STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

SUZANNE M. SCHOLZ, Charging Party, v. TRUSTEES OF THE CALIFORNIA STATE UNIVERSITY (LONG BEACH), Respondent.	Case No. LA-CE-1026-H PERB Decision No. 2201-H September 13, 2011

Appearances: Suzanne M. Scholz, on her own behalf; Donald A. Newman, University Counsel, for Trustees of the California State University (Long Beach).

Before McKeag, Dowdin Calvillo and Huguenin, Members.

DECISION

DOWDIN CALVILLO, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Suzanne M. Scholz (Scholz) from a Regional Director's dismissal of her unfair practice charge. The charge alleged that the Trustees of the California State University (Long Beach) (CSU) violated the Higher Education Employer-Employee Relations Act (HEERA)[1] by retaliating against her for having filed an unfair practice charge and contract grievances. Following deferral of the charge to arbitration, the PERB Regional Director dismissed the charge after Scholz failed to request a repugnancy review pursuant to PERB Regulation 32661.[2]

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

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

The Board has reviewed the dismissal and the record in light of Scholz's appeal, CSU's response,[3] and the relevant law. Based on this review, we affirm the dismissal of the charge for the reasons discussed below.

FACTUAL AND PROCEDURAL SUMMARY

Scholz was employed as a lecturer with CSU. On February 6, 2008, Scholz filed an unfair practice charge alleging that CSU retaliated against her for having previously filed an unfair practice charge with PERB[4] and for filing several contract grievances over the denial of teaching assignments and the contents of a performance evaluation.

On February 19, 2008, Scholz filed a grievance pursuant to the provisions of a memorandum of understanding (MOU) between CSU and the California Faculty Association (CFA). The grievance alleged violations of Articles 3, 10, 11, 12 and 15 of the MOU, and described the grounds for the grievance as follows:

> Grievant eligible to teach classes in Marketing for Spring 2008 semester. The Grievant was not appointed work in Fall 07 because work was not available. In Spring 2008, work became available and courses were offered to lecturers with one-year appointments or less. Grievant has one-year appointment in Marketing. Grievant denied careful consideration and appointment in applicable courses. Grievant denied preference for work over lecturer faculty who did not have one-year appointments. Failure by department and University to offer new or additional work to Grievant, in classes which the Grievant is qualified and eligible to teach.
>
> Further, Grievant has filed previous grievance on Spring 2007 evaluation, currently in personnel action file (CSU #R03-2007-125). Grievant alleges that as long as the Spring 2007 evaluation remains in file, Grievant can not accurately be reviewed and considered for subsequent work and appointment. Grievant alleges Spring 2007 evaluation contains incorrect factual information.

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[3] As discussed in footnote 7, *infra*, we have considered CSU's response filed after the matter was placed on the Board's docket.

[4] PERB Case No. LA-CE-824-H.

By letter dated March 11, 2008, CSU asserted that the charge should be deferred to arbitration because it concerned matters subject to binding arbitration. Specifically, CSU asserted that Article 10.36 of the MOU provides that "[n]o reprisals shall be taken against any employee for the filing and processing of any grievances" and that Article 6.16 provides that "[a] faculty unit employee shall not suffer reprisals for participation in CFA activities."

By letter dated April 22, 2008, the PERB Regional Director informed Scholz that the standards for deferral pursuant PERB Regulation 32620(b)(6)[5] had been met and that the charge would be deferred to the contractual arbitration process and placed in abeyance until such time as the arbitration process has concluded. The letter further informed Scholz that, following the arbitration, the charge would be dismissed unless Scholz sought a repugnancy review by PERB of the arbitrator's decision under the criteria set forth in *Dry Creek Joint Elementary School District* (1980) PERB Order No. Ad-81a (*Dry Creek*). The letter further advised Scholz that she could amend the charge to address any factual inaccuracies in the letter or provide additional facts that would require a different conclusion.

Scholz did not file an amended charge. By letter dated May 6, 2008, the Regional Director issued a notice of abeyance and deferral to arbitration, notifying the parties that the charge was being deferred to arbitration pursuant to PERB Regulation 32620(b)(6). The letter

[5] Regulation 32620(b)(6) requires PERB to:

> Place the charge in abeyance if the dispute arises under MMBA, HEERA, TEERA, Trial Court Act or Court Interpreter Act and is subject to final and binding arbitration pursuant to a collective bargaining agreement, and dismiss the charge at the conclusion of the arbitration process unless the charging party demonstrates that the settlement or arbitration award is repugnant to the purposes of MMBA, HEERA, TEERA, Trial Court Act or Court Interpreter Act, as provided in section 32661.

again notified Scholz that, following the arbitration, the charge would be dismissed unless Scholz sought a repugnancy review by PERB.

