STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

TODD SENIGAR, Charging Party, v. REGENTS OF THE UNIVERSITY OF CALIFORNIA (SAN FRANCISCO), Respondent.	Case No. SF-CE-1064-H PERB Decision No. 2372-H April 21, 2014

Appearances: Todd Senigar, in propria persona; Renne, Sloan, Holtzman & Sakai by Timothy G. Yeung, Attorney; University of California, Office of the General Counsel by Stephanie Leider, Senior Counsel, for Regents of the University of California (San Francisco).

Before Huguenin, Winslow and Banks, Members.

DECISION[1]

HUGUENIN, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Todd Senigar (Senigar) of the dismissal (attached) of his unfair practice charge by PERB's Office of the General Counsel. Senigar's charge, as amended, alleges that the Regents of the University of California (San Francisco) (UCSF) violated sections 3567 and 3571(a) of the Higher Education Employer-Employee Relations Act (HEERA)[2] when it denied him reappointment rights and disability benefits; improperly reported income to the Internal Revenue Service; and caused the U.S. Department of Homeland Security to investigate him.

[1] PERB Regulation 32320(d) provides, in pertinent part: "Effective July 1, 2013, a majority of the Board members issuing a decision or order pursuant to an appeal filed under Section 32635 [Board Review of Dismissals] shall determine whether the decision or order, or any part thereof, shall be designated as precedential." Having met none of the criteria enumerated in the regulation, the decision herein has not been designated as precedential. (PERB Regs. are codified at Cal. Code of Regs., tit. 8, § 31001 et seq.)

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

We have reviewed the unfair practice charge; the amended charges; the appeal; UCSF's responses thereto; Senigar's previous unfair practice charge against UCSF which was dismissed on September 10, 2012;[3] the warning and dismissal letters in the instant unfair practice charge; and the entire record in light of relevant law. Based on this review, we affirm the Office of the General Counsel's dismissal and adopt the warning and dismissal letters as the decision of the Board itself.

ORDER

The unfair practice charge in Case No. SF-CE-1064-H is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Winslow and Banks joined in this Decision.

[3] The Board takes official notice of the content of its casefile in Case No. SF-CE-1007-H.

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
1330 Broadway, Suite 1532
Oakland, CA 94612-2514
Telephone: 510-622-1025
Fax: (510) 622-1027

November 19, 2013

Todd Senigar

Re: *Todd Senigar v. Regents of the University of California (San Francisco)*
Unfair Practice Charge No. SF-CE-1064-H
DISMISSAL LETTER

Dear Mr. Senigar:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on May 10, 2013. Todd Senigar (Charging Party) alleges that the Regents of the University of California (San Francisco) (University or Respondent) violated the Higher Education Employer-Employee Relations Act (HEERA or Act)[1] by denying him reappointment and misreporting his income to the United States Internal Revenue Service (IRS).

Charging Party was informed in the attached Warning Letter dated October 11, 2013 that the above-referenced charge did not state a prima facie case. Charging Party was advised that, if there were any factual inaccuracies or additional facts that would correct the deficiencies explained in that letter, the charge should be amended. Charging Party timely filed a Third Amended Charge on October 16, 2013.

As set forth in greater detail in the October 11, 2013 Warning Letter, Charging Party alleges that the University's denials of his multiple requests for reappointment were based on his protected activity. Additional information provided in the Third Amended Charge is discussed herein. Charging Party further alleges that the University filed a purportedly inaccurate income report with the IRS because of his protected activity.

Denial of Reappointment Rights, Timeliness

The October 11, 2013 Warning Letter noted that Charging Party had previously filed an unfair practice charge with PERB on April 18, 2012, in which he alleged that following his termination for cause on October 24, 2011, he learned that he would be denied benefits

[1] HEERA is codified at Government Code section 3560 et seq. PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq. The text of the HEERA and PERB Regulations may be found at www.perb.ca.gov.

afforded to individuals who are medically separated from University employment, including reappointment rights. The October 11, 2013 Warning Letter explained that PERB may take official notice of matters within its own files and records. (*Antelope Valley Community College District* (1979) PERB Decision No. 97.) Because Charging Party had learned no later than April 18, 2012, when he filed the prior charge in PERB Case No. SF-CE-1007-H, that he would be denied reappointment rights, the Warning Letter concluded that the related allegations concerning the denial of reappointment in the instant charge are untimely.

