STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

TOMMIE R. DEES, Charging Party, v. CALIFORNIA STATE EMPLOYEES' ASSOCIATION, Respondent.	)	Case No. SF-CO-11-H PERB Decision No. 590-H September 25, 1986

Appearance: Tommie R. Dees, on his own behalf;
Ronald E. Almquist for California State Employees' Association.

Before Hesse, Chairperson; Morgenstern, Burt and Porter, Members.

DECISION

This case is before the Public Employment Relations Board (Board) on appeal by the charging party of the Board agent's dismissal, attached hereto, of his charge alleging that the California State Employees' Association violated section 3571.1 of the Higher Education Employer-Employee Relations Act (Gov. Code sec. 3560 et seq.).

We have reviewed the dismissal and, finding it free from prejudicial error, adopt it as the Decision of the Board itself.

ORDER

The unfair practice charge in Case No. SF-CO-11-H is hereby DISMISSED WITHOUT LEAVE TO AMEND.

By the BOARD

PUBLIC EMPLOYMENT RELATIONS BOARD
San Francisco Regional Office
177 Post Street, 9th Floor
San Francisco, California 94108
(415) 557-1350

June 10, 1986

Tommie R. Dees

Ron Almquist
CSEA
1108 "O" Street
Sacramento, CA 95814

Re: REFUSAL TO ISSUE COMPLAINT AND DISMISSAL OP UNFAIR PRACTICE CHARGE
Tommie R. Dees v. California State Employees Association
Charge No. SF-CO-11-H

Dear Parties:

Pursuant to Public Employment Relations Board (PERB) Regulation section 32730, a complaint will not be issued in the above-referenced case and the pending charge is hereby dismissed because it fails to allege facts sufficient to state a prima facie violation of the Higher Education Employer-Employee Relations Act (HEERA.[1] The reasoning which underlies this decision follows.

On December 9, 1985 charging party filed an unfair practice charge against the California State Employees Association (Association) alleging violation of HEERA section 3571.1 "and any others that may apply." The attached proof of service indicates that charging party served the Association with a completed unfair practice form and indicated that "all other pages and documents and witnesses statements to be hand-carried in or sent later as confidential investigation continues." Charging party appears to base his charge on documents submitted to PERB on June 5, 1985 and June 30, 1985. He states:

> Charging party is resubmitting (hand-delivered back to the PERB-SF office) the documentation of his witnesses statements found in "new charge of discrimination" and "PERB new evidence of discrimination" of June 5, 1985 and June 30, 1985.

Upon filing, the charge was accompanied by the following documents: an item designated "confidential material from PERB to W. C. 10A8/85" which consisted of three pages, is followed by two pages of handwritten notes and a proof of

[1]References to the HEERA are to Government Code sections 3560 et seq. PERB Regulations are codified at California Administrative Code, Title 8.

service by mail in duplicate and has attached to it a letter from Robert Thompson, regional attorney for PERB, dated September 12, 1984 which addresses Mr. Dees concerning a subpoena issued to the PERB in connection with his matter before the Workers' Compensation Appeals Board; a document designated "confidential documents filed by Tommie R. Dees" (there are 31 documents listed on the first and second page and a second list commences on the second page and continues on the third page which lists 10 documents); a letter from Robert Thompson, regional attorney for PERB, to Tommie Dees, dated October 22, 1985; a copy of PERB's denial of charging party's request for reconsideration dated July 16, 1985; a handwritten office memo from Mr. Wilson, a proof of service form, and two completed unfair practice charge forms.

The second item consists of a collection of documents entitled "confidential documents" and bears the date December 7, 1985. The first two pages describe charging party's position. He states in conclusionary terms that abnormal employment and working conditions existed before, during and after his period of employment as a groundskeeper at Cal State Hayward. He complains that there was "harassment," "discrimination," "unprofessional conduct," "mismanagement," "hostile communication and lack of communication," "unfair labor practices," and "immoral, dishonesty, threats, reprisals." The thrust of his complaint appears to be that the employer, the California State University, Hayward, engaged in certain discriminatory conduct and that the CSEA, though threatening to file unfair practice charges against the University, did not protect his interests because agents of the organization had friendships with management personnel as well as political ties that caused them to act in collusion with the agents of the employer. The second item consists in its entirety of 31 pages, numbered by the regional attorney in the lower right-hand corner.

