**STATE OF CALIFORNIA**
**DECISION OF THE**
**PUBLIC EMPLOYMENT RELATIONS BOARD**

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| GEORGE SARKA,<br><br>Charging Party,<br><br>v.<br><br>REGENTS OF THE UNIVERSITY OF CALIFORNIA,<br><br>Respondent. | Case No. LA-CE-748-H<br><br>PERB Decision No. 1585-H<br><br>January 15, 2004 |

Appearance: Pappy & Davis by George A. Pappy, Attorney, for George Sarka.

Before Baker, Whitehead and Neima, Members.

DECISION

BAKER, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by George Sarka (Sarka) of a Board agent's dismissal of his unfair practice charge. The charge alleged that the Regents of the University of California violated the Higher Education Employer-Employee Relations Act (HEERA)[1] by retaliating against Sarka for his participation in protected activities. Specifically, Sarka alleges that he was terminated because he filed grievances, filed unfair practice charges, and served as a union job steward.

After reviewing the entire record in this matter, including the original charge, the warning and dismissal letter, and Sarka's appeal, the Board issues the following decision.

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

## BACKGROUND

Sarka's charge consists of a thirty-six page statement of facts and approximately 300 pages of attachments. According to the charge, Sarka was employed as an assistant clinical professor of medicine at the University of California at Los Angeles (UCLA). Sarka became one of the first physicians involved in the University Professional and Technical Employees (UPTE) union in 1998. Sarka alleges that in May 2000, he organized his fellow union members in criticizing Vice Chancellor, Winston Doby (Doby) for his handling of the "UCLA Student Health situation." Sarka alleges that problems "exploded" during the years 2001 and 2002, culminating in the filing of an unfair practice charge.[2] On April 26, 2001, Sarka again wrote to Doby expressing his "concerns." Sarka alleges that because of the April 26, 2001 letter, there was a "modus operandi" by UCLA to terminate him.

On July 2, 2002, Sarka was given notice of his termination. The notice cited Sarka's refusal to follow directions and general poor performance. Sarka responded to the notice and participated in a Skelly[3] hearing on July 12, 2002. Sarka received his final notice of termination on August 16, 2002. The notice informed Sarka that he was being terminated effective August 23, 2002. Sarka filed the instant unfair practice charge on February 24, 2003.

## BOARD AGENT'S DISMISSAL

The Board agent first warned Sarka that his charge did not contain a "clear and concise statement of the facts and conduct alleged to constitute an unfair practice." (PERB

[2] That charge, unfair practice Case No. LA-CE-647-H, is currently on appeal before the Board.

[3] See Skelly v. State Personnel Bd. (1975) 15 Cal.3d 194 [124 Cal.Rptr. 14].

Reg. 32615(a)(5).[4]) The Board agent noted that Sarka had alleged violations of HEERA in conclusory terms instead of alleging specific facts. Sarka's charge instructed the Board agent to review the attached documents for necessary details. The Board agent responded that, "It is the Charging Party's responsibility to state in a clear and concise manner facts which he alleges support a violation. It is not the Board agent's responsibility to read a large stack of documents to ascertain what if any violation occurred."

After reviewing the facts as described above, the Board agent warned Sarka that the charge failed to state a prima facie case. First, the charge was filed on February 24, 2003. Given the six-month statute of limitations, only allegations of misconduct occurring on or after August 23, 2002 were timely. Although Sarka was terminated effective August 23, 2002, he was given notice of his termination well before that time. The Board agent cited PERB precedent holding that it is the notice of termination, not the effective date of termination, that triggers the running of the statute of limitations. (Regents of the University of California (1999) PERB Decision No. 1327-H (Regents).) Accordingly, the Board agent found Sarka's charge untimely, since Sarka had notice of his termination prior to August 23, 2002.

Second, the Board agent warned Sarka that the charge failed to establish nexus. The notice of termination was well-documented and there were no facts indicating any disparate treatment or other circumstantial evidence of animus. After Sarka failed to file an amended charge, the Board agent issued a dismissal letter on March 21, 2003.