In the Third Amended Charge, Charging Party states:

> Respectfully, I did NOT know about the denial of my right to reappointment as stated in my current charge. I received notice of this from the Respondent in or about January 28, 2013 (as stated in my current Charge). Reappointment rights did not attach until UCRP Disability benefits were approved. Mine were not approved until after January 2013. Even with the approval the benefits are reduced. I continue to Challenge this. I could not have known that the University would deny me reappointment rights along with reducing the other benefits.
>
> The noted paragraph seems to go beyond establishing a prima-facie finding. I am not privy to files PERB may have on hand, so I cannot address the reference to a prior Unfair Practice Charge.

However, in the charge filed on April 18, 2012, Charging Party wrote:

> Following my termination, on October 24, 2011, I learned that I was denied options pertaining to a possible transfer and/or medical separation, and I consequently was denied benefits afforded by the appropriate disability system (i.e. PERS; UCRP), and pursuant to UC Policy 66 [ITEM #1][2] even though it was known throughout UCSF… that I was continuing to grapple with health problems due to a work incurred injury/illness and, as a result of, I was continuing to receive medical treatment for a number of years. I believe the suppression of rights was in reprisal, in part, for my filed grievances.

[2] This reference, appearing in the charge itself, is to the University's policy on medical separation, a copy of which Charging Party attached. Included in Policy 66 are the "Special Reappointment Procedures" which Charging Party invoked in connection with the instant charge.

With respect to Charging Party's claim that he cannot address whether he previously made this allegation to PERB, Charging Party is again advised that 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.) Charging Party knew no later than April 18, 2012 that he would not be entitled to reappointment rights under University Policy 66 concerning medical separation, because he stated in his April 18, 2012 charge that "I learned that I was denied...medical separation." Once the statute begins to run, a charging party "cannot cause it to begin anew by making the same request over and over again." (*Teamsters Locals 78 & 853 (Hinek)* (2009) PERB Decision No. 2056-M.) Consequently, Charging Party's March 18 and April 22, 2013 requests that he be reappointed pursuant to the University's medical separation policy do not restart the statute, when Charging Party has known at least as long ago as April 18, 2012 that he had no such rights. The allegation that the University withheld such rights in retaliation for Charging Party's protected activity is therefore untimely and is hereby dismissed. (*Coachella Valley Mosquito and Vector Control District v. Public Employment Relations Board* (2005) 35 Cal.4th 1072.)

Although Charging Party's previous unfair practice charge alleged the University denied PERS and UCRP benefits on or after October 24, 2011 and before April 18, 2012, it appears Charging Party now alleges that he learned on or about January 28, 2013, that his "UCRP disability benefits were approved [but] the benefits are reduced." Assuming Charging Party's allegations concerning the reduction of his UCRP benefits are not barred by the statute of limitations, the same retaliation analysis set forth in the October 11, 2013 Warning Letter applies to such allegations. It appears Charging Party engaged in protected activity by filing the previous unfair practice charge on April 18, 2012 and that the University knew about Charging Party's exercise of rights to file an unfair practice charge. It further appears the University took an action—the reduction of UCRP benefits—that may be considered adverse. However, as noted in the October 11, 2013 Warning Letter, the allegations to not provide information that demonstrates Charging Party was an employee or "higher education employee" pursuant to HEERA section 3562(e) in January 2013 when the University allegedly reduced UCRP benefits. For this reason, the allegations fail to state a prima facie case of retaliation.

Assuming for the sake of argument, however, that Charging Party provided information demonstrating he was an employee and that the University took an adverse action against Charging Party, the charge still lacks information demonstrating the necessary nexus between Charging Party's protected activity and the University's reduction of his benefits. First, the nine months between Charging Party's April 2012 exercise of rights protected under HEERA and the University's January 2013 reduction of benefits is insufficient to establish the necessary timing factor. (*North Sacramento School District* (1982) PERB Decision No. 264 [the timing of the employer's adverse action in close temporal proximity to the employee's protected conduct is an important factor; *Regents of the University of California* (2006) PERB Decision No. 1851-H [two months between the protected activity and the adverse action was too remote in time to establish close enough temporal proximity]; *Trustees of the California State University (San Marcos)* (2009) PERB Decision No. 2070-H [Five days between protected activity and adverse action was sufficiently close in time to establish timing factor].)

