STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

YI-KUANG LIU, Charging Party, v. REGENTS OF THE UNIVERSITY OF CALIFORNIA, Respondent.	Case No. LA-CE-1065-H PERB Decision No. 2153-H December 30, 2010

Appearance: Yi-Kuang Liu, on his own behalf.

Before Dowdin Calvillo, Chair; McKeag and Wesley, Members.

DECISION

WESLEY, Member: This case is before the Public Employment Relations Board (Board) on appeal by Yi-Kuang Liu (Liu) of a Board agent's dismissal (attached) 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 discriminating against Liu, wrongfully terminating his employment, breaching his employment contract, defaming his character, and misrepresenting his scholarly/academic efforts.

The Board has reviewed the dismissal and the record in light of Liu's appeal and the relevant law. Based on this review, the Board finds the Board agent's warning and dismissal letters to be a correct statement of the law and well-reasoned, and therefore adopts them as the decision of the Board itself.[2]

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[1] HEERA is codified at Government Code section 3560 et seq.

[2] The Board does not adopt the references to *Campbell Municipal Employees Assn. v. City of Campbell* (1982) 131 Cal.App.3d 416 and *San Leandro Police Officers Assn. v. City of San Leandro* (1976) 55 Cal.App.3d 553, as support for the well-established discrimination test set forth in *Novato Unified School District* (1982) PERB Decision No. 210. (*Fontana Unified School District* (2010) PERB Decision No. 2147.)

ORDER

The unfair practice charge in Case No. LA-CE-1065-H is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chair Dowdin Calvillo and Member McKeag joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD

Los Angeles Regional Office
700 N. Central Ave., Suite 200
Glendale, CA 91203-3219
Telephone: (818) 551-2809
Fax: (818) 551-2820

March 4, 2010

Yi-Kuang Liu

Re: *Yi-Kuang Liu v. Regents of the University of California*
Unfair Practice Charge No. LA-CE-1065-H
DISMISSAL LETTER

Dear Mr. Liu:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on April 2, 2009 and was amended on September 30, October 1, and December 22, 2009.[1] Yi-Kuang Liu alleges that the Regents of the University of California (UCLA or University) violated the Higher Education Employer-Employee Relations Act (HEERA or Act)[2] by discriminating against him, wrongfully terminating his employment, breaching his employment contract, defaming his character, and misrepresenting his scholarly/academic "efforts."

Mr. Liu was informed in the attached Warning Letter dated December 3, 2009, that the above-titled charge did not state a prima facie case. Mr. Liu was advised that, if there were any factual inaccuracies or additional facts that would correct the deficiencies explained in the December 3 Warning Letter, he should amend the charge. Mr. Liu was further advised that, unless he amended the charge to state a prima facie case or withdrew it prior to December 14, 2009, the charge would be dismissed.

On December 8, 2009, Mr. Liu informed the undersigned that his address had changed and that he did not receive the December 3 Warning Letter. In response, on December 8, 2009, the undersigned sent the December 3 Warning Letter to Mr. Liu's new address and verbally

[1] Since Mr. Liu's initial filing of the above-titled charge, he has sent PERB various cards and letters expressing his gratitude to PERB for investigating this matter. Mr. Liu was advised by the undersigned on multiple occasions that PERB is prohibited from considering documents not accompanied by a completed proof of service form. (*United Educators of San Francisco (Banos)* (2005) PERB Decision No. 1764; *Service Employees International Union, Local 790 (Fanene)* (2003) PERB Decision No. 1513.) Accordingly, the above-described cards and letters sent by Mr. Liu to PERB were not considered during the undersigned's investigation of the above-titled charge.

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

instructed Mr. Liu to file either an amended charge or a request for withdrawal by December 22, 2009. On December 22, 2009, Mr. Liu filed an amended charge with PERB.

