

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



KURT L. BENFIELD,)
)
Charging Party,) Case No. SA-CE-122-H
)
v.) PERB Decision No. 1327-H
)
REGENTS OF THE UNIVERSITY OF) April 26, 1999
CALIFORNIA,)
)
Respondent.)
_____)

Appearances: Mark R. Kruger, Attorney, for Kurt L. Benfield;
Beverly Wilcox, University Advocate, for Regents of the
University of California.

Before Caffrey, Chairman; Dyer and Amador, Members.

DECISION AND ORDER

AMADOR, Member: This case is before the Public Employment Relations Board (Board) on appeal by Kurt L. Benfield (Benfield) to a Board agent's dismissal (attached) of his unfair practice charge. Benfield alleged that the Regents of the University of California (University) violated section 3571(a) and (d) of the Higher Education Employer-Employee Relations Act (HEERA)¹ when it

¹HEERA is codified at Government Code section 3560 et seq. 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. For purposes of this subdivision, "employee" includes an applicant for employment or reemployment.

terminated his employment.

The Board has reviewed the entire record in this case, including the Board agent's warning and dismissal letters, the original and amended unfair practice charge, Benfield's appeal and the University's response. The Board finds the warning and dismissal letters to be free of prejudicial error and adopts them as the decision of the Board itself.

The unfair practice charge in Case No. SA-CE-122-H is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chairman Caffrey and Member Dyer joined in this Decision.

(d) Dominate or interfere with the formation or administration of any employee organization, or contribute financial or other support to it, or in any way encourage employees to join any organization in preference to another. However, subject to rules and regulations adopted by the board pursuant to Section 3563, an employer shall not be prohibited from permitting employees to engage in meeting and conferring or consulting during working hours without loss of pay or benefits.

PUBLIC EMPLOYMENT RELATIONS BOARD



Sacramento Regional Office
1031 18th Street, Room 102
Sacramento, CA 95814-4174
(916) 322-3198



December 11, 1998

Mark R. Kruger, Attorney

Re: Kurt L. Benfield v. Regents of the University of California
Unfair Practice Charge No. SA-CE-122-H
DISMISSAL LETTER

Dear Mr. Kruger:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on August 18, 1998. The charge alleges that the Regents of the University of California (University) violated the Higher Education Employer-Employee Relations Act (HEERA), Government Code section 3571(a) and (d), when it terminated the employment of Kurt L. Benfield.

I indicated to Mr. Benfield in the attached letter dated November 5, 1998, that the above-referenced charge did not state a prima facie case. Mr. Benfield was advised that if there were any factual inaccuracies or additional facts which would correct the deficiencies explained in that letter, the charge should be amended. He was further advised that unless the charge was amended to state a prima facie case or it was withdrawn prior to November 16, 1998, the charge would be dismissed.

On November 13, 1998, you telephoned to inform me that you were representing Mr. Benfield in this matter and you requested an extension of time to file an amended charge. An extension was granted to December 7, 1998. On that date I received an amended unfair practice charge.

In the attached warning letter, I indicated that based upon the facts alleged in the original charge, PERB was without jurisdiction to consider the merits of the charge because the charge was untimely filed. The amended charge provides additional information in response to the timeliness issue.

Mr. Benfield was employed as a police officer at the University of California, Davis campus. During his employment, Mr. Benfield served as president of the UC Davis police officers association. Mr. Benfield participated in numerous protected activities, including the effort to certify a union to exclusively represent University police officers systemwide.

On May 1, 1996, the University sent Mr. Benfield a letter of intent to dismiss him from his position. The termination of employment was effective May 31, 1996. On June 3, 1996, Mr. Benfield filed a grievance challenging his termination. Mr. Benfield's grievance advanced through a lengthy process which concluded in binding arbitration.

The amended charge alleges that during the grievance and arbitration process the University twice presented settlement proposals to Mr. Benfield. On March 28, 1997, the University offered Mr. Benfield, among other things, a "retraction of his termination." This offer was not accepted.

On June 17, 1997, the University again presented this offer to Mr. Benfield. Although the offer was not accepted, the charge alleges that Mr. Benfield and his counsel believed the settlement offer "remained open and available to him up to and including the date the decision of the arbitrator was served on all parties on February 19, 1998." The charge continues:

Officer Benfield believed that up to and including February 19, 1998, the University was wavering on its intent to terminate him. Once it became apparent that the University, upon receipt of the arbitrator's decision would not resolve the issue as it had previously offered, Officer Benfield knew that the University would continue with its intent to terminate him despite his protected activities.