Second, even if there was close temporal proximity, timing, without more, does not demonstrate the necessary connection or "nexus" between the adverse action and the protected conduct. (*Moreland Elementary School District* (1982) PERB Decision No. 227.) The information provided by Charging Party does not demonstrate the presence of any additional nexus factors as explained in the October 11, 2013, Warning Letter.

Income Reporting

As discussed in the October 11, 2013 Warning Letter, Charging Party alleges that on January 23, 2013, the University filed with the IRS a 1099-MISC form "falsely claiming that [Charging Party] had received approximately $50,000 in income from the University in 2012." The University states that on May 11, 2012, Charging Party filed a lawsuit against the University in the United States District Court for the Northern District of California alleging retaliation, disability discrimination, hostile work environment, failure to engage in the interactive process, and violation of the Employee Retirement Income Security Act. The University filed an offer of judgment in favor of Charging Party pursuant to Federal Rule of Civil Procedure 68, in the sum of $50,001. Charging Party, through his attorney, filed with the court an acceptance of the offer of judgment on December 12, 2012, and an acknowledgement of satisfaction of judgment on January 14, 2013.[3]

The Warning Letter further noted that there is an ambiguity in the facts alleged concerning the money described in the acknowledgement of satisfaction of judgment. In the Second Amended Charge, Charging Party acknowledges that he accepted the offer of judgment, however, "[Charging Party] did not receive any funds related thereto until about January 14, 2013." However, Charging Party also alleged that "[i]t is [his] understanding that the funds were sent to a former representative of [Charging Party's] in January 2013... [Charging Party] did not receive the sum reported to the IRS at any time." The Third Amended Charge does not address this ambiguity or otherwise clarify the allegation.

The Warning Letter informed Charging Party that PERB does not have jurisdiction to enforce the Internal Revenue Code or IRS regulations. (*State of California (Department of Personnel Administration)* (2009) PERB Decision No. 2018-S.) Charging Party's ambiguous allegation that the University "falsely" reported his income to the IRS is generally outside of PERB's jurisdiction. Nonetheless, the Warning Letter noted that PERB may have jurisdiction where

[3] In the Third Amended Charge, Charging Party states that the fact described in the Warning Letter that the acknowledgment of satisfaction of judgment was filed on January 14, 2013 is "inaccurate." Charging Party appears to claim that the University delayed filing this document while it attempted to reach a settlement with Charging Party. However, the Warning Letter does not purport to state anything about when the University filed the acknowledgement of satisfaction of judgment, because Charging Party's attorney filed the document in question, a copy of which was provided to PERB by the University. It is therefore unclear what inaccuracy Charging Party means to correct.

incorrect reporting of an employee's income would be considered an adverse action under *Novato Unified School District* (1982) PERB Decision No. 210. However, the allegations do not contain information demonstrating the University's reporting of Charging Party's income, even if incorrect, would be considered by a reasonable person under the same circumstances to have an adverse impact on the employee's employment. (*Newark Unified School District* (1991) PERB Decision No. 864.) In the Third Amended Charge, Charging Party states that it is "reasonable to believe" that the tax dispute between himself and the University could endanger his employment prospects with the University. This information does not demonstrate an adverse impact on Charging Party's employment because it does not explain how income reporting to the IRS, even if incorrect, would prevent Charging Party's application for work. (See *County of San Bernardino (County Library)* (2009) PERB Decision No. 2071-M [where Charging Party alleged the employer's conduct prevented her from appealing the employer's decision to deny her job application, but Charging Party failed to allege she actually sought an appeal, there was no adverse action].) Moreover, any future impact on Charging Party's employment is merely speculative, even considering the anecdotal information Charging Party provided regarding a former employee who was alleged to have violated University ethical standards in her resumé. (*County of San Diego* (2009) PERB Decision No. 2005-M [adverse action is not established where it is based on a prediction of future events].)