The December 22 amended charge contests the rational of the December 3 Warning Letter and presents additional facts. Mr. Liu asserts that he did not engage in any union activity because the University "deliberately/systematically sneaked me into a [job] title" that was not represented by an employee organization. Mr. Liu goes on to argue that he exercised his rights under HEERA when he filed various complaints with the University. The December 22 amended charge provides in relevant part:

> I described some concerns about the unethical activities in 2008 to the [UCLA] Ombuds Office like radioactive material handling, employment title code misuse, violations of the [UCLA] policies, discriminations data [sic] integrity, equipment fund usage, major capital equipment purchase, and others. The data integrity issue and violation of offer letter/contract was mentioned to the Postdoctoral Office in 2008. Later[,] I consulted the NIH[[3]] and the UCLA grant division about the data integrity issues in January-February, 2009. I also filed [a] report in Jan[uary]-Feb[ruary], 2009 to the UCLA compliance office and March, 2009 to the UC compliance office. Due to the confidential processes, [sic] I was not supposed to know the details. Through several occasions that the [sic] supervisor would know immediately the contents of the consultation or discussions with the related offices (Ombuds) etc., it was clear that the supervisor/department had been unhappy and could have planned for the retaliation, including denying my group or protected activities.

Discussion

1. PERB's Jurisdiction

As stated in the December 2 Warning Letter, PERB is a quasi-judicial administrative agency charged with administering California's collective bargaining statutes covering public employees. One of the statutes PERB administers is HEERA, which governs labor relations between public higher education employers (California State University System, the University of California System and Hastings College of Law) and their employees. However, HEERA is limited in scope, regulating only certain conduct by employers. (*Los Angeles Community*

[3] Mr. Liu does not define "NIH."

College District (1979) PERB Order No. Ad-64.)[4] For example, HEERA does not address—and PERB has no jurisdiction over—allegations that a higher education employer breached an employment contract with an employee, defamed an employee's character or misrepresented an employee's scholarly/academic efforts. (See generally *Union of American Physicians & Dentists (Menaster)* (2007) PERB Decision No. 1918-S [PERB's jurisdiction does not include, among other things, enforcement of the Americans with Disabilities Act, the U.S. Constitution, the Whistleblower Protection Reporting Act, laws governing improper government activity, laws governing sexual harassment, laws governing defamation, or laws governing the unemployment insurance process].) Accordingly, Mr. Liu's allegations that UCLA violated HEERA by breaching his employment contract, defaming his character, and misrepresenting his scholarly/academic efforts are hereby dismissed.

2. Discrimination/Retaliation

As stated in the December 2 Warning Letter, to demonstrate that an employer discriminated or retaliated against an employee in 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; (3) the employer took adverse action against the employee; and (4) the employer took the action because of the exercise of those rights. (*Campbell Municipal Employees Assn. v. City of Campbell* (1982) 131 Cal.App.3d 416 (*Campbell*); *San Leandro Police Officers Assn. v. City of San Leandro* (1976) 55 Cal.App.3d 553 (*San Leandro*); *Novato Unified School District* (1982) PERB Decision No. 210 (*Novato*).)

In determining whether evidence of adverse action is established, the Board uses an objective test and will not rely upon the subjective reactions of the employee. (*Palo Verde Unified School District* (1988) PERB Decision No. 689.) In a later decision, the Board further explained that:

> The test which must be satisfied is not whether the employee found the employer's action to be adverse, but whether a reasonable person under the same circumstances would consider the action to have an adverse impact on the employee's employment.

(*Newark Unified School District* (1991) PERB Decision No. 864; emphasis added; footnote omitted.)

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

[4] When interpreting HEERA, it is appropriate to take guidance from cases interpreting the National Labor Relations Act and California labor relations statutes with parallel provisions. (See *Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608.)

"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; *Campbell*, *supra*, 131 Cal.App.3d 416); (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; *San Leandro*, *supra*, 55 Cal.App.3d 553); (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; *San Leandro*, *supra*, 55 Cal.App.3d 553); (4) the employer's cursory investigation of the employee's misconduct (*City of Torrance* (2008) PERB Decision No. 1971-M; *Coast Community College District* (2003) PERB Decision No. 1560); (5) the employer's failure to offer the employee justification at the time it took action (*Oakland Unified School District* (2003) PERB Decision No. 1529) or the offering of exaggerated, vague, or ambiguous reasons (*McFarland Unified School District* (1990) PERB Decision No. 786); (6) employer animosity towards union activists (*Jurupa Community Services District* (2007) PERB Decision No. 1920-M; *Cupertino Union Elementary School District* (1986) PERB Decision No. 572); or (7) any other facts that might demonstrate the employer's unlawful motive. (*North Sacramento School District*, *supra*, PERB Decision No. 264; *Novato*, *supra*, PERB Decision No. 210.)

HEERA section 3567 provides:

> Any employee or group of employees may at any time, either individually or through a representative of their own choosing, present grievances to the employer and have such grievances adjusted, without the intervention of the exclusive representative; provided, the adjustment is reached prior to arbitration pursuant to Section 3589, and the adjustment is not inconsistent with the terms of a written memorandum then in effect. The employer shall not agree to 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.

In *Regents of the University of California* (1991) PERB Decision No. 872-H (*Regents*), the Board held that while HEERA section 3567 grants employees a right to file grievances without the interference of their exclusive representative, it does not grant a statutory right to employees to represent themselves individually in their employment relations with their employer. In *Regents*, *supra*, PERB Decision No. 872-H, a campus police officer filed multiple grievances pursuant to the University's internal personnel policies, filed a charge with the Equal Employment and Opportunity Commission (EEOC), challenged work performance evaluations, and sent a letter to his campus' chancellor urging the chancellor to reject the creation of a civilian review board for the campus police department. At the time *Regents*, *supra*, PERB Decision No. 872-H was decided, there was no exclusive representative for campus police officers. In concluding that the campus police officer had not engaged in

activity guaranteed by HEERA, the Board relied heavily on the fact that the campus police officer's activities were entirely personal in nature and not an extension of concerted action. (*Ibid.*)

In *San Joaquin Delta Community College District* (2010) PERB Decision No. 2091 (*San Joaquin*),[5] the Board held that employee complaints to employers are protected only when those complaints "are a logical continuation of group activity."

PERB Regulation 32615(a)(5)[6] requires, among other things, that an unfair practice charge include a "clear and concise statement of the facts and conduct alleged to constitute an unfair practice." The charging party's burden includes alleging the "who, what, when, where and how" of an unfair practice. (*State of California (Department of Food and Agriculture)* (1994) PERB Decision No. 1071-S, citing *United Teachers-Los Angeles (Ragsdale)* (1992) PERB Decision No. 944.) Mere legal conclusions are not sufficient to state a prima facie case. (*Ibid.*; *Charter Oak Unified School District* (1991) PERB Decision No. 873.) For determining whether the charge states a prima facie case, the factual allegations in the charge are deemed true. However, factually unsupported legal conclusions in the charge need not be accepted as true. (*Charter Oak Unified School District* (1991) PERB Decision No. 873.)

In the December 22 amended charge, Mr. Liu alleges that his "supervisor/department had deliberately/systematically sneaked me into a title that I could not have the union [sic] or collective bargain [sic] representation. Therefore, their action for this alone was equivalent to retaliation for my protected activities." Mr. Liu has not presented PERB with any facts in support of this conclusion. Accordingly, Mr. Liu's allegation that the University violated the Act by intentionally placing him in a job classification that is not represented by an employee organization is hereby dismissed. (PERB Regulation 32615(a)(5); *Charter Oak Unified School District*, *supra*, PERB Decision No. 873.)

Further, while Mr. Liu alleges that he filed numerous complaints with the University, Mr. Liu does not allege or present facts establishing that his complaints were a continuation of group activity. (*San Joaquin*, *supra*, PERB Decision No. 2091; *Regents*, *supra*, PERB Decision No. 872-H.) For example, although Mr. Liu asserts that he complained to the Office of Ombuds Services about "radioactive material handling," Mr. Liu does not provide facts demonstrating that he filed the complaint because he and his coworkers were concerned about their safety or for another reason that would show that his complaint was an extension of group activity. Consequently, Mr. Liu has not overcome his burden of providing PERB with a clear and concise statement of facts demonstrating that he engaged in protected activity.

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[5] A case decided under the Educational Employment Relations Act (EERA), which unlike HEERA specifically grants employees "the right to represent themselves individually." (Gov. Code, § 3543, subd. (a).)

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

Consequently, Mr. Liu has not established that the University discriminated against him because he engaged in protected activity. (*Novato*, *supra*, PERB Decision No. 210.) Accordingly, Mr. Liu's allegation that the University discriminated against him is dismissed.

Right to Appeal

Pursuant to PERB Regulations, Mr. Liu 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 Regs, tit. 8, § 32635, subd. (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 during a regular PERB business day. (Cal. Code Regs, tit. 8, §§ 32135, subd. (a) and 32130; see also Gov. Code, § 11020, subd. (a).) A document is also considered "filed" when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet which meets the requirements of PERB 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. (Cal. Code Regs, tit. 8, § 32135, subds. (b), (c) and (d); see also Cal. Code Regs., tit. 8, §§ 32090 and 32130.)

The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95811-4124
(916) 322-8231
FAX: (916) 327-7960

If Mr. Liu files 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 Regs, tit. 8, § 32635, subd. (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 Regs., tit. 8, § 32140 for the required contents.) The document will be considered properly "served" when personally delivered or deposited in the mail or deposited with a delivery service and properly addressed. A document may also be concurrently served via facsimile transmission on all parties to the proceeding. (Cal. Code Regs, tit. 8, § 32135, subd. (c).)

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 Regs, tit. 8, § 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,

TAMI R. BOGERT
General Counsel

By _____
Sean McKee
Regional Attorney

Attachment

cc: Maure Gardner, Manager, Labor Relations

PUBLIC EMPLOYMENT RELATIONS BOARD

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Telephone: (818) 551-2809
Fax: (818) 551-2820

December 3, 2009

Yi-Kuang Liu

Re: *Yi-Kuang Liu v. Regents of the University of California*
Unfair Practice Charge No. LA-CE-1065-H
WARNING LETTER

Dear Mr. Liu:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on April 2, 2009 and was amended on September 30 and October 1, 2009. Yi-Kuang Liu alleges that the Regents of the University of California (UCLA or University) violated the Higher Education Employer-Employee Relations Act (HEERA or Act)[1] by discriminating against him, wrongfully terminating his employment, breaching his employment contract, defaming his character, and misrepresenting his scholarly/academic "efforts." The above-titled charge and amended charges total approximately six-hundred pages. The following summarizes the relevant facts.

Background as Alleged

Dr. Liu was hired by UCLA as a postdoctoral scholar in June 2006. At all times relevant herein, Dr. Liu works "in the super-resolution microscopy laboratory in the Anesthesiology Department in the David Geffen School of Medicine" (lab). Dr. Liu's job classification is not represented by an exclusive representative. UCLA has adopted several employment policies that permit an employee to file grievances. Dr. Liu's immediate supervisor is Enrico Stefani. When Dr. Liu was first hired by UCLA, he worked alone in the lab. A few months into Dr. Liu's employment with UCLA, other employees, including Zhaonian Zhang and Hui Zhao, began working in the lab.

The charge provides in relevant part:

> After the new hires arrived, [Dr. Stefani] said [they] were the experts in my work and [he] asked me to transfer all [of my work] to them. I [responded by stating that] they had their own projects and this was no[t] in accordance with [UCLA's] offer [of employment to me]. After 3 . . . discussions, [Dr. Stefani]

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

> refused to listen to m[e.] I [then] talked to the Dep[artment] Chair. . . . The [Department] Chair said she had to talk to [Dr. Stefani]. She did so . . . one afternoon. [Dr. Stefani] ceased the pressing actions but he [was] upset [with me because] I did not follow the chain of command[]. This could be considered my first grievance.

In an e-mail message dated August 6, 2007, Dr. Stefani advised Dr. Liu:

> Today I had a meeting with the Chair, Dr. Kapur. . . .
>
> I was surprised that you did not follow the chain of command with me about your recent concerns. According to the Chair's point of view and the meetings I had with you, you are not willing to share your knowledge with junior trainees. This is not acceptable in our [Department] and in general at David Geffen School of Medicine at UCLA. . . . If you do not feel that you can share this mission, I suggest that you find another place to work outside of UCLA. . . .
>
> With this situation, my support for your advancement to an academic position is on hold.

In a letter dated November 13, 2007, Dr. Stefani advised Dr. Liu:

> I am writing to you to further document and further explain the issues and the expectations I have concerning your performance as a member of my laboratory. I have counseled you in written form on these issues since the e-mail on August 6, 2007.
>
> As you are aware, I have counseled you several times then reiterated in my e-mails of October 10, 2007 and October 24, 2007 that "you start documenting the mechanical and electronic layout" and "you will prepare a detailed documentation of the hardware including electronic circuitry, mechanical layout, optic schemes. . . ." However, until now this has not happened. . . .
>
> Your constant refusal (personal and others) to participate in the training and sharing the information of what you are building with junior bioengineering trainees is unacceptable. . . .
>
> In summary, I am very disappointed and concerned about the negative attitudes you express regarding your refusal to participate in laboratory meetings, sharing of information of the microscopes you are building, and teaching of others. I am also

> disappointed by the delays in completing the work needed to report a successful first year. . . . I have explained to you your duties in detail in the email dated 10/10/2007. I did all I can do to facilitate your career at UCLA. However, your constant negativity in sharing information and teaching new trainees, makes this very unlikely.
>
> If you do not plan or if you are unwilling or unable to perform these assignments and duties, your academic career will be in jeopardy. . . ."

Upon receiving this letter, Dr. Liu contacted the "Postdoctoral office." The Postdoctoral office informed Dr. Liu that the letter was the first step the University took when it intended to terminate an employee's employment. The Postdoctoral office referred Dr. Liu to the "Ombuds office" where Dr. Liu alleges he filed "initial reports."

On December 12, 2007, Dr. Liu submitted a response to the letter (Rebuttal Letter). Dr. Liu asserts that on December 12, 2007, Dr. Stefani apologized to him for issuing him the letter. Dr. Stefani then informed Dr. Liu that the letter would be removed from his personnel file and that the matter was officially closed.

In an e-mail message dated December 17, 2007, Dr. Liu asked Anesthesiology Department Administrator Sharyn Roberts if there was anything else he needed to provide UCLA in regards to the November 13 letter. In an e-mail message dated December 18, 2007, Dr. Roberts responded in relevant part:

> I have spoken to the Ombudsman twice now and understand that you are still concerned about the letter. I would like to make it clear to you that the letter was part of the "counseling" that needed to take place to explain to you what was expected of you. Your performance and behavior were not meeting expectations as we have discussed in detail and in these cases, we normally counsel employees and present a letter outlining the points of our discussion and expectations. That was the spirit of the letter. It was not meant as a formal warning/disciplinary or a dismissal letter but a means to tell you what was expected so that you would have an opportunity to understand and meet those expectations.

The next day, Dr. Roberts sent Dr. Liu another e-mail message that states in relevant part: "You need to concentrate your efforts participating in the group and working on your very important project and not in preparing a formal written response to your counseling letter since it is not required."

In the Spring of 2008, Dr. Stefani began discussing the possibility of "adjusting" Dr. Liu's job title to "Assistant Project Scientist." In several e-mail messages dated between April and June 2008, Dr. Liu expressed his concern to Dr. Stefani that changes to his job title may negatively impact his duties, pay, and future employment with UCLA. For example, in an e-mail message dated June 2, 2008, Dr. Liu asked Dr. Stefani: "Today you mentioned that it might be possible that [my title] will be adjusted to the engineer title first. Would you mind letting me know the reason for it? As we know, it will be more difficult and complicated for adjusting from non-academic title to the academic one later on."

On June 2, 2008, Dr. Liu sent a separate e-mail message to Dr. Stefani's supervisor, Anesthesiology Department Chair Patricia Kapur. In the e-mail message Dr. Liu stated in relevant part:

> I am also concerned about the possible delay for catching the 7/1/2008 timeline and being unemployed or being changed to [a] non-academic position [that might create] difficulties [for me to get] back o[n] the academic track. If the publications are the limiting factor[], the key data and analysis of several publications [Dr. Stefani] mentioned were in his hands for a long time. I am trying to work with him and find a clear outline. Going into the project scientist without [a] clear outline of the academic track could be the graveyard for [my] career.

In November 2008, Dr. Liu consulted the Office of Ombuds Services regarding Dr. Stefani's desire to adjust his job title. The Office of Ombuds Services responded by setting up a mediation session between Dr. Stefani and Dr. Liu. Dr. Liu alleges that Dr. Stefani "was initially upset by my seeking the mediation from the Ombuds [o]ffice for the title adjustment and publication issues."

In a letter dated November 17, 2008, Dr. Stefani offered Dr. Liu a "full-time (100%) appointment as an Assistant Researcher, Step I. . . ." The Assistant Researcher position included a pay raise and greater benefits. Shortly after the Assistant Researcher position was offered to Dr. Liu, Dr. Stefani notified Dr. Kapur that he was putting the offer to Dr. Liu on "hold." On November 24, 2008, Dr. Liu filed a grievance against UCLA. The current record does not describe the subject matter of the grievance.

On December 2, 2008, Dr. Liu filed a "report" with the Office of Ombuds Services alleging that UCLA was discriminating against him because of his age. Dr. Liu alleges that Dr. Stefani knew that he had filed a discrimination report with the Office of Ombuds Services because Dr. Stefani made comments to Dr. Liu about the discrimination report.

In mid-December 2008, Dr. Stefani again reassured Dr. Liu that the November 13 letter had been removed from Dr. Liu's personnel file and that the matter was closed. Dr. Stefani specifically told Dr. Liu that he did not have to worry about the letter.

On January 8, 2009, Dr. Zhao and Dr. Zhang reported to Dr. Stefani that while they were working on a microscope in the lab, Dr. Liu suddenly got up from his work station and confronted them. Dr. Liu allegedly demanded to know what Dr. Zhao and Dr. Zhang were doing to one of his projects. Dr. Zhao and Dr. Zhang responded by informing Dr. Liu that Dr. Stefani had ordered them to work on the microscope. In a raised voice, Dr. Liu demanded that they stop working on the microscope because it was his project. Immediately thereafter, Dr. Stefani had Dr. Liu escorted off the UCLA campus by the police.

In a letter dated January 12, 2009, Dr. Stefani informed Dr. Liu "that as a result of your actions on Thursday, January 8, 2009, I am placing you on an investigatory leave with pay during which time the department shall review your activities in the laboratory on Thursday afternoon."

UCLA interviewed Dr. Liu, Dr. Stefani, Dr. Zhou, Dr. Zhang and Dr. Mansoureh Eghbali regarding the January 8 incident. Dr. Zhou and Dr. Zhang were later interviewed a second time. A summary of the interviews and some background information on Dr. Liu were then forwarded to a "committee" who recommended that Dr. Liu "not return to work . . . and [that] his University appointment be terminated." Dr. Liu insists that the summary of his interview is not accurate. The summary of the interviews also references that Dr. Liu had previously sought the assistance of the Office of Ombuds Services . The summary of the interviews provides in relevant part: "Three months ago[,] YK sought the advice of the Ombuds office based on his belief that he was being mistreated. YK and the Ombuds office (Kathy) met with Dr. Stefani."

In a letter dated January 30, 2009, Dr. Kapur informed Dr. Liu "that it is the intent of the Department of Anesthesiology to dismiss you from your employment as a Project Scientist effective end of business on February 17, 2009, for inappropriate and disruptive behavior in the laboratory of Dr. Enrico Stefani." The January 30 letter concludes in relevant part: "You have a right to respond to this intent to dismiss in writing within 14 calendar days of the date of this letter." Attached to the January 30 letter was a copy of the November 13 letter. Dr. Liu's Rebuttal Letter was not attached to the November 13 letter.

While the current record is not entirely clear, it appears that Dr. Liu either amended his grievance or filed a new grievance regarding the University's decision to terminate his employment on February 17, 2009.

Discussion

1. PERB's Jurisdiction

PERB is a quasi-judicial administrative agency charged with administering California's collective bargaining statutes covering public employees. One of the statutes PERB administers is HEERA, which governs labor relations between public higher education employers (California State University System, the University of California System and Hastings College of Law) and their employees. However, HEERA is limited in scope,

regulating only certain conduct by employers. (*Los Angeles Community College District* (1979) PERB Order No. Ad-64.)[2] For example, HEERA does not address—and PERB has no jurisdiction over—allegations that a higher education employer breached an employment contract with an employee, defamed an employee's character or misrepresented an employee's scholarly/academic efforts. (See generally *Union of American Physicians & Dentists (Menaster)* (2007) PERB Decision No. 1918-S [PERB's jurisdiction does not include, among other things, enforcement of the Americans with Disabilities Act, the U.S. Constitution, the Whistleblower Protection Reporting Act, laws governing improper government activity, laws governing sexual harassment, laws governing defamation, or laws governing the unemployment insurance process].) Accordingly, Mr. Liu's allegations that UCLA violated HEERA by breaching his employment contract, defaming his character, and misrepresenting his scholarly/academic efforts must be dismissed.

HEERA section 3571 clearly sets forth unlawful employer practices under HEERA:

> 3571. Unlawful employer practices
>
> 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. . . .
>
> (b) Deny to employee organizations rights guaranteed to them by this chapter.
>
> (c) Refuse or fail to engage in meeting and conferring with an exclusive representative.
>
> (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.

[2] When interpreting HEERA, it is appropriate to take guidance from cases interpreting the National Labor Relations Act and California labor relations statutes with parallel provisions. (See *Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608.)

> (e) Refuse to participate in good faith in the impasse procedure set forth in Article 9 (commencing with Section 3590).
>
> (f) Consult with any academic, professional, or staff advisory group on any matter within the scope of representation for employees who are represented by an exclusive representative, or for whom an employee organization has filed a request for recognition or certification as an exclusive representative until such time as the request is withdrawn or an election has been held in which "no representative" received a majority of the votes cast. This subdivision is not intended to diminish the prohibition of unfair practices contained in subdivision (d). For the purposes of this subdivision, the term "academic" shall not be deemed to include the academic senates.

As an individual employee, Mr. Liu does not have standing to allege violations of HEERA section 3571, subdivisions (b) through (f). (See *Orange Unified School District* (2004) PERB Decision No. 1670 [individual employees do not have standing to allege violations of sections of the Act that protect the collective bargaining rights of employee organizations].) However, Mr. Liu has standing to allege a violation of HEERA section 3571(a). Accordingly, this Warning Letter analyzes the above-titled charge under HEERA section 3571(a). (*Los Angeles County Office of Education* (1999) PERB Decision No. 1360 [where the charging party fails to allege that any specific section of the Government Code has been violated a Board agent, upon a review of the charge, may determine under what section the charge should be analyzed].)[3] While HEERA section 3571(a) does not address every type of "wrongful termination," it does prohibit a higher education employer from discharging an employee because he exercised rights guaranteed by HEERA. (*California State University, Fresno* (1990) PERB Decision No. 845-H.)

2. Discrimination/Retaliation

To demonstrate that an employer discriminated or retaliated against an employee in 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; (3) the employer took adverse action against the employee; and (4) the employer took the action because of the exercise of those rights. (*Campbell Municipal Employees Assn. v. City of Campbell* (1982) 131 Cal.App.3d 416 (*Campbell*); *San Leandro Police Officers Assn. v. City of San Leandro* (1976) 55 Cal.App.3d 553 (*San Leandro*); *Novato Unified School District* (1982) PERB Decision No. 210 (*Novato*).)

In determining whether evidence of adverse action is established, the Board uses an objective test and will not rely upon the subjective reactions of the employee. (*Palo Verde Unified*

[3] If Mr. Liu believes another legal theory exists, please notify me of it.

School District (1988) PERB Decision No. 689.) In a later decision, the Board further explained that:

> The test which must be satisfied is not whether the employee found the employer's action to be adverse, but whether a reasonable person under the same circumstances would consider the action to have an adverse impact on the employee's employment.

(*Newark Unified School District* (1991) PERB Decision No. 864; emphasis added; footnote omitted.)

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; *Campbell*, *supra*, 131 Cal.App.3d 416); (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; *San Leandro*, *supra*, 55 Cal.App.3d 553); (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; *San Leandro*, *supra*, 55 Cal.App.3d 553); (4) the employer's cursory investigation of the employee's misconduct (*City of Torrance* (2008) PERB Decision No. 1971-M; *Coast Community College District* (2003) PERB Decision No. 1560); (5) the employer's failure to offer the employee justification at the time it took action (*Oakland Unified School District* (2003) PERB Decision No. 1529) or the offering of exaggerated, vague, or ambiguous reasons (*McFarland Unified School District* (1990) PERB Decision No. 786); (6) employer animosity towards union activists (*Jurupa Community Services District* (2007) PERB Decision No. 1920-M; *Cupertino Union Elementary School District* (1986) PERB Decision No. 572); or (7) any other facts that might demonstrate the employer's unlawful motive. (*North Sacramento School District*, *supra*, PERB Decision No. 264; *Novato*, *supra*, PERB Decision No. 210.)

HEERA section 3567 provides:

> Any employee or group of employees may at any time, either individually or through a representative of their own choosing, present grievances to the employer and have such grievances adjusted, without the intervention of the exclusive representative; provided, the adjustment is reached prior to arbitration pursuant to Section 3589, and the adjustment is not inconsistent with the terms of a written memorandum then in effect. The employer shall not agree to 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.

In *Regents of the University of California* (1991) PERB Decision No. 872-H (*Regents*), the Board held that while HEERA section 3567 grants employees a right to file grievances without the interference of their exclusive representative, it does not grant a statutory right to employees to represent themselves individually in their employment relations with their employer. In *Regents*, *supra*, PERB Decision No. 872-H, a campus police officer filed multiple grievances pursuant to the University's internal personnel policies, filed a charge with the Equal Employment and Opportunity Commission (EEOC), challenged work performance evaluations, and sent a letter to his campus' chancellor urging the chancellor to reject the creation of a civilian review board for the campus police department. At the time *Regents*, *supra*, PERB Decision No. 872-H was decided, there was no exclusive representative for campus police officers. In concluding that the campus police officer had not engaged in activity guaranteed by HEERA, the Board relied heavily on the fact that the campus police officer's activities were entirely personal in nature and not an extension of concerted action. (*Ibid.*)

Like the police officer in *Regents*, *supra*, PERB Decision No. 872-H, Dr. Liu sent e-mail messages to his supervisors about his employment conditions and rebutted a negative work performance evaluation.[4] Similar to the police officer in *Regents*, *supra*, PERB Decision No. 872-H, Dr. Liu filed a complaint with the Office of Ombuds Services alleging that he was the victim of age discrimination. Analogous to the police officer in *Regents*, *supra*, PERB Decision No. 872-H, Dr. Liu also filed grievance(s) against the University pursuant to the University's personnel policies, not a collective bargaining agreement. Accordingly, the current record shows that all of Dr. Liu's activities were entirely personal in nature. Therefore, the current record does not establish that Dr. Liu exercised rights under HEERA because none of the activities Dr. Liu engaged in were an extension of concerted action. (*Ibid.*) Consequently, Dr. Liu has also failed to establish that the University was aware that he engaged in protected activity and that the University terminated his employment because he engaged in protected activity.

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[4] *Regents of the University of California* (2006) PERB Decision No. 1851-H is distinguishable from the present charge because the employee in *Regents of the University of California*, *supra*, PERB Decision No. 1851-H appealed his performance evaluation pursuant to a specific provision in the CBA. Thus, the employee's activity in *Regents of the University of California*, *supra*, PERB Decision No. 1851-H was an extension of concerted activity.

For these reasons the charge, as presently written, does not state a prima facie case.[5] If there are any factual inaccuracies in this letter or additional facts that would correct the deficiencies explained above, Dr. Liu may amend the charge. The amended charge should be prepared on a standard PERB unfair practice charge form, clearly labeled Third Amended Charge, contain all the facts and allegations Dr. Liu wishes to make, and be signed under penalty of perjury by Dr. Liu or an authorized agent of Dr. Liu. 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 University's representative and the original proof of service must be filed with PERB. If an amended charge or withdrawal is not filed on or before December 14, 2009,[6] PERB will dismiss the above-titled charge. Questions concerning this matter should be directed to me at the telephone number listed above.

Sincerely,

Sean McKee
Regional Attorney

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[5] In *Eastside Union School District* (1984) PERB Decision No. 466, the Board explained that a prima facie case is established where the Board agent is able to make "a determination that the facts as alleged in the charge state a legal cause of action and that the charging party is capable of providing admissible evidence in support of the allegations. Consequently, where the investigation results in receipt of conflicting allegations of fact or contrary theories of law, fair proceedings, if not due process, demand that a complaint be issued and the matter be sent to formal hearing." (*Ibid.*)

[6] A document is "filed" on the date the document is **actually received** by PERB, including if transmitted via facsimile. (PERB Regulation 32135.)