

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



FARHAD MIRHADY,)
)
Charging Party,) Case No. SF-CO-16-H
)
v.) PERB Decision No. 746-H
)
CALIFORNIA FACULTY ASSOCIATION,) June 26, 1989
)
Respondent.)
_____)

Appearances: Farhad Mirhady, on his own behalf; Reich, Adell & Crost by Glenn Rothner, Attorney, for California Faculty Association.

Before Porter, Craib and Shank, Members.

DECISION

PORTER, Member: This case is before the Public Employment Relations Board (Board) on appeal by Farhad Mirhady (Charging Party) of a Board agent's dismissal, attached hereto, of his charge that the California Faculty Association violated section 3571.1(e) of the Higher Education Employer-Employee Relations Act (HEERA)¹ by failing to satisfy its duty of fair representation with regard to Charging Party's challenge to San Francisco State University's refusal to grant him tenure.

¹HEERA is codified at Government Code section 3560 et seq. Unless otherwise indicated, all statutory references are to the Government Code. Section 3571.1 provides, in pertinent part:

It shall be unlawful for an employee organization to:

.....

(e) Fail to represent fairly and impartially all the employees in the unit for which it is the exclusive representative.

On appeal, Charging Party argues that his first amended charge establishes a prima facie violation of section 3571.1(e), contrary to the Board agent's finding and resultant dismissal of the charge. Upon reviewing the entire record herein and finding no prejudicial error, we hereby adopt the Board agent's dismissal as the Decision of the Board itself.

ORDER

Based on the foregoing, the First Amended Unfair Practice Charge in Case No. SF-CO-16-H is hereby DISMISSED without leave to amend.

Members Craib and Shank join in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
177 Post Street Suite 900
San Francisco, California 94108
(415)557-1350



November 19, 1987

Farhad Mirhady

Re: Farhad Mirhady v. California Faculty Association
Unfair Practice Charge No. SF-CO-16-H

Dear Mr. Mirhady:

In the above-referenced charge, you allege that the California Faculty Association (Association) violated section 3571.1(e) of the Higher Education Employer-Employee Relations Act by failing to satisfy its duty of fair representation with regard to your protest of the San Francisco State University's decision denying you tenure.

I indicated to you in my attached letter dated November 4, 1987, that the above-referenced charge did not state a prima facie case. You were advised that if there were any factual inaccuracies or additional facts which would correct the deficiencies explained in that letter, you should amend the charge accordingly. You were further advised that unless you amended the charge to state a prima facie case or withdrew the charge prior to November 18, 1987, it would be dismissed.

On Monday, November 16, 1987, you submitted an amendment to the above-referenced charge along with numerous documents. All of those documents that were provided to the Association or that refer to the issues you sought to be raised in arbitration were provided to me along with the initial charge. Thus, this information does not alter my conclusion as expressed in my letter dated November 4, 1987. Along with this amendment, you additionally provided me with a large loose-leaf notebook containing numerous documents such as faculty members' reports on class evaluations, letters of recommendation from faculty members and students, documents concerning your role as student advisor, as a member of the School of Business Graduate Council, as a member of the Affirmative Action Mentorship Program, and as a member of the International Visitors Center, published and unpublished papers in your field of study, professional evaluations of your research, program schedules for seminars you participated in or attended, a grant application for undergraduate international studies, a new course proposal, and letters concerning your initiative in introducing computer usage.

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This documentation, while perhaps relevant to the University's decision to deny you tenure, fails to add factual allegations sufficient to demonstrate in what manner the Association breached its duty of fair representation. As I indicated in my previous letter, the conduct undertaken by the Association on your behalf was not perfunctory. The fact that your representative did not elect to introduce every favorable document or raise every argument does not demonstrate conduct falling short of that demanded by the duty of fair representation. In addition, you have failed to allege facts that your representative acted in a way that is arbitrary, discriminatory, or in bad faith. I am therefore dismissing the charge based on the facts and reasons expressed herein and contained in my letter of November 4, 1987.

Right to Appeal

Pursuant to Public Employment Relations Board regulations, 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 dismissal (California Administrative Code, title 8, section 32635(a)). To be timely filed, the original and five copies of such appeal must be actually received by the Board itself before the close of business (5:00 p.m.) or sent by telegraph, certified or Express United States mail postmarked no later than the last date set for filing (section 32135). Code of Civil Procedure section 1013 shall apply. 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 copies of a statement in opposition within twenty 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.

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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 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 specified time limits, the dismissal will become final when the time limits have expired.

Sincerely,

John Spittler
Acting General Counsel

By _____
CAROL A. VENDRILLO
Staff Attorney

Attachment

cc:

PUBLIC EMPLOYMENT RELATIONS BOARD

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



November 4, 1987

Farhad Mirhady

Re: Farhad Mirhady v. California Faculty Association
Unfair Practice Charge No. SF-C0-16-H.

Dear Mr. Mirhady:

I am in receipt of the above-captioned charge in which you allege that the California Faculty Association (Association or CFA) violated section 3571.1(e) of the Higher Education Employer-Employee Relations Act (HEERA) by failing to satisfy its duty of fair representation with regard to your protest of the San Francisco State University's decision to deny you tenure.

My investigation has revealed the following facts. On or about June 2, 1986, you received notification of the University's decision denying you tenure status. You contacted CFA requesting that a grievance be filed on your behalf in order to contest the University's decision. CFA accepted the grievance for arbitration. In preparation for the arbitration, you provided CFA with several documents outlining the various procedural deficiencies made by the University in its tenure review process. Initially, Paul Worthman, CFA Assistant General Manager, was assigned as your representative. Thereafter, Michael Egan became your representative. You discussed the case with both Worthman and Egan and provided them with your detailed assessment and analysis of the case. In documents you have provided me, you set forth arguments you wished CFA to make, requested the production of certain documents in the University's control and identified witnesses you felt would help you reverse the University's decision.

The arbitration hearing was conducted on February 5 and 6, 1987 before arbitrator William Levin. The arbitrator's authority with respect to cases involving tenure is set forth in paragraph 10.19(e) of the agreement between CFA and the California State University. It states in pertinent part as follows:

In cases involving...tenure, the arbitrator shall recognize the importance of the decision not only to the individual in terms of his/her livelihood, but also the importance of the decision to the institution involved.

The arbitrator shall not find that an error in procedure will overturn an appointment...or tenure decision on the basis that proper procedure has not been followed unless:

1. there is clear and convincing evidence of a procedural error; and
2. that such error was prejudicial to the decision with respect to the grievant.

The normal remedy for such a procedural error will be to remand the case to the decision level where the error occurred for reevaluation, with the arbitrator having authority in his/her judgment to retain jurisdiction.

An arbitrator shall not grant...tenure except in extreme cases where it is found that:

1. the final campus decision was not based on reasoned judgment;
2. but for that, it can be stated with certainty that...tenure would have been granted; and
3. no other alternative except that remedy has been demonstrated by the evidence as a practicable remedy available to resolve the issue.

In general, you were dissatisfied with the manner in which Egan presented your case before the arbitrator. You indicated that, because the arbitrator arrived several hours late for the arbitration, you believe that Egan rushed through his presentation. In addition, Egan failed to present two witnesses you believed would be quite helpful to your case, Richard Axen, who would speak to the issue of procedural irregularities in the tenure process, and Paul Rech, a member of the merit award committee, who would attest to the fact that

you had been a serious contender for a merit award. In addition, you are of the opinion that Egan should have introduced evidence to discredit the University's reliance on students' evaluations of your teaching ability based on the fact that the data presented included the student evaluations given to 25 part-time lecturers. Egan introduced into evidence an analysis of this data you prepared using only full-time lecturers in your comparison, however, Egan was critical of your analysis because you did not rely on all of the data provided.

After the arbitration hearing, you discussed the subjects to be addressed in the brief with Egan. On one occasion, you were given an outline of Egan's brief and were disappointed to see that it consisted only of a replication of the contract provisions at issue in the case. You were also disturbed by the fact that Egan had to ask for an extension of time to file his brief, and, once completed, you again felt that many arguments had not been included. In general, you believe that Egan was disinterested in your case and, therefore, failed to represent you in an earnest and aggressive manner.

Based on the facts as described above, this charge does not state a prima facie violation of the HEERA for the reasons that follow. A breach of the duty of fair representation guaranteed by section 3578 violates section 3541.1(e) of the HEERA. To establish a prima facie violation of a breach of the duty of fair representation, the charging party must set forth a clear and concise statement of facts demonstrating that the employee organization acted arbitrarily, discriminatorily or in bad faith. California State Employees' Association (Dees) (1985) PERB Decision No. 496-H. The Board has ruled that the duty of fair representation imposed on the exclusive representative extends to the handling of contractual grievances. Thus, in the processing of your grievance contesting the University's tenure decision, the Association was bound by the duty of fair representation.

In Vaca v. Sipes (1967) 386 U.S. 171, the United States Supreme Court held that a union may not process a meritorious grievance in a perfunctory fashion. While your union representative did not make every argument or call every witness you requested, this conduct cannot be reasonably characterized as perfunctory. Moreover