Because Charging Party has not shown that the University's report to the IRS of Charging Party's approximately $50,000 income had any impact on his employment, no adverse action is shown and the allegation must be dismissed. (*Newark Unified School District*, *supra*, PERB Decision No. 864.)

Additional Allegations

The Third Amended Charge alleges, for the first time, that the University caused Charging to be investigated by the United States Department of Homeland Security. This allegedly required the release of certain financial information relating to a claim for disability benefits and allegedly resulted in the denial of certain disability benefits for Charging Party and the denial of Charging Party's requests for public records. Each of these allegations, however, lacks the specificity required by PERB Regulation 32615(a)(5). Furthermore, as with the above allegations concerning the University's alleged incorrect reporting of Charging Party's income to the IRS, the allegation fails to demonstrate that the University's conduct had an adverse impact on Charging Party's employment, or that a reasonable person under the same circumstances would consider the report to Homeland Security to have an adverse impact on their employment. For these reasons, Charging Party's additional information regarding the University's alleged conduct in causing Homeland Security to investigate Charging Party do not establish a prima facie case of retaliation and are hereby dismissed.

Conclusion

For the above reasons and those contained in the October 11, 2013 Warning Letter, the charge is hereby dismissed.

Right to Appeal

Pursuant to PERB Regulations, Charging Party 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 you file a timely appeal of the refusal to issue a complaint, any other party may file with the Board an original and five copies of a statement in opposition within twenty (20) calendar days following the date of service of the appeal. (Cal. Code 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,

M. SUZANNE MURPHY
General Counsel

By _____
Daniel Trump
Regional Attorney

Attachment

cc: Timothy G. Yeung, Partner
Stephanie Leider, Senior Counsel

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
1330 Broadway, Suite 1532
Oakland, CA 94612-2514
Telephone: 510-622-1025
Fax: (510) 622-1027

October 11, 2013

Todd Senigar

Re: *Todd Senigar v. Regents of the University of California (San Francisco)*
Unfair Practice Charge No. SF-CE-1064-H
WARNING LETTER

Dear Mr. Senigar:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on May 10, 2013. Todd Senigar (Charging Party) alleges that the Regents of the University of California (San Francisco) (University or Respondent) violated the Higher Education Employer-Employee Relations Act (HEERA or Act)[1] by denying him reappointment.

Charging Party filed a First Amended Charge on May 15, 2013, and a Second Amended Charge on June 20, 2013. The Second Amended Charge was filed in response to the position statement of the University, filed on June 14, 2013. The relevant facts alleged in these filings are summarized below.[2]

Facts Alleged

Charging Party was formerly employed by the University at UCSF. On March 18, 2013 and April 22, 2013, Charging Party wrote letters to UCSF Director of Labor and Employee Relations Shelly Nielsen requesting "reappointment with no break in service consistent with applicable University of California policy regarding those who were separated as a result of a disability or medical condition impacting job performance." In the original charge, Charging Party alleges that he was told that he "would not be allowed to receive this reappointment

[1] HEERA is codified at Government Code section 3560 et seq. PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq. The text of the HEERA and PERB Regulations may be found at www.perb.ca.gov.

[2] Nothing in PERB case law requires a Board agent to ignore undisputed facts provided by the Respondent and consider only the facts provided by the Charging Party. (*Service Employees International Union #790 (Adza)* (2004) PERB Decision No. 1632-M.)

benefit," on January 28, 2013, prior to his attempts to invoke it. In the Second Amended Charge, Charging Party states that he was informed of this on January 14, 2013. This is apparently related to the nature of Charging Party's separation from the University, which the University describes as a for-cause termination. In the June 20, 2013 Second Amended Charge, Charging Party states, "I was apparently... separated under a different policy than that which would afford me reappointment rights. There would have been no way for me to know this at the time I was terminated." However, in a prior Unfair Practice Charge filed by Charging Party on April 18, 2012, Charging Party alleged that following his termination on October 24, 2011, he learned that he would be denied the benefits afforded to individuals who are medically separated from University employment, including reappointment rights.[3]

Charging Party states that he has "repeatedly made efforts to internally grieve and seek appropriate resolution to perceived management misconduct within the University of California taken against employees, including [Charging Party], who have attempted to exercise protected rights." Charging Party cites March 2012 and January 2013 as examples of his protected activity, when he "spoke[] before the UC regents requesting intervention into retaliatory acts... based on [his] experiences as well as that of other former colleagues and co-workers." In addition, Charging Party states that on November 23, 2012, he "requested the intervention by [*sic*] the Vice President of Human Resources—Mr. Dwaine Duckett."