On May 18, 2009, the arbitrator issued an arbitration decision in the matter deferred to arbitration. Scholz did not file a request for a repugnancy review with PERB. After attempting unsuccessfully to reach Scholz by telephone,[6] on January 7, 2010, the Regional Director issued a letter dismissing the charge for the reasons set forth in the May 6, 2008 notice of abeyance and deferral to arbitration.

By letter to PERB dated January 14, 2010, Scholz stated that she was not aware that she could appeal the arbitrator's decision and requested to "move forward with my appeal." That letter further requested an extension of time to file with PERB. By letter dated January 25, 2010, PERB notified the parties that, pursuant to the parties' agreement, an extension of time within which to file an appeal from the dismissal of the charge was granted to February 16, 2010.

On February 16, 2010, Scholz filed a document purporting to be an amended charge. The amended charge includes a copy of the arbitrator's decision and award and asserts that the arbitrator's decision did not address the retaliation issues raised in her original charge before PERB.

On June 3, 2010, CSU filed a response to the amended charge.[7]

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[6] The telephone number contained in the charge had been disconnected.

[7] Scholz did not file an appeal from dismissal in accordance with the requirements of PERB Regulation 32635. Nonetheless, the Board has historically treated the filing of an amended charge after an unfair practice charge has been dismissed as an appeal from the dismissal of the charge. (*Compton Unified School District* (2008) PERB Order No. Ad-374; *Regents of the University of California* (2008) PERB Order No. Ad-370-H; *Los Angeles Unified School District* (2007) PERB Order No. Ad-368.) Given Scholz's failure to properly identify the appeal and CSU's assertion that it believed it would receive notice from PERB of the deadline to respond, as PERB typically provides when amended charges are filed, the Board finds good cause to accept CSU's June 3, 2010 response to the appeal.

ISSUES

1. Did Scholz timely file a request for repugnancy review of the arbitrator's decision?

2. If so, was the arbitrator's decision repugnant to the purposes of HEERA?

DISCUSSION

Timeliness

As indicated above, PERB Regulation 32620(b)(6) requires PERB to place an unfair practice charge under HEERA in abeyance if the dispute is subject to final and binding arbitration pursuant to a collective bargaining agreement, and to dismiss the charge at the conclusion of the arbitration process unless the charging party demonstrates that the settlement or arbitration award is repugnant to the purposes of HEERA. Pursuant to PERB Regulation 32661, an unfair practice charge may be filed based on a claim that the settlement or arbitration award is repugnant to HEERA. Unfair practice charges so filed are subject to all of the requirements applicable to the filing of unfair practice charges under PERB Regulation 32615 and must allege with specificity the facts underlying the charging party's claim that the arbitrator's award is repugnant to the purposes of the applicable statute. (PERB Reg. 32661(b).)

HEERA section 3563.2, subdivision (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.) A charging party bears the burden of demonstrating that the charge is timely filed. (*Long Beach Community College District* (2009)

PERB Decision No. 2002.) Thus, Scholz was required to plead facts showing her request for repugnancy review was timely filed.

The arbitrator issued his decision on May 18, 2009. The amended charge filed nearly nine months later on February 16, 2010, fails to allege any facts showing when Scholz first learned of the issuance of the arbitration award. Moreover, her January 14, 2010 letter states only that she was not aware that she could appeal the arbitrator's award, but does not indicate that she was not previously aware of the award. Given that the PERB Regional Director twice informed Scholz that she would have the right to seek a repugnancy review following issuance of the arbitration decision, we conclude that Scholz knew or should have known of the issuance of the arbitration decision shortly after May 18, 2009. Accordingly, the request for repugnancy review filed on February 16, 2010, was untimely.

We disagree with our colleague that PERB Regulation 32661(d) authorizes the Board to decide this case. That section provides that the "Board itself may, at any time, direct that the record be submitted to the Board itself for final decision." We construe this language to mean that the Board may itself render a final decision without requiring the matter to be processed first by the PERB Office of the General Counsel as an unfair practice charge. Nothing therein, however, authorizes the Board to disregard the statute of limitations and rule on an untimely claim.

