of the two telephone calls which resulted in the criticism in the evaluation for discourteous behavior, the amended charge alleges that Higgins represented a grievant involved in a dispute with Kathy Balestreri over a disciplinary action. The employee reported to Balestreri but worked primarily for an Assistant Hospital Director. The Assistant Hospital Director had approached the grievant and told her that she should withdraw the grievance because Balestreri would retaliate against her. In the telephone conversation which prompted the report from Balestreri to Yalich, Balestreri made an unsolicited call to Higgins returning a message left for her superior, Bill Kerr, Hospital Director, regarding a union complaint about employee health benefits.

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Balestreri said, "I see you have a call into Bill, can I help you?" Higgins said "No. If I wanted to speak to you I would have called you." Higgins then hung up. Higgins later told Yalich that she denied that she hung up the telephone. The amended charge alleges that Yalich conducted only a cursory investigation of the matter. Higgins alleges that she told Yalich that she should "check" out the situation with the Assistant Director. No other facts supporting the contention of cursory investigation are alleged, although Higgins does make an assertion that the grievant was being intimidated and that this inappropriate conduct suggests a motive for the criticism by Balestreri.

Evidence of Yalich's anti-union motivation for her inclusion of Balestreri's criticism is lacking. Yalich did not have the same motive to retaliate against Higgins as Balestreri apparently did. The grievance was not filed against Yalich. There is no evidence that Yalich had knowledge of the grievance. There is only evidence that Yalich knew that Higgins was a union representative. There is no evidence that Yalich has demonstrated anti-union bias in the past so as to support an inference that she would have desired to support Balestreri's version of the events regardless of the facts. Higgins admits in the charge that she hung up on Balestreri when Balestreri asked if she should respond to Higgins' complaint about employee health benefits -- a matter which Higgins believed was of no concern to Balestreri. Higgins does not allege that she explained to Yalich the surrounding circumstances of her relationship with Balestreri which might have justified further investigation. Even if she had, the level of investigation expected to support an informal adverse comment in an evaluation would not be high. There is no evidence that Yalich failed to elicit favorable information from Balestreri in her investigation of the incident.

The amended charge also contains information concerning the second telephone call which prompted criticism of Higgins' telephone manners. Higgins called to complain to David Odata, Assistant Director for Medical Center Human Resources, about the distribution of a payroll code number to various supervisors. This number had traditionally been used for employees who had been transferred to the Mt. Zion facility after the University acquired the site. The employees wanted to retain the ability to have their checks picked up by Higgins using the exclusive code number. When the number was given to other supervisors, Higgins would pick up checks for employees for whom she did not have pick-up authorization. Odata's office was not successful in ceasing the supervisor's use of the code number. Therefore, Higgins called Odata to complain. Odata reported to Yalich that

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Higgins had called one of the supervisors "stupid." Higgins alleges that she did not use this word, but does acknowledge saying, "She doesn't know what she is doing."

The amended charge alleges that a third complaint was made by Donys Powell. Yalich raised it with Higgins prior to the evaluation. Powell had apparently complained that Higgins was rude in a conversation concerning the renewal of a contract with an outside vendor. Higgins denied being rude. Yalich said that she would investigate. She did not tell Higgins of the results of the investigation. The evaluation form indicates that only two complaints were cited by Yalich in her discussion of the issue with Higgins. The University indicated to the undersigned that Powell did not want to go on record regarding the matter. Higgins does not allege that this incident was one of the two on which Yalich relied. The charge alleges that the two incidents involved individuals against whom Higgins had grievances. There is no allegation that any grievance or complaint had been lodged against Powell. Higgins does allege that at the time Yalich asked her about this incident, she told Higgins that she wanted to recommend Higgins for a special performance award. Higgins was not nominated for the award.

The allegations regarding the telephone complaints are insufficient to establish the cursory investigation element, or any other element, supporting unlawful motivation.

The amended charge also contains a letter from Higgins to Yalich complaining about the removal of a job duty, which the charge alleges was retaliatory. Higgins had been assigned the duty of processing certain documents referred to as "Requests for Payroll Action Forms." Higgins alleges that this was implemented without notice. However, she also acknowledges that, prior to implementation of the change, Yalich asked Higgins if she objected. Yalich responded to Higgins' letter, explaining why the change was made and indicating that further modifications of the processing process could be made or a return to the previous process explored if the problems raised by Higgins persisted.

The allegations with regard to the removal of the job duty fail to establish evidence of unlawful motivation.

The amended charge also refers to other conduct of Yalich and the University which is claimed to demonstrate an anti-union bias. This evidence, which is not recited here, has been reviewed, but found lacking in probative value.

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Based on the analysis of the new evidence above and the facts and reasons contained in my January 28, 1994 letter, the charge fails to state a prima facie violation and therefore is dismissed.

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. (Cal. Code of Regs., tit. 8, sec. 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 p.m.) or sent by telegraph, certified or Express United States mail postmarked no later than the last date set for filing. (Cal. Code of Regs., tit. 8, sec. 32135.) Code of Civil Procedure section 1013 shall apply. 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 (20) calendar days following the date of service of the appeal. (Cal. Code of Regs., tit. 8, sec. 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 Cal. Code of Regs., tit. 8, sec. 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 (3) 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

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be accompanied by proof of service of the request upon each party. (Cal. Code of Regs., tit. 8, sec. 32132.)