Charging Party also alleges that on January 23, 2013, UCSF filed with the United States Internal Revenue Service (IRS) a 1099-MISC form "falsely claiming that [Charging Party] had received approximately $50,000 in income from the University in 2012." The University states that on May 11, 2012, Charging Party filed a lawsuit against the University in the United States District Court for the Northern District of California alleging retaliation, disability discrimination, hostile work environment, failure to engage in the interactive process, and violation of the Employee Retirement Income Security Act. The University filed an offer of judgment in favor of Charging Party pursuant to Federal Rule of Civil Procedure 68, in the sum of $50,001. Charging Party, through his attorney, filed with the court an acceptance of the offer of judgment on December 12, 2012, and an acknowledgement of satisfaction of judgment on January 14, 2013.

In the Second Amended Charge, Charging Party acknowledges that he accepted the offer of judgment, however, "[Charging Party] did not receive any funds related thereto until about January 14, 2013." Charging Party further explains that "[i]t is [his] understanding that the

[3] PERB may take official notice of matters within its own files and records. (*Antelope Valley Community College District* (1979) PERB Decision No. 97.) Charging Party's prior Unfair Practice Charge against the University, PERB Case No. SF-CE-1007-H, was dismissed on September 10, 2012. Charging Party did not appeal the dismissal.

funds were sent to a former representative of [Charging Party's] in January 2013... [Charging Party] did not receive the sum reported to the IRS at any time."[4]

Charging Party alleges that these actions—denying reappointment rights and reporting approximately $50,000 to the IRS—were in retaliation for his protected activity.

Discussion

Charging Party's Burden

PERB Regulation 32615(a)(5) requires, inter alia, that an unfair practice charge include a "clear and concise statement of the facts and conduct alleged to constitute an unfair practice." To do so, the charging party should include sufficient facts that describe 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.)

The charging party's burden also includes alleging facts showing that the unfair practice charge was timely filed; i.e., that the alleged unfair practice occurred no more than six months prior to the filing of the charge. (*Los Angeles Unified School District* (2007) PERB Decision No. 1929; *City of Santa Barbara* (2004) PERB Decision No. 1628-M.) 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. (*Coachella Valley Mosquito and Vector Control District v. Public Employment Relations Board* (2005) 35 Cal.4th 1072.) 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.)

Denial of Reappointment Rights, Timeliness

As noted above, the dispute between Charging Party and Respondent concerning whether he would be entitled to reappointment rights following his termination on October 24, 2011 dates back to around that time and was the subject of a prior Unfair Practice Charge. Although Charging Party did not state with specificity when he learned that the University considered him ineligible for reappointment, it was some time prior to the filing of the charge in PERB Case No. SF-CE-1007-H. Therefore, Charging Party knew, or should have known, that he would be denied reappointment rights no later than April 18, 2012. Because the instant charge was filed well beyond the six-month statute of limitations, this allegation will be dismissed.

[4] It is unclear from this statement whether Charging Party is alleging that he never received the offer of judgment, or that the income reported on the IRS Form 1099-MISC in the same amount was a for a different purpose.

Coachella Valley Mosquito and Vector Control District v. Public Employment Relations Board, *supra*, 35 Cal.4th 1072.)

Income Reporting, 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. (*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 "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 (*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).

Adverse Action

As an initial matter, PERB does not have jurisdiction to enforce the Internal Revenue Code or IRS regulations. (*State of California (Department of Personnel Administration)* (2009) PERB Decision No. 2018-S.) The question for PERB is whether incorrect reporting of an employee's income would be considered an adverse action under *Novato*, *supra*, PERB Decision No. 210.

As noted above, PERB applies an objective test to determine whether an adverse action is established. (*Palo Verde Unified School District*, *supra*, PERB Decision No. 689.) The question is 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*, *supra*, PERB Decision No. 864.)