## SARKA'S APPEAL

Sarka raises three issues on appeal. First, he takes issue with the Board agent's statement that it was not the Board agent's job to search for the relevant facts from a large

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

stack of documents. Sarka argues that is precisely the job of a Board agent. Sarka points to PERB Regulation 32620 for the proposition that a Board agent must "assist" the charging party and "make inquiries and review the charge." Sarka argues that he should not be penalized for submitting "too much evidence."

Next, Sarka argues that the Board's decision in Regents conflicts with the California Supreme Court's decision in Romano v. Rockwell Internat., Inc. (1996) 14 Cal.4th 479 [59 Cal.Rptr.2d 20] (Romano). In that decision, the court held that under the Fair Employment and Housing Act (FEHA) (Gov. Code, sec. 12900 et seq.), a cause of action for wrongful termination accrues on the actual date of termination, not on the date when the employee receives notice of his termination. Sarka argues that the Romano rule should be adopted by PERB.

Finally, Sarka argues that he has demonstrated sufficient nexus to establish a prima facie case. Sarka again details his history of protected activities on behalf of the UPTE and argues that his termination was retaliatory.

## DISCUSSION

### 1. Duties of the Board Agent

Sarka's charge states that, "Dr. Sarka was terminated and harassed by management because he engaged in union activities." The charge then directs the Board agent to review 300 pages of attachments. The Board agrees with the Board agent that Sarka has failed to provide a clear and concise statement of the facts as required by PERB Regulation 32615.

Sarka's reliance upon PERB Regulation 32620 is of no aid to him. Regulation 32620 requires the Board agent to, "Assist the charging party to state in proper form the information required by Section 32615." This is exactly what the Board agent did in the warning letter to

Sarka. Regulation 32620 also requires the Board agent to make inquires and review the charge. However, the charge to be reviewed must comply with PERB Regulation 32615. In short, the Board finds nothing in PERB Regulation 32620 that conflicts with the requirement in Section 32615 to provide a clear and concise statement of the facts.

Even though Sarka failed to provide a clear and concise statement of the facts, the record establishes that the Board agent thoroughly reviewed the documents attached to Sarka's charge. Based upon that review, the Board agent set forth the relevant facts as best she could in the warning letter. If Sarka disputed those facts, he could have filed an amended charge, which he did not. Having selected not to file an amended charge, Sarka is in no position to now complain about the actions of the Board agent.

2. Triggering of Statute of Limitations

PERB is prohibited 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." (HEERA sec. 3563.2(a).) 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.) With respect to allegations of wrongful termination, PERB has held that it is the notice of termination, not the effective date of termination that triggers the running of the statute of limitations. (Regents.) In this matter, Sarka received notice on July 2, 2002, that UCLA intended to terminate him and received a final notice of termination on August 16, 2002. Sarka was actually terminated on August 23, 2002. This charge was not filed until February 24, 2003. Accordingly, Sarka's charge is untimely if either the July 2 or August 16 notices triggered the running of the statute of

limitations. Under Regents, Sarka's charge would only be timely if the limitations period began to run on August 23, his actual date of termination.

Sarka argues that PERB should overturn Regents and adopt the rule set forth in Romano. Romano addressed the identical issue faced here except in an action arising under FEHA (Gov. Code section 12900 et seq.). In Romano, the plaintiff was notified in December 1998 that he would be terminated once he accumulated a certain number of service credits under the defendant's retirement plan. The plaintiff did not reach that point until May 1991. After he was actually terminated, the plaintiff filed an age discrimination suit under FEHA. The issue before the California Supreme Court was whether the one-year statute of limitations under FEHA should begin to run from when plaintiff received notice of his termination or from when he was actually terminated.

Relying upon the language of FEHA, the Court held that the statute of limitations did not begin to run until the date of plaintiff's actual termination. (Romano, at p. 493.) The Court held that such a rule is consistent with the plain language of FEHA and the remedial purposes of FEHA. The Court also noted that such a bright-line rule is easier to apply since, "[u]like notice of termination, which frequently is oral and may be conditional or equivocal, the date of actual termination is a date that in most cases is subject to little dispute." (Romano, at p. 494.)