Merits of Repugnancy Claim

Even if we were to consider Scholz's request for repugnancy review to be timely filed, we would nonetheless dismiss the charge for failure to meet the requirements for establishing that the arbitration award is repugnant to the purposes of HEERA.

As indicated above, PERB Regulation 32620(b)(6) requires PERB to dismiss a charge filed under HEERA at the conclusion of the arbitration process unless the charging party

demonstrates that the arbitration award is repugnant to the purposes of HEERA. In determining repugnancy claims, PERB utilizes the standards set forth in *Dry Creek* in which the Board adopted the post arbitration deferral standard enunciated by the National Labor Relations Board (NLRB) in *Spielberg Manufacturing Company* (1955) 112 NLRB 1080 (*Spielberg*).[8] (*Santa Ana Unified School District* (2008) PERB Decision No. 1951 (*Santa Ana*).) Under this standard, the Board will exercise its discretionary jurisdiction to dismiss and defer a complaint to the arbitrator's award if: (1) the unfair practice issues were presented to and considered by the arbitrator; (2) the arbitral proceeding was fair and regular; (3) the parties agreed to be bound; and (4) the decision of the arbitrator must not have been "clearly repugnant to the purposes and policies of the Act." (*Dry Creek.*)

In *Olin Corp.* (1984) 268 NLRB 573, 574 (*Olin Corp.*), the NLRB further described its standard for deferral to an arbitrator's award:

> . . . we adopt the following standard for deferral to arbitration awards. We would find that an arbitrator has adequately considered the unfair labor practice if (1) the contractual issue is factually parallel to the unfair labor practice issue, and (2) the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice. In this respect, differences, if any, between the contractual and statutory standards of review should be weighed by the Board as part of its determination under the Spielberg standards of whether an award is 'clearly repugnant' to the Act. . . . Unless the award is 'palpably wrong,' i.e., unless the arbitrator's decision is not susceptible to an interpretation consistent with the Act, we will defer. [Fns. omitted.]

[8] The *Dry Creek* standards are applicable to cases under HEERA. (*Regents of the University of California (San Francisco)* (1984) PERB Order No. Ad-139-H; *California State University* (1984) PERB Decision No. 392–H.)

The NLRB further stated that it:

> . . . would require that the party seeking to have the Board [NLRB] reject deferral and consider the merits of a given case show that the above standards for deferral have not been met. Thus, the party seeking to have the Board [NLRB] ignore the determination of an arbitrator has the burden of affirmatively demonstrating the defects in the arbitral process or award. [Fn. omitted.]

Thus, PERB has found issues decided by an arbitrator to be "factually parallel" to those raised in an unfair practice charge alleging retaliation where the evidence presented on the alleged contract violation, including the employer's justification for its conduct, is the same as the evidence that would be considered by PERB. (*Santa Ana*; *San Diego County Office of Education* (1991) PERB Decision No. 880 [overruled on other grounds]; *Yuba City Unified School District* (1995) PERB Decision No. 1095.)

In this case, the grievance filed by Scholz alleges that CSU's denial of teaching assignments violated Article 10 of the MOU. Article 10.36 prohibits reprisals against an employee for the filing and processing of a grievance. In addition, Article 6.16 prohibits retaliation for engaging in CFA activities. The grievance alleges that Scholz has filed previous grievances over her Spring 2007 evaluation and that, as long as that evaluation remained in her file, she cannot be accurately reviewed and considered for subsequent work and appointment. Thus, the grievance alleges similar facts to those that would be considered in the unfair practice charge.

In her appeal, Scholz argues that, because the parties failed to include retaliation in the stipulated issue before the arbitrator, post-arbitral deferral is inappropriate. We disagree. The purpose of the Board's deferral rules is to encourage voluntary resolution of disputes through agreed upon procedures. A party cannot avoid deferral simply by failing to pursue available contractual procedures. By failing to specifically include the retaliation claim in her stipulation of the issues before the arbitrator, Scholz cannot now assert that the arbitrator's

award is repugnant to the purposes of HEERA. Moreover, in this case, the arbitrator considered CSU's justification for its actions and concluded that CSU gave Scholz "careful consideration" in its decision not to assign her to teach classes. Thus, the arbitrator, stated: "The totality of the evidence reflects that the decision not to reappoint Scholz was not made 'in bad faith and without careful consideration;' rather the evidence suggests that [the decision maker] acted in good faith." This conclusion necessarily means that CSU's actions were not the product of unlawful discrimination. Thus, the arbitrator's conclusions encompass the same factual issues that would have been presented on the retaliation claim.