The third item is entitled "new charge of discrimination" and consists of 131 pages, numbered in the top left-hand corner.

The fourth item consists of a U.S. Supreme Court decision entitled Bowen v. U.S. Postal Service, decided on January 11, 1983; an article which appeared in the UCLA Law Review entitled "The Employee's Remedy for Union Breach of the Duty of Fair Representation: Vaca v. Sipes"; and, a copy of a decision by the U.S. Court of Appeals (4th Circuit) entitled Griffin v. UAW, dated October 25, 1972.

The fifth item consists of a letter dated December 2, 1985 sent by PERB to charging party advising him that his charge was filed incorrectly and suggesting steps he might take to cure the defects.

Examination and investigation of the charge revealed the following. On May 21, 1984 charging party filed an unfair practice charge against CSEA alleging violation of HEERA section 3571.1. On August 2, 1984 PERB wrote to charging party advising him that unless withdrawn or amended, the allegations

would be dismissed because they did not state a prima facie violation of HEERA. Thereafter, charging party filed a first amended unfair practice charge on August 21, 1984. On September 5, 1984 the General Counsel dismissed the charge. Charging party appealed this dismissal and the Board, on March 14, 1985, upheld the dismissal. (PERB Decision No. 496-H.) On July 16, 1985, PEE® denied charging party's request for reconsideration (PERB Decision No. 496a-H.}

On June 5, 1985 and June 30, 1985, charging party brought several documents to the San Francisco Office of PERB and requested, based on his alleged incompetence to file an unfair practice charge due to his psychological condition and lack of legal training, that PERB examine the documents and advise him whether an unfair practice charge could be filed. On July 25, 1985 the regional attorney wrote to Mr. Dees advising him that the 3-1/2 inch thick stack of documents did not support a prima facie violation of HEERA. (Letter attached and incorporated by reference.) The letter set forth the law concerning the 6-month period of limitations, as well as the elements which have to be alleged to support a prima facie violation of HEERA sections 3571.1(e) and 3578 (the right to fair representation by the exclusive representative).

On December 9, 1985 charging party filed the above-described unfair practice charge alleging facts which are not significantly different, if at all, from those alleged in support of the initial charge which was dismissed by PERB. More importantly, the facts and conclusions contained in the documents submitted to PERB do not describe conduct which occurred within the six months immediately preceding the filing of the charge. Charging party appears not to have had any contact with the Association during the entire year of 1985. No omissions or commissions on the part of the Association are described as having occurred or not occurred during 1985.

For the reasons stated in the letter sent to charging party by the regional attorney on July 25, 1985, the allegations of the charge are hereby dismissed. No facts are alleged describing arbitrary, bad faith or discriminatory conduct on the part of the Association. Rocklin Teachers Professional Association (Romero) (1980) PERB Decision No. 124. No facts are alleged to have occurred within the six months preceding the filing of the charge, or which could provide the basis for "tolling." The matter is therefore time-barred. San Dieguito Union High School District (1982) PERB Decision No. 184.

Pursuant to Public Employment Relations Board regulation section 32635 (California Administrative Code, title 8, part III), you may appeal the refusal to issue a complaint (dismissal) to the Board itself.

Right to Appeal

You may obtain a review of this dismissal of the charge by filing an appeal to the Board itself within twenty (20) calendar days after service of this Notice

(section 32635(a)). To be timely filed, the original and five (5) copies of such appeal must be actually received by the Board itself before the close of business (5:00 p.m.) on June 30, 1986, or sent by telegraph or certified or Express United States mail postmarked not later than June 30, 1986 (section 32135). The Board's address is:

Public Employment Relations Board
1031 18th Street
Sacramento, CA 95814

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 (5) copies of a statement in opposition within twenty (20) calendar days following the date of service of the appeal (section 32635(b)).

Service

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding, and a "proof of service" must accompany each copy of a document served upon a party or filed with the Board itself (see section 32140 for the required contents and a sample form). The document will be considered properly "served" when personally delivered or deposited in the first-class mail postage paid and properly addressed.

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 (section 32132).

Final Date

If no appeal is filed within the specific time limits, the dismissal will become final when the time limits have expired.

Very truly yours,

JEFFREY SLOAN
Acting General Counsel

By _____
PETER HABERFELD
Regional Attorney

cc: General Counsel

PUBLIC EMPLOYMENT RELATIONS BOARD
San Francisco Regional Office
177 Post Street, 9th Floor
San Francisco, California 94108
(415) 557-1350

July 25, 1985

Tommie R. Dees

Dear Mr. Dees:

During the early part of June 1985, you brought several documents to the San Francisco office of the Public Employment Relations Board: a completed unfair practice charge form, signed June 5, 1985, alleging violation of the Higher Education Employer-Employee Relations Act (HEERA) by the California State Employees' Association (CSEA); two photocopies of that completed form; a completed unfair practice charge form, signed June 5> 1985, alleging violation of HEERA by the California State university, Hayward (CSU); two copies of that completed form; a four-page attachment, incorporated in the charges against the CSEA and CSU entitled "New Charge of Discrimination"; a one-page letter from Carolyn D. Spatta, vice president, administration and business affairs, directed to Mr. Tommie Dees and dated May 29, 1985 and incorporated in the charges against CSEA and CSU; a proof of service form dated June 6_T 1985, signed by Mr. Raymond Lee, declaring that the "new charges" had been served against CSU and CSEA on that date. Additionally, you presented a 3-1/4 inch stack of documents and suggested that they contained evidence, either of new incidents of unfair practices directed against you by CSEA and/or CSU, or new facts to bolster claims about previously charged unfair practices committed by CSEA and/or CSU. You stated that you could not afford to photocopy that stack of papers to meet the filing requirements of PERB and the service requirements of PERB rules. Further, you indicated that because you are not a lawyer, you did not feel confident in designating which of the documents contained in the 3-1/4 inch stack of papers described new incidents or new facts. As a consequence, we agreed that prior to the official filing of your new charges, I would review the documents and make specific suggestions concerning which documents might be attached and incorporated in your new charges, as well as which facts might be alleged to establish new unfair practices or bolster previously made and presently pending unfair practice claims.

On June 30, 1985. you mailed material to me, marked "confidential." It consisted of a four-page document entitled "PERB new evidence of discrimination." Attached to it are the following documents: the decision by the California State Personnel Board in the matter of the appeal by Samuel Walton; the proposed decision issued by administrative law judge Ruth M. Friedman in that matter; a two-page order of dismissal issued by the Workers Compensation Appeals Board in the matter entitled Tommie Dees v. California State University, Hayward and State Compensation Insurance Fund; a two-page letter signed by George D. Cowen, M.D., addressed to Judge Mason

concerning your physical and mental health; a two-page claim statement by you which appears to have been submitted pursuant to provisions of the Unemployment Insurance Code; a one-page notice from the Employment Development Department indicating "you did not qualify"; and, a proof of service form signed by William A. Danisher on July 1, 1985 declaring that the "new evidence of discrimination" had been sent to the Public Employment Relations Board.

The status of the charges filed by you previously with PERB are summarized briefly. On May 21, 1984 you filed an unfair practice charge against CSD (SF-CE-192-H). On August 2, 1984 a warning letter was sent to you in regard to that charge by Emily E. Vasquez, staff attorney for PERB. The first amended unfair practice charge was filed in that matter on August 21, 1984. On September 9, 1984 PERB's General Counsel issued a partial dismissal of the unfair practice charge and issued a complaint on the remaining allegations in that matter.

On May 21, 1984, you filed a charge against the CSEA alleging violation of HEERA section 3571.1 (SF-CO-5-H). On August 2, 1984 staff attorney Emily Vasquez wrote you a warning letter regarding that charge. On September 5, 1984 the General Counsel of PERB issued a dismissal of the unfair practice charge and refused to issue a complaint in that matter. Thereafter, you filed a motion for reconsideration, but this was denied by the PERB Board on July 16, 1985.

Examination of the materials revealed the following. On November 15, 1983 CSU representative Robert A. Kennelly directed a memorandum to you placing you on leave until such time as you are

> able and willing to perform the full range of . . . normal duties as and where assigned by . . . [his] supervisors.

CSD claimed that its determination was based on information provided by your psychologist as well as your supervisors. The letter informs you that you may return to work when you can submit a medical release confirming your ability to perform your normal assignment without damage to health and well being, and when you can state your willingness to perform your normal assignment under normal working conditions. Further, the letter informs you that during your leave you may use any accrued sick leave or other leave credits. Finally, you are told that once you exhaust your sick leave credits you should apply for nonindustrial disability insurance benefits.

On February 16, 1984 Mr. Slade Lindemon, representative of CSD, wrote to Ms. Marilyn Sardonis, field representative for CSEA, concerning you case. The letter concerns, for the most part, CSU's effort to resolve a grievance. However, the letter closes by reminding Ms. Sardonis concerning your possible eligibility for nonindustrial disability benefits. The letter indicates that a copy was sent to you.

On March 8, 1984 Mr. Lindemon addressed a letter to you informing you that your leave credits were exhausted on February 9, 1984, and therefore either you would have to return to work, terminate your employment at the University, or be placed on unpaid leave status. The letter informed you that if you wish to secure a leave of absence without pay for medical reasons, you would have to submit a written request as well as state a specific period of intended absence. In the event you wished to return to work, you would have to submit a physician's or psychologist's written statement confirming that you are able to resume your employment without endangering your health.

The letter also informs you of your option for disability retirement. The letter closes informing you that inaction on your part will result in termination from employment because there is no request for approved leave on file. You are instructed to respond by March 16, 1984.

On March 13, 1984 you wrote to Mr. John Hamilton, representative of CSEA. You enclosed the CSU letter of March 9, 1984 and requested that CSEA

> look over the letter and the grievance and make a decision on what, if anything, further needs to be done.

On March 26, 1984, Mr. Lindemon addressed another letter to you: The letter of March 8, 1984 was attached and reference is made by Mr. Lindemon to a letter dated March 20, 1984 from Mr. Dees, I have been unable to locate a copy of such a letter in the materials provided to roe. Lindemon requests a response from you by April 6, 1984.

The March 26, 1984 letter closes by referring to a separate letter, dated March 23, 1984 in which CSU informed you of health benefits and repeats an admonition apparently made also in the letter of March 23, 1984: that you must protect your health benefits by March 31, 1984. A copy of the March 26, 1984 letter was sent to Ms. Sardonis. I have been unable to locate a copy of the March 23, 1984 letter referenced here.

On April 12, 1984 CSEA wrote a letter to CSU responding to CSU's March 26, 1984. The CSEA letter begins by accusing CSU of bypassing the exclusive representative and interfering with the employee's right to be represented by an employee organization. CSEA takes issue with Mr. Lindemon having communicated directly with you despite knowledge that CSEA is your representative in a grievance hearing involving the underlying incident. Next, the letter makes clear that you do not intend to apply for disability retirement and that you would return to work immediately if the employer complied with its obligation to make a reasonable accommodation in the work location assigned to you. The letter explains that your physical/mental condition is specific to the work location where you were assigned last. CSEA contends that your status shou3.d remain unchanged during the pending grievance. CSEA accuses CSU of applying a different standard to you than it does apply to other employees. However, no facts are provided to demonstrate

that the treatment is disparate and that the difference is a result of anti-union animus.

On May 29, 1985 Ms. Carolyn D. Spatta, representative of CSU, wrote a letter to you informing you that you have

> automatically resigned from employment with the University.

The letter refers to your having been informed in March 1984 of the actions you would have to take to protect your employment status, and states that because you failed to either return to your normal assignment or request a leave of absence, that you have been considered absent without authorized leave. Further, the letter informs you that you have ten days within which to file a request for reinstatement with the CSU.

In San Dieguito Union High School District (1982) PERB Decision No. 184, PERB held that, to state a prima facie violation, charging party must allege and ultimately establish that the alleged unfair practice either occurred or was discovered within the six-month period immediately preceding the filing of the charge with PEPS. EERA section 3541.5; Danzansky-Goldberg Memorial Chapels, Inc. (1982) 264 NLRB 112 [112 LRRM 1108]; American Olean Tile Co. (1982) 265 NLRB No. 206 [112 LRRM 1080]; A.F.C. Industries, Inc. (Amcar Division) (1978) 234 NLRB 1063 [98 LRRM 1287], enfd as modified (8 Cir. 1979) 596 F.2d 1344 [100 LRRM 3074]. The National Labor Relations Board cases cited here hold that the six-month period commences on the date the conduct constituting the unfair practice is discovered. It does not run from the discovery of the legal significance of that conduct.

PERB has held that a prima facie statement of unlawful discrimination and retaliation requires allegations that: (1) the employer took adverse action against a certain employee; (2) the employee engaged in activity protected by HEERA; and, (3) the employer would not have taken the adverse action against the particular employee "but for" his/her having engaged in the protected activity. Novato Unified School District (1982) PERB Decision No. 210; Regents of the University of California (1983) PERB Decision No. 308-H; Regents of the University of California (1983) PERB Decision No. 319-H.

The nexus between the employer conduct and the protected activity is established by alleging unlawful motivation on the part of the employer. In Placerville Union School District (1984) PERB Decision No. 377, PERB stated that where direct evidence of unlawful motivation is lacking, it has generally looked to such factors as timing (North Sacramento School District (1982) PERB Decision No. 254; Coast Community College District (1982) PERB Decision No. 251), disparate treatment (San Joaquin Delta Community College District (1982) PERB Decision No. 261; San Leandro Unified School District (1983) PERB Decision No. 288), departure from past procedures (Novato Unified School District, supra), and inconsistent justifications (State of California (Department of Parks and Recreation) (1983) PERB Decision No. 328-S) which,

under certain circumstances, may support an inference of unlawful motivation. Also see University of California (1983) PERB Decision No. 308-H.

Section 3571.1(e) protects rights guaranteed by provisions such as HEERA section 3578 which extends to nonmembers the right to fair representation fay the exclusive representative. The duty of fair representation is breached if the organization's conduct has "a substantial impact on the relationship of unit members to their employer" (SEIU, Local 99 (Kimmett) (1979) PERB Decision No. 106), and is "arbitrary, discriminatory and in bad faith" (Rocklin Teachers Professional Association (Romero) (1980) PERB Decision No. 124. The fair representation duty imposed on the exclusive representative extends to grievance-handling (Fremont Teachers Association (King) (1980) PERB Decision No. 125; United Teachers of Los Angeles (Collins) (1983) PERB Decision No. 258.

PERB has enunciated the standard to apply to an exclusive representative's conduct concerning the processing or failure to process a grievance. In United Teachers of Los Angeles (Collins), supra, the Board stated:

> Absent bad faith, discrimination, or arbitrary conduct, mere negligence or poor judgment in handling a grievance does not constitute a breach of the Union's duty. (Slip Op. at p. 5.)

PERB continued by stating:

> A union may exercise its discretion to determine how far to pursue a grievance in the employee's behalf as long as it does not arbitrarily ignore a meritorious grievance or process a grievance in a perfunctory fashion. A union is also not required to process an employee's grievance if the chances for success are minimal. (Ibid.)

After examining the contents of your documents, I have come to the following conclusion. The correspondence described above reveals that there occurred additional protected conduct on your part, namely: within the preceding six months you asserted your right to participate in the activities of and be represented by the exclusive representative. Further, it reveals additional conduct by CSU adverse to your interests, to wit: discharging you from employment. Therefore, you should consider filing a first amended unfair practice charge alleging the additional protected activity and adverse conduct by CSU apparent in the sequence of events occurring between November 15, 1983 and May 29, 1985.

No further conduct can be identified which occurred within the preceding six months and constitutes an unfair practice on the part of either CSU or CSEA. First, the only conduct described in the material provided me as occurring

within the preceding six months is that apparent from the correspondence reviewed above. Second, as to CSEA, no information has been provided which could support a finding that its conduct during the preceding six-month period has been arbitrary, discriminatory, or in bad faith. Third, there is no indication that any of its conduct during that time was in any manner injurious to you. For these reasons, there do not appear to be grounds for filing an unfair practice charge against CSEA, or new charges, as opposed to new evidence supporting old charges, against CSU.

Please, if you decide to pursue this matter, submit an unfair practice charge attaching and incorporating the documents attached to this letter. It, as well as the documents, should be served on CSU, the charged party. A proof of service should accompany the original charge and two copies of that charge when you file with PERB. Upon receiving your charge, I will prepare and issue a First Amended Complaint in Case No. SF-CE-192-H alleging, as explained above, additional protected activity and adverse employer conduct which occurred within the last six months. Enclosed are the forms for your convenience.

Sincerely,

Peter Haberfeld
Regional Attorney

Enclosures