The Board agrees that Romano represents the better rule when dealing with reprisals and discrimination. Under HEERA, it is an unfair practice for an employer to impose "reprisals" or "discriminate" against an employee for protected activity. (HEERA sec. 3571.) The statute of limitations under HEERA is triggered when the unfair practice occurs. (HEERA sec. 3563.2(a).) Under Romano, where the unfair practice is termination of employment, the

unfair practice does not occur until the date of actual termination. The statute of limitations "would not run from the earlier date of notification of discharge, because on that date the unlawful practice (that is, the discharge) had not yet 'occurred.'" (Romero, at p. 493.) Because the language prohibiting discrimination under HEERA is similar to that of FEHA, the Board finds that the Romano rule should control. Accordingly, the statute of limitations on Sarka's charge alleging termination for protected activities does not begin to run until the date of actual termination. To the extent that Regents and other cases hold differently, they should be overruled.

The Board's adoption of the Romano rule is not only supported by the language of HEERA, but also by public policy. First, as the Court in Romano noted, "such a rule has the obvious benefit of simplicity." In most cases, there will be little dispute as to the date of actual termination. Second, the Romano rule acts to encourage the use of internal grievance and appeal procedures instead of forcing employees to immediately file a unfair practice charge with PERB. Especially where there is a negotiated grievance procedure as part of a collective bargaining agreement, the Board believes that employees should be encouraged to utilize internal grievance and appeal procedures whenever possible. This is because the Board believes as a matter of sound public policy that disputes should be settled at the most informal level whenever possible. (Long Beach Community College District (2003) PERB Decision No. 1564.) Settling disputes at an informal level also acts to conserve PERB's limited resources. For all these reasons, the Board adopts the Romano holding that the limitations period does not begin to run until the date of actual termination.

The Board notes, however, that HEERA and the other statutes administered by PERB differ significantly from FEHA in one important aspect. Unlike FEHA, HEERA makes it

an unfair practice to "threaten to impose reprisals" and "threaten to discriminate." (HEERA sec. 3571.) Thus, HEERA prohibits both the taking of adverse action and threatening to take adverse action because of protected activity.

The Board's adoption of the Romano rule today is not intended to affect a charging party's right to file a charge over a threat. Where the alleged unfair practice is a threat, the statute of limitations is triggered by the threat itself and would remain so even after adoption of the Romano rule. This is because the threat and the actualization of the threat can be viewed as separate violations under the language of the statute. (HEERA sec. 3571.) Thus, where an employer threatened to terminate an employee and then actually terminated the employee, both the threat and actual termination constitute violations of HEERA and each action triggers the running of the limitations period.

3. Prima Facie Case

Although Sarka's charge is timely, the Board must nevertheless dismiss the charge because it fails to state a prima facie case of discrimination. Specifically, Sarka's charge fails to establish the element of nexus required by Novato Unified School District (1982) PERB Decision No. 210. Sarka's only proffered evidence of discrimination is his allegation that the charges in his termination notice are unsubstantiated. In short, Sarka argues that UCLA lacked good cause to terminate his employment. However, the fact that the charges against Sarka are unsubstantiated, even if true, does not by itself establish the required nexus.

Sarka also argues that he has a long history of pro-union activism. Sarka asserts that his union activities increased significantly in the six months prior to his termination. However, apart from this conclusory allegation, Sarka identifies no protected activity (e.g., filing of a grievance, etc.) close in time to his termination. Thus, "timing" (one of the traditional indicia

of discrimination) is not present. Furthermore, there is no evidence of disparate treatment or other inconsistencies that might constitute circumstantial evidence of discrimination. Sarka was provided an opportunity to correct these deficiencies by filing an amended charge, but chose not to do so. Accordingly, the charge must be dismissed.

## ORDER

The unfair practice charge in Case No. LA-CE-748-H is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Whitehead and Neima joined in this Decision.