We also find that the arbitration award itself is not "clearly repugnant to the purposes and policies" of HEERA. Under the *Spielberg* standards adopted by the Board in *Dry Creek*, an arbitration award is not repugnant unless it is "palpably wrong," i.e., not susceptible to an interpretation consistent with HEERA. (*Olin Corp.*) No such showing has been made in this case.[9]

ORDER

The unfair practice charge in Case No. LA-CE-1026-H is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Member McKeag joined in this Decision.

Member Huguenin's concurrence begins on page 10.

[9] We decline to adopt the view of our colleague that allegations of retaliation for having participated in the Board's processes can never be deferred to arbitration. In this case, there is simply no showing that the retaliation issues could not have been resolved through the arbitration process or that the arbitration award is repugnant to the purposes and policies of HEERA.

HUGUENIN, Member, concurring: I agree with the majority that the repugnancy review claim is tardy. I believe we have the discretion to consider the repugnancy claim under Public Employment Relations Board (PERB or Board) Regulation 32661(d).[1] The majority disagrees, and thus they dismiss the repugnancy claim as untimely. Since the majority concludes the repugnancy claim is untimely, I conclude there is no need to address the repugnancy issue. Therefore, I do not join that discussion.

I write separately for another reason. Were the issue of deferral before me, I would follow the lead of the National Labor Relations Board (NLRB) in not deferring to arbitration a claim that an employee was discriminated against for seeking relief under one of the labor board's statutes. Such a claim was made here and deferred to arbitration. In my view that deferral was inappropriate.

The National Labor Relations Act contains an express provision[2] prohibiting discrimination against an employee due to filing charges or giving testimony. In *Filmation Associates, Inc.* (1977) 227 NLRB 1721, the Board explained why it does not defer such matters to arbitration:

> The prohibition expressed in Section 8(a)(4) against discharging or otherwise discriminating against an employee because he has filed charges or given testimony under the Act is a fundamental guarantee to employees that they may invoke or participate in the investigative procedures of this Board without fear of reprisal and is clearly required in order to safeguard the integrity of the Board's processes. In our view the duty to preserve the Board's processes

[1] PERB Regulation section 32661(d) states that as to repugnancy matters the "Board itself may, at any time, direct that the record be submitted to the Board itself for final decision." PERB regulations are codified at California Code of Regulations, title 8, section 31001, et seq.

[2] Section 8(a)(4) provides: "It shall be an unfair labor practice for an employer . . . to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act."

> from abuse is a function of this Board and may not be delegated to the parties or to an arbitrator. Accordingly, as we conclude that issues involving Section 8(a)(4) of the Act are solely within the Board's province to decide we will not apply the *Spielberg* [[3]] doctrine to such issues.

(*Id.*, at p. 1721.)

We have held that filing PERB charges,[4] testifying in a PERB hearing,[5] and participating in a PERB informal settlement conference[6] are conduct protected from discrimination or retaliation. These rights arise not from provisions of our statutes that protect employee rights to form, join and participate in activities of employee organizations (or to refuse to do so),[7] but rather are necessary antecedents to the rights of employees to access the remedies afforded by our statutes against discrimination or retaliation by employers or employee organizations. Like the NLRB, we must safeguard our processes from abuse and should not delegate the responsibility to protect employees who use our processes. Accordingly, I would treat allegations of discrimination or retaliation for accessing or participating in PERB's remedial processes as matters for adjudication by PERB and not for disposition under our routine deferral rules.

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[3] *Spielberg Manufacturing Company* (1955) 112 NLRB 1080.

[4] *Los Angeles Community College District* (2004) PERB Decision No. 1667, affirming regional attorney's dismissal.

[5] *Regents of the University of California* (1984) PERB Decision. No 403-H; *Placer Hills Union School District* (1984) PERB Decision No. 377.

[6] *Fullerton Elementary School District* (2004) PERB Decision No. 1671, adopting the administrative law judge's proposed decision.

[7] Government Code Sections 3502, 3515, 3531, 3543, 3565, 3581.1, 71631, 71813, and 99563.