The charging party contends that the "open ended settlement proposal evinces a wavering of the University's intent to continue its unfair practice of terminating Officer Benfield as a result of his union activities." The charging party asserts that the University's "wavering of intent" continued until February 19, 1998, the date the arbitrator's decision upholding his dismissal was issued.

Based on the facts provided in the original and amended unfair practice charge, the charge fails to state a prima facie case.

As I previously discussed in the attached letter, HEERA section 3563.2(a) prohibits PERB from taking jurisdiction and issuing a complaint based upon an unfair practice which occurred more than six months prior to the filing of the charge. The charge was filed on August 18, 1998. Therefore, only alleged unfair practices which occurred on or after February 18, 1998 are timely filed.

Mr. Benfield received from the University a letter of intent to dismiss him from his employment on May 1, 1996. The dismissal was effective May 31, 1996. The termination of Mr. Benfield's employment, allegedly in retaliation for his participation in protected activities, occurred well outside the statutory limitations period.

In the amended charge, the charging party argues that by making two settlement offers to Mr. Benfield to "retract his termination," the University was wavering in its intent to terminate Mr. Benfield's employment.

This argument fails, however, because Mr. Benfield's termination was effective May 31, 1996. On that date, Mr. Benfield was no longer an employee of the University. The fact that the University later offered to "retract" the termination demonstrates only that the University was willing to reverse its prior action, not that it was still considering whether to terminate Mr. Benfield's employment. Accordingly, the adverse act was effective on May 31, 1996. Mr. Benfield was notified of the University's intent to implement the termination on May 1, 1996. Both of these dates fall outside the statutory limitations period, therefore, PERB is without jurisdiction to consider the merits of the unfair practice charge and the charge must be 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 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
Robin Wright Wesley
Regional Attorney

Attachment

cc: Edward M. Opton, Jr.
Michael L. Sheesley

PUBLIC EMPLOYMENT RELATIONS BOARD



Sacramento Regional Office
1031 18th Street, Room 102
Sacramento, CA 95814-4174
(916) 322-3198



November 5, 1998

Kurt L. Benfield

Re: Kurt L. Benfield v. Regents of the University of California
Unfair Practice Charge No. SA-CE-122-H
WARNING LETTER

Dear Mr. Benfield:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on August 18, 1998. The charge alleges that the Regents of the University of California (University) violated the Higher Education Employer-Employee Relations Act (HEERA), Government Code section 3571(a) and (d), when it terminated your employment.

Investigation of the charge revealed the following pertinent information. You were hired by the University of California, Davis as a police officer on January 2, 1990. At the time, University police officers were not exclusively represented by an employee organization. During the course of your employment you received several commendations and you were rated "very good" to "excellent" on your performance evaluations.

In early 1994, you were elected president of the UC Davis police officers association (POA), a nonexclusive representative. As president, you filed grievances and met with management of the University Police Department (Department) to discuss matters of concern to University police officers. You were also involved in a grievance and a related federal lawsuit filed against the University concerning FLSA standards regarding overtime pay. As a result of the lawsuit, the University changed its overtime policy and paid approximately \$176,000 to police department employees. You were also involved in organizing meetings at UC campuses statewide concerning the certification of a union to exclusively represent all University police officers. You actively obtained signature cards and undertook other activities, of which the University was aware, in an attempt to certify an exclusive representative. The charge fails to indicate when you engaged in these protected activities.

You allege that after you were elected president of the UC Davis POA the University began to retaliate against you. You stated that you were denied the right to attend advanced officer training and specialty position training assignments. After

being selected as a weaponless defense instructor, you were never allowed to attend a weaponless defense instructor course, although other instructors attended these courses. You applied for a Field Training Officer (FTO) specialty position within the Department on several occasions. Four or five times you were scheduled for the FTO oral interview. However, just prior to each interview, the interviews were canceled by the Department. In one instance, the interview was canceled five minutes before it was to begin. You were told that the interview had been canceled because one of the panelists, Sergeant Joyce Souza, had gone home sick. When you contacted Sergeant Souza later at home, she told you that she was not ill but had been ordered to go home by Lieutenant Rita Spaur.

You allege that as a result of your activities as POA president and your efforts toward systemwide organization of University police officers, you were subject to seven internal affairs investigations. In one instance, involving a specialty assignment on "Picnic Day" at UC Davis, you arrived approximately five minutes late for work, after having called work to report car problems. You were advised that a disciplinary comment card for tardiness would be placed in your personnel file. You learned that two other officers arrived much later for their assignments on Picnic Day, however, neither employee was given a disciplinary comment card. The charge fails to state when these adverse acts occurred.