Final Date

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

Sincerely,

ROBERT THOMPSON
Deputy General Counsel

By _____
DONN GINOZA

Regional Attorney

Attachment

cc: Lawrence W. Hanson

PUBLIC EMPLOYMENT RELATIONS BOARD



San Francisco Regional Office
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January 28, 1994

Mary G. Higgins

Re: **WARNING LETTER**

Mary G. Higgins v. Regents of the University of California
Unfair Practice Charge No. SF-CE-392-H

Dear Ms. Higgins:

The above-referenced unfair practice charge, filed on December 16, 1993, alleges that the Regents of the University of California discriminated against Mary Higgins by issuing her a negative performance evaluation and eliminating a job duty. This conduct is alleged to violate Government Code section 3571(a) of the Higher Education Employer-Employee Relations Act (HEERA).

Investigation of the charge revealed the following. Mary G. Higgins is employed by the University as an Administrative Assistant III in the Administration Section at the University of California at San Francisco (UCSF) Clinical Laboratories. Her supervisor is Betty Yalich, Management Services Officer III. Her duties generally involve budget and accounting matters, purchasing, billing, and personnel and payroll functions. She has engaged in protected activities over a period of years through her involvement with the American Federation of State, County and Municipal Employees (AFSCME) as a job steward and member of the bargaining team.

The factual statement of the charge states as follows:

My supervisor Betty Yalich - UCSF Clinical Labs gave me an "unsatisfactory" rating on one item of my P-E [performance evaluation] that I believe was related to my work as a steward. The remarks were in the "overall evaluation" and "complies with University Telephone and House Standards."

In the course of my job, I handle thousands of calls a year. Two calls which are the

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basis of the evaluation rating were either individuals against whom grievances have been filed or their advocate. I believe their characterization of the circumstances and the subsequent evaluation are in retaliation to [sic] my steward/bargaining team union work. Further, one job duty was removed from me without any explanation, which I also believe is in retaliation.

The "overall evaluation" section of the evaluation (which grades her "more than satisfactory") states as follows:

For the past two years Mary has single-handedly managed the business office for extensive periods of time. Her ability to juggle many responsibilities and to quickly dispense with large volumes of work, as well as her willingness to come in on weekends and holidays as work volume dictates, has resulted in significant savings for the Hospital. Her efforts and talents are commendable. Further, her sense of responsibility regarding ETR and payroll issues, billing problem resolution, and benefits information dissemination is an asset to the staff and to the department. The one detraction from Mary's performance has been complaints from individuals regarding the style of communication they have received from Mary. She has been perceived as angry and discourteous. [O]bservance of the University House and Telephone Standards is required by all employees.

Overall, Mary's performance has been impressive and her efforts invaluable in managing the laboratory's business office.

The University does not deny that Higgins has participated in the activities of AFSCME and that her supervisor had knowledge of these activities.

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

To demonstrate a violation of HEERA section 3571(a), the charging party must show that: (1) the employee exercised rights under HEERA; (2) the employer had knowledge of the exercise of those rights; and (3) the employer imposed or threatened to impose reprisals, discriminated or threatened to discriminate, or otherwise interfered with, restrained or coerced the employees because of the exercise of those rights. (Novato Unified School District (1982) PERB Dec. No. 210; Carlsbad Unified School District (1979) PERB Dec. No. 89; Department of Developmental Services (1982) PERB Dec. No. 228-S; California State University (Sacramento) (1982) PERB Dec. No. 211-H.)

Although the timing of the employer's adverse action in close temporal proximity to the employee's protected conduct is an important factor, it does not, without more, demonstrate the necessary connection or "nexus" between the adverse action and the protected conduct. (Moreland Elementary School District (1982) PERB Dec. No. 227.) Facts establishing one or more of the following additional factors must also be present: (1) the employer's disparate treatment of the employee; (2) the employer's departure from established procedures and standards when dealing with the employee; (3) the employer's inconsistent or contradictory justifications for its actions; (4) the employer's cursory investigation of the employee's misconduct; (5) the employer's failure to offer the employee justification at the time it took action or the offering of exaggerated, vague, or ambiguous reasons; or (6) any other facts which might demonstrate the employer's unlawful motive. (Novato Unified School District, supra PERB Dec. No. 210; North Sacramento School District (1982) PERB Dec. No. 264.) As presently written, this charge fails to demonstrate any of these factors and therefore does not state a prima facie violation of HEERA section 3543.5(a).

For these reasons the charge, as presently written, does not state a prima facie case. If there are any factual inaccuracies in this letter or additional facts which would correct the deficiencies explained above, please amend the charge. The amended charge should be prepared on a standard PERB unfair practice charge form, clearly labeled First Amended Charge, contain all the facts and 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 **February 1, 1994**, I

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shall dismiss your charge. If you have any questions, please
call me at (415) 557-1350.

Sincerely,


DONN GINOZA
Regional Attorney