STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

JANIE ANN ENTER, Charging Party, v. REGENTS OF THE UNIVERSITY OF CALIFORNIA (LOS ALAMOS NATIONAL LABORATORY), Respondent.	Case No. SF-CE-613-H PERB Decision No. 1519-H May 7, 2003

Appearances: Janie Ann Enter, on her own behalf; Office of Laboratory Counsel by Ellen M. Cain Castille, Attorney, for Regents of the University of California (Los Alamos National Laboratory).

Before Baker, Whitehead and Neima, Members.

DECISION

WHITEHEAD, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Janie Ann Enter (Enter) of a Board agent's dismissal (attached) of her unfair practice charge. The charge alleged that the Regents of the University of California (Los Alamos National Laboratory) (LANL) violated the Higher Education Employer-Employee Relations Act (HEERA)[1] by denying Enter the representative of her choice in a disciplinary meeting and by ordering a factfinder, hired by LANL to investigate her case, to modify the wording in his summary of her complaint. Enter alleged that this conduct

[1]HEERA is codified at Government Code section 3560 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

constituted a violation of Government Code section 3509,[2] and HEERA sections 3560, 3563, 3571(a), 3571.3 and 3581.1. After his investigation, the Board agent dismissed the charge for failure to state a prima facie case. In addition, the Board agent found that Enter did not establish that her allegation regarding the factfinder's tampering with his report occurred within the six-month statute of limitations. The Board has reviewed the entire record in this case, including the original charge, correspondence from Enter dated April 25, 2002, LANL's response to the charge, the Board agent's warning and dismissal letters, Enter's appeal, and LANL's response to Enter's appeal. The Board finds the Board agent's warning and dismissal letters to be free of prejudicial error and affirms the Board agent's dismissal consistent with the following discussion.

DISCUSSION

In her appeal, Enter reiterates the allegations in her charge regarding LANL's denial of her right to representation at the disciplinary meeting and LANL's tampering with the factfinder's report. She further asserts that she was not treated fairly by the Board agent by not being provided with sufficient time to respond to the warning letter. Enter further argues that the Board agent made no effort to determine whether or not she truly is a supervisor, a point on which she acknowledges confusion.

The Board finds that the Board agent properly considered Enter an "employee," and not a "supervisor," under HEERA.

With respect to Enter's claim that LANL denied her the representative of her choice at the January 29, 2002 disciplinary meeting, the Board agrees with the Board agent's conclusion

[2]Government Code section 3509 is a provision of the Meyers-Milias-Brown Act that applies to employees of local public agencies in California and not LANL employees.

that Enter lacked standing to allege a unilateral change.[3] (Oxnard School District (Gorcey/Tripp) (1988) PERB Decision No. 667.) The Board further agrees with the Board agent's findings that this conduct failed to demonstrate a prima facie case of interference with Enter's rights in violation of HEERA section 3571(a).

In her appeal, Enter disputed the Board agent's finding that LANL's "tampering" with the factfinder's summary of her grievance did not interfere with her rights under HEERA and LANL policy, but she did not address the untimeliness of this allegation. In the dismissal, the Board agent held that this allegation failed to state a prima facie case and in the alternative, failed to establish that the alleged conduct occurred within the six month period preceding the filing of the charge. He reasoned that Enter's charge did not provide the date of LANL's alleged tampering with the report or the date of issuance of the report. We hold that there is no need to assess whether LANL's conduct in this instance interfered with Enter's protected rights since this aspect of her charge was properly found to be untimely. The Board thereby lacks jurisdiction to evaluate the merits of the charge. (HEERA sec. 3563.2(a); Service Employees International Union, Local 790 (Bryant) (2001) PERB Decision No. 1419.) The Board therefore does not adopt the Board agent's discussion of the merits of this claim.

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[3]However, the Board disagrees that its holding in Regents of the University of California (1990) PERB Decision No. 849-H (Regents of UC) is relevant to the disposition of this matter, and thereby declines to adopt that portion of his discussion in the dismissal of this charge. His reference to that case for the principle that the Board does not enforce an employer's policy is misplaced in this instance. Instead, in Regents of UC, the Board confirmed that under sections 3563.2(b) and 3567, it has no authority to require the university to arbitrate a grievance brought by an individual employee where the collective bargaining agreement (CBA) required the union and the university to meet to select the arbitrator and where there was otherwise no evidence of an unfair practice. The CBA provided that if the parties did not agree to the arbitrator within the time limits set in the CBA, then the grievance was ineligible for arbitration. This holding bears little resemblance to the Board's authority to enforce an employer's policy.