In 1994, Sergeant Jerry Bounds prepared your annual evaluation, rating you as "very good." The Department ordered Sergeant Bounds to rewrite your evaluation and to lower your evaluation rating. In his many years with the University, Sergeant Bounds has been ordered to rewrite only one other evaluation, that of a previous POA president. You also allege that other police officers serving as POA officers at UC Davis and other University campuses have been disciplined or terminated as a result of their union activity.

In January 1996, the Department initiated another internal affairs investigation against you. The Department alleged that you improperly utilized the Department computer and sent electronic mail in order to perform union business and communicate with union members. On April 19, 1996, approximately three months before the scheduled systemwide certification election to determine union representation for police officers, you were placed on administrative leave. On April 19, after relinquishing your weapon and badge, Captain Michael Corkery gave you a ride to your vehicle. During the ride, Captain Corkery asked you who was going to run the union's certification campaign now that you had been terminated. When you responded that you

would continue to direct the union's certification activities, Captain Corkery appeared extremely frustrated.

On May 1, 1996, you received from the University a letter of intent to dismiss you from your position. The termination of your employment was effective May 31, 1996. On June 3, 1996, you filed a grievance challenging your termination. The grievance process concluded in binding arbitration and an arbitrator's decision upholding your dismissal was issued on February 19, 1998. The arbitrator's decision was received by your attorney on February 22, 1998. You contend that the University failed to comply with the grievance process which requires grievances to be resolved within 90 days.

You assert that the University violated HEERA section 3571(a) when it terminated your employment for engaging in protected activity. You also contend that the University violated HEERA section 3571(d) by interfering with the formation and administration of the union by ordering your dismissal, as the organizer of the systemwide certification effort, three months before the election.

Based upon the facts stated above, the charge fails to state a prima facie case.

HEERA section 3563.2(a) states that PERB "shall not issue a complaint in respect of any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge."

PERB has held that the six month statutory limitations period begins to run when the charging party knew or should have known of the conduct giving rise to the alleged unfair practice. (Regents of the University of California (1983) PERB Decision No. 359-H.) Since the charge was filed on August 18, 1998, the statutory limitations period began to run on February 18, 1998. Accordingly, only alleged unfair practices which occurred on or after February 18, 1998 are timely filed.

On May 1, 1996, you received from the University a letter of intent to dismiss you from your position effective May 31, 1996. Therefore, as of May 1, 1996, you were on notice that the University intended to terminate your employment. PERB is without jurisdiction to consider unfair practice charges which are not filed within six months of the alleged unfair practice, in this case, the May 1, 1996 notice of termination. The charge fails to state when the remaining alleged unlawful adverse acts occurred. However, it is clear that they occurred prior to your being placed on administrative leave on April 19, 1996.

Accordingly, these alleged unfair practices are also untimely filed.

Citing several PERB decisions, you contend that the statute of limitations was tolled while you appealed your dismissal through the University's grievance and arbitration process. Your grievance was filed on June 3, 1996 and the arbitrator's decision was issued on February 19, 1998.

Under the Ralph C. Dills Act and the Educational Employment Relations Act, the statute of limitations period is tolled during the time it takes a charging party to exhaust the grievance procedure. (Government Code sections 3514.5(a) and 3541.5(a) respectively.) However, the language of HEERA does not provide for statutory tolling and, therefore, the Board has concluded that under HEERA the six month statute of limitations is not tolled by the pursuit of a grievance. (California State University (1995) PERB Decision No. 1094-H.)

In support of the timeliness of your charge you cite three proposed decisions issued by PERB administrative law judges (ALJ) which apply the doctrine of equitable tolling. These early PERB ALJ decisions are not helpful to your position. First, proposed decisions issued by PERB ALJs which are not adopted by the Board itself, are not considered precedential decisions and may not be relied upon. (See PERB Regulation 32215.) Second, in a later PERB decision, California State University, San Diego (1989) PERB Decision No. 718-H, the Board held that the six month statutory limitations period is jurisdictional in nature and can not be waived by either a party or by the Board itself. Under prior PERB decisions, the doctrine of equitable tolling allowed the Board, in its discretion and in furtherance of the principles of equity, to waive the six month statute of limitations period while a matter was being pursued through formal legal processes. However, in Regents of the University of California (UC-AFT) (1990) PERB Decision No. 826-H, the Board concluded that it no longer had the discretion to waive the six month statutory limitations period and, therefore, the doctrine of equitable tolling is no longer applicable.

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 have the case number written on the top right hand corner of the charge form. The amended charge must be

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served on the respondent's representative and the original proof of service must be filed with PERB. If I do not receive an amended charge or withdrawal from you before November 16, 1998, your charge will be dismissed. If you have any questions, please call me at (916) 322-3198, ext 305.

Sincerely,

Robin Wright ~~Wesley~~
Regional Attorney