There are two separate reasons why Charging Party has not established this element of the retaliation claim with respect to the income reporting issue. First, Charging Party does not appear to be an employee or "higher education employee" pursuant to HEERA section 3562(e). Charging Party's employment with the University was terminated on October 24, 2011. Although former employees who are on a reemployment list may be considered to be employees (*see Jurupa Unified School District* (2013) PERB Decision No. 2309), Charging Party was never given reappointment rights. As discussed in more detail above, Charging Party's allegation that he should have been given reappointment rights is untimely.

Even assuming that Charging Party is considered an employee or higher education employee, there is a second reason why Charging Party has not established that the University's allegedly incorrect reporting of income to the IRS is an adverse action. Charging Party has not shown how such conduct could affect his employment relationship with the University, as opposed to his relationship with the IRS. No facts are provided which would show whether, for example, the allegedly incorrect IRS Form 1099-MISC the University prepared will make it less likely that he is able to attain reemployment.

Protected Activity

Charging Party alleges that he was engaged in protected activity when he "repeatedly made efforts to internally grieve and seek appropriate resolution to perceived management misconduct within the University of California taken against employees, including [Charging Party], who have attempted to exercise protected rights." No other details related to this allegation are provided. Charging Party also alleges that he was engaged in protected activity when he spoke before meetings of the Regents in March 2012 and January 2013.

According to the University, Senigar is in a bargaining unit that is not exclusively represented by any union.[5] However, the University Professional and Technical Employees (UPTE) serves as the non-exclusive representative of Senigar's bargaining unit. As such, there is no collective bargaining agreement that covers Senigar's position, and he is instead covered by the University's Personnel Policies for Staff Members (PPSM). PPSM 70 provides a procedure for an employee to file a complaint about adverse management actions.

In *Regents of the University of California* (1991) PERB Decision No. 872-H *(Regents),* the Board held that HEERA does not grant a statutory right to employees to represent themselves individually in their employment relations with their employer. In *Regents*, a campus police officer filed multiple grievances pursuant to the University's internal personnel policies, filed a charge with the Equal Employment 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*, 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),* the Board reaffirmed that employee complaints to employers are protected only when those complaints "are a logical continuation of group activity."

Charging Party does not provide any essential details related to the "grievances" he filed. Filing grievances pursuant to a negotiated agreement is protected activity. (*North Sacramento School District* (1982) PERB Decision No. 264.) However, it appears that the "grievances" relevant to the present case were not filed pursuant to any negotiated agreement. Charging Party has not provided sufficient facts to show that these "grievances" were protected activity.

Similarly, Charging Party does provide any detail concerning his statements to the Regents. There is insufficient information to determine whether this conduct was protected either. (*Regents*, *supra*, PERB Decision No. 872-H.)

It is noted, however, that Charging Party was engaged in protected activity when he filed his prior PERB charge on April 18, 2012. (*Regents of the University of California* (1984) PERB Decision No. 403-H.)

Nexus

As noted above, Charging Party must also establish that Respondent took adverse action against him because of his exercise of protected rights. While timing is an important factor, it

[5] The charge identifies the bargaining unit involved as "none." Charging Party's prior charge identified the bargaining unit involved as "Dues paid [*sic*] UPTE member—no contract in place."

does not, without more, establish a nexus between the adverse action and protected activity. (*Moreland Elementary School District, supra*, PERB Decision No. 227.) Even assuming Charging Party is able to establish that the University's allegedly incorrect reporting of his income to the IRS is an adverse action, Charging Party must still provide facts which would show that this conduct was motivated by his prior protected activity.

The only example of protected activity Charging Party has established—filing and pursuing the prior PERB charge—ended around September 10, 2012. The timely alleged adverse action—misreporting Charging Party's income to the IRS—occurred around three-and-a-half months later. While the events are relatively close in time, this fact alone does not establish the nexus element. (*Moreland Elementary School District, supra*, PERB Decision No. 227.)

Conclusion

For these reasons the charge, as presently written, does not state a prima facie case.[6] If there are any factual inaccuracies in this letter or additional facts that would correct the deficiencies explained above, Charging Party 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 you wish to make, and be signed under penalty of perjury by an authorized agent of 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 an amended charge or withdrawal is not filed on or before October 18, 2013,[7] PERB will dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Daniel Trump
Regional Attorney

DT

---

[6] 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.*)

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