Finally, the Board disagrees with Enter's assertion that she was not provided adequate time to respond to the warning letter. The Board agent sent Enter a warning letter dated April 12, 2002 containing an explanation of the applicable timelines. On April 26, 2002, the due date for an amended charge, Enter faxed a letter to the Board agent, which complained about the short time frame for filing an amended charge. The Board agent called Enter on April 26 and left a message asking whether she wished to request an extension of time or file an amended charge. Enter did not respond. On May 2, 2002, the Board agent properly issued the dismissal.

ORDER

The unfair practice charge in Case No. SF-CE-613-H is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Baker and Neima joined in this Decision.

STATE OF CALIFORNIA GRAY DAVIS, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
1031 18th Street
Sacramento, CA 95814-4174
Telephone: (916) 327-8383
Fax: (916) 327-6377

May 2, 2002

Janie Ann Enter

Re: Janie Ann Enter v. Regents of the University of California (Los Alamos National Laboratory)
Unfair Practice Charge No. SF-CE-613-H
DISMISSAL LETTER

Dear Ms. Enter:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on March 7, 2002. In your charge, you allege that the Regents of the University of California (Los Alamos National Laboratory) (hereafter, Laboratory or UC) violated the Higher Education Employer-Employee Relations Act (HEERA)[1] by the denial of desired representation and by tampering with a factfinder's summary of a complaint filed by you.

I indicated to you in my attached letter dated April 12, 2002, 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 April 26, 2002, the charge would be dismissed.

I have not received either an amended charge or a request for withdrawal. However, on April 26, 2002, I did receive a fax copy of a letter from you acknowledging receipt of my earlier letter and protesting as unreasonable the duration of the period of time allowed to respond. Your letter did not request additional time nor indicate whether you intended to amend or withdraw the charge in this matter. I telephoned you on April 26, 2002 and left a message inquiring whether you wished to request an extension of time and/or whether you intended to file an amended charge. I have not received a return call nor any further correspondence from you.

Therefore, I am dismissing the charge based on the facts and reasons contained in my April 12, 2002 letter.

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[1] HEERA is codified at Government Code section 3560 et seq. The text of the HEERA and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

Right to Appeal

Pursuant to PERB Regulations,[2] 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. (Regulation 32635(a).) Any document filed with the Board must contain the case name and number, and the original and five (5) copies of all documents must be provided to the Board.

A document is considered "filed" when actually received before the close of business (5 p.m.) on the last day set for filing or when mailed by certified or Express United States mail, as shown on the postal receipt or postmark, or delivered to a common carrier promising overnight delivery, as shown on the carrier's receipt, not later than the last day set for filing. (Regulations 32135(a) and 32130.)

A document is also considered "filed" when received by facsimile transmission before the close of business on the last day for filing together with a Facsimile Transmission Cover Sheet which meets the requirements of Regulation 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Regulations 32135(b), (c) and (d); see also Regulations 32090 and 32130.)

The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95814-4174
FAX: (916) 327-7960

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. (Regulation 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 Regulation 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. A document filed by facsimile transmission may be concurrently served via facsimile transmission on all parties to the proceeding. (Regulation 32135(c).)

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[2] PERB's Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

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. (Regulation 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
General Counsel

By _
Les Chisholm
Regional Director

Attachment

cc: James N. Odell
Ellen M. Castille

STATE OF CALIFORNIA GRAY DAVIS, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
1031 18th Street
Sacramento, CA 95814-4174
Telephone: (916) 327-8383
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April 12, 2002

Janie Ann Enter

Re: Janie Ann Enter v. Regents of the University of California (Los Alamos National Laboratory)
Unfair Practice Charge No. SF-CE-613-H
WARNING LETTER

Dear Ms. Enter:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on March 7, 2002. In your charge, you allege that the Regents of the University of California (Los Alamos National Laboratory) (hereafter, Laboratory or UC) violated the Higher Education Employer-Employee Relations Act (HEERA)[1] by the denial of desired representation and by tampering with a factfinder's summary of a complaint filed by you.

You are employed as a technical staff member by the Laboratory. Your charge alleges that you are a supervisor within the meaning of HEERA section 3580.3 but does not provide specific facts to establish such status.[2] On November 27, 2000, you filed a grievance alleging that you were the victim of physical assault and battery by your supervisor. That grievance is still pending. On July 29, 2001, you filed a second grievance, also still pending, alleging retaliation by the Laboratory for filing the first grievance. The nature of the alleged retaliation is not set forth in your charge.

On January 27, 2002, you received a written counseling that you allege is further retaliation for the filing of the two grievances.

Your supervisor, Mark Pickrell, communicated with you on January 24, 2002, that a time needed to be arranged for a meeting. His email acknowledged that you wished to arrange for a representative at the meeting and that you were entitled to same. However, Mr. Pickrell also stated that he was only obligated to wait a reasonable period of time for you to arrange for representation, that two days was reasonable and that attempts to schedule the meeting had

[1] HEERA is codified at Government Code section 3560 et seq. The text of the HEERA and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

[2] In its response to the charge, the Laboratory refers to you as a non-supervisory employee.

already been underway longer than two days, and that you were required to find a substitute representative if your desired representative was not available.

On January 28, 2002, Phil Kruger, the Laboratory's Deputy Division Director, Human Resources, informed you that the purpose of the meeting being scheduled was to give you a written counseling and not to obtain facts from you. Mr. Kruger continued by stating that HEERA does not require UC to allow representation for such a meeting but that the Laboratory was willing to allow you to have a representative, within certain constraints. The limitations referenced by Mr. Kruger were that your representative must be either a non-supervisory employee of the Laboratory or a representative of an employee organization registered with PERB for purposes of representing Laboratory employees. Mr. Kruger also informed you that your supervisor was entitled to know in advance who your representative would be. Finally, Mr. Kruger reminded you that you were required to attend the meeting and that you would be subject to disciplinary action if you failed to do so.

You and Mr. Kruger exchanged further emails on this subject, but the disagreement persisted concerning whether you were entitled to a representative without any limitations for a meeting at which your supervisor would deliver a written counseling. According to the Laboratory, the meeting did take place on January 29, 2002, and a non-supervisory employee of the Laboratory served as your representative. That person was not your desired choice as a representative.

As a part of the grievance process for your first grievance, filed in November 2000 concerning the alleged physical assault and battery by your supervisor, the Laboratory appointed a factfinder. The factfinder is a volunteer and a Laboratory employee, whose assignment in this respect was to prepare a report for Laboratory managers to use in adjudicating the grievance. You contend that the factfinder was not allowed to operate independently and was ordered to change reference to your allegation of "assault and battery" to a reference instead to "inappropriate touching." In its response to this charge, the Laboratory submitted a declaration by the factfinder stating that he did consult with the Laboratory's Project Leader for Complaint Resolution Services, that he was advised that the term "assault and battery" represented a legal conclusion, and that he did agree to use the term "inappropriate touching" in his findings of fact along with a footnote explaining why he concluded thusly. The factfinder's declaration also states that your complaint, in your own terms, was also included in his report. Neither your statement of the charge nor the Laboratory's response indicates when the report was issued.

Discussion

As noted above, your charge alleges in conclusory fashion that you are a supervisor within the meaning of HEERA. As discussed with you by telephone on March 12, 2002, your status as a supervisor, if correct, requires that your charge be dismissed, as supervisors under HEERA lack standing to file unfair practice charges with PERB. HEERA section 3580 makes rights and provisions of HEERA, other than those set forth in Article 6.5, inapplicable to supervisors, and HEERA's Article 6.5 does not provide for PERB jurisdiction over its provisions nor for supervisors to have a right to file an unfair practice charge with PERB.

However, as your charge does not contain facts establishing your supervisory status and the Laboratory disputes you are a supervisor, the alleged violations set forth in your charge will be analyzed to determine whether either constitutes a prima facie violation of HEERA. To the extent your charge relies on alleged violations of HEERA sections 3580 through 3581.7, those allegations shall be dismissed.

Denial of Representative of Choice for January 29, 2002 Meeting

The theory underlying this alleged violation variously refers to the Laboratory's conduct as unlawful discrimination and/or interference with your statutory rights, interference with your rights under Laboratory policy, and as an unlawful unilateral change in Laboratory policy.[3] However, individual employees do not have standing to allege unilateral change violations (Oxnard School District (Gorcey/Tripp) (1988) PERB Decision No. 667), and PERB does not enforce policies of an employer (see, e.g., Regents of the University of California (1990) PERB Decision No. 849-H). This charge allegation is properly analyzed as an interference with employee rights in violation of HEERA section 3571(a).

An employee required to attend an investigatory interview with the employer is entitled to union representation where the employee has a reasonable basis to believe discipline may result from the meeting. PERB adopted the Weingarten[4] rule in Rio Hondo Community College District (1982) PERB Decision No. 260. In order to establish a violation of this right, the charging party must demonstrate: (a) the employee requested representation, (b) for an investigatory meeting, (c) which the employee reasonably believed might result in disciplinary action; and (d) the employer denied the request. (See Redwoods Community College District v. Public Employment Relations Board (1984) 159 Cal.App.3d 617.; Fremont Union High School District (1983) PERB Decision No. 301; University of California (Lawrence Berkeley Laboratory) (1993) PERB Decision No. 998-H.)

In Rio Hondo Community College District (1982) PERB Decision No. 260, the Board cited with approval Baton Rouge Water Works Company (1979) 246 NLRB 995, which provided:

> the right to representation applies to a disciplinary interview, whether labeled as investigatory or not, so long as the interview

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[3] The charge also, at times refers to alleged violations of statutory provisions that are not applicable to you, including provisions of the Meyers-Milias-Brown Act (MMBA) that applies to employees of local public agencies in California and not to UC employees. Such allegations shall be dismissed.

[4] In National Labor Relations Board v. Weingarten (1975) 420 U.S. 251 (Weingarten), the Court granted employees the right to representation during disciplinary interviews. The NLRB extended Weingarten rights to nonunion employees in nonunion employees in Epilepsy Foundation of Northeast Ohio (2000) 331 NLRB 92, holding that even in the absence of a union an employee was entitled to have a co-worker present at an investigatory interview.

> in question is not merely for the purpose of informing the employee that he or she is being disciplined.

In approving the Weingarten rule, the U.S. Supreme Court noted with approval that the National Labor Relations Board would not apply it to "such run-of-the-mill shop-floor conversations as, for example, the giving of instructions or training or needed corrections of work techniques." (Weingarten, quoting Quality Manufacturing Co. (1972) 195 NLRB 197, 199 [79 LRRM 1269, 1271].)

A right to union representation may be held to exist in the absence of an objectively reasonable fear of discipline only under "highly unusual circumstances." (Redwoods Community College District v. PERB (1984) 159 Cal.App.3d 617 [205 Cal.Rptr. 523].) The finding of "highly unusual circumstances" in the Redwoods case was based on the requirement that the employee attend a meeting which she no longer sought over her appeal of a negative performance rating; the fact that the interview was investigatory and formal; the interview was held by a high-ranking official of the employer; and the hostile attitude of the official toward the employee.

The charge fails to establish that you enjoyed a right to representation under the Weingarten standard, as the Laboratory clearly informed you in advance that the purpose of the meeting was not investigatory and was for the purpose of delivering to you a written counseling that had already been decided. Thus, no violation would be found under this test.

Even if a right to representation is held to arguably exist under the Redwoods case, this element of your charge must still be dismissed. Cases applying Weingarten do not require an employer to postpone an interview to allow for a specific representative to be present, so long as another representative is available. (Pacific Gas & Electric Co. (1981) 253 NLRB 1143; Roadway Express (1979) 246 NLRB 1127; Coca-Cola Bottling Co. (1977) 227 NLRB 1276.) Your charge concedes that you had representation at the meeting in question, and the charge does not contain facts establishing that the denial of a representative of your choice resulted in even slight harm to your rights under HEERA. (Carlsbad Unified School District (1979) PERB Decision No. 89.)

For these reasons, this element of your charge must be dismissed.

Tampering with Report by Factfinder

The test for whether a respondent has interfered with the rights of employees under the HEERA does not require that unlawful motive be established, only that at least slight harm to employee rights results from the conduct. The Board described the standard as follows:

> [I]n order to establish a prima facie case of unlawful interference, the charging party must establish that the respondent's conduct tends to or does result in some harm to employee rights granted under EERA. (State of California (Department of Developmental Services) (1983) PERB Decision No. 344-S, citing Carlsbad

> Unified School District (1979) PERB Decision No. 89; Service Employees International Union, Local 99 (Kimmett) (1979) PERB Decision No. 106.)

Under the above-described test, a violation may only be found if HEERA provides the claimed rights. (Los Rios Community College District, supra, PERB Decision No. 1274.)

The "right" to an independent, neutral evaluation of your grievance at issue in this case is one arguably established by Laboratory policy, not by HEERA. While HEERA in section 3567 provides an employee the right to present grievances to his or her employer, the statute does not prescribe how the employer will process and consider such grievances and does not require a factfinding that is free of management influence or control. In Chaffey Joint Union High School District (1982) PERB Decision No. 202, the Board considered the meaning of language in Government Code section 3543[5] that is very similar to that of section 3567. In that case, the Board interpreted section 3543 as "merely providing an employer who agrees to hear an individual grievance with an affirmative defense against a charge that it has thereby bypassed the exclusive representative on matters of wages, hours or terms and conditions of employment." Thus, your charge fails to establish that HEERA provides the claimed right that the Laboratory's conduct allegedly violated. For this reason, this element of the charge must be dismissed. (Los Rios Community College District, supra, PERB Decision No. 1274.)

In addition, the charge fails to establish that the alleged conduct occurred within the six months' period preceding the filing of the charge. HEERA section 3563.2(a) prohibits PERB from issuing a complaint with respect to "any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge." The limitations period begins to run once the charging party knows, or should have known, of the conduct underlying the charge. (Gavilan Joint Community College District (1996) PERB Decision No. 1177.) The charging party bears the burden of demonstrating that the charge is timely filed. (Tehachapi Unified School District (1993) PERB Decision No. 1024; State of California (Department of Insurance) (1997) PERB Decision No. 1197-S.)

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[5] Section 3543 is contained within the Educational Employment Relations Act, which confers collective bargaining and union organization rights upon employees in public schools in California. Section 3543 provides in relevant part as follows:

> Any employee may at any time present grievances to his or her employer, and have such grievances adjusted, without the intervention of the exclusive representative, as long as the adjustment is reached prior to arbitration pursuant to Sections 3548.5, 3548.6, 3548.7, and 3548.8 and the adjustment is not inconsistent with the terms of a written agreement then in effect; provided that the public school employer shall not agree to a resolution of the grievance until the exclusive representative has received a copy of the grievance and the proposed resolution and has been given the opportunity to file a response.

Alleged Retaliation on January 27, 2002

As noted above, your charge alleges in conclusory fashion that the disciplinary action of January 27, 2002, was itself retaliatory and related to your two earlier grievances. The charge as written does not offer additional facts or argument in support of this assertion.

To demonstrate a violation of HEERA section 3571(a) under a discrimination theory, 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 Decision No. 210 (Novato); Carlsbad Unified School District (1979) PERB Decision No. 89.)

Although the timing of the employer's adverse action in close temporal proximity to the employee's protected conduct is an important factor (North Sacramento School District (1982) PERB Decision No. 264), 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 Decision 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 (State of California (Department of Transportation) (1984) PERB Decision No. 459-S); (2) the employer's departure from established procedures and standards when dealing with the employee (Santa Clara Unified School District (1979) PERB Decision No. 104.); (3) the employer's inconsistent or contradictory justifications for its actions (State of California (Department of Parks and Recreation) (1983) PERB Decision No. 328-S; (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; (6) employer animosity towards union activists (Cupertino Union Elementary School District) (1986) PERB Decision No. 572.); or (7) any other facts which might demonstrate the employer's unlawful motive. (Novato; North Sacramento School District, supra, PERB Decision No. 264.)

Your charge fails to demonstrate prima facie evidence of the connection or "nexus" necessary for a finding of a violation.

Conclusion

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 that 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 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 April 26, 2002, I shall dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Les Chisholm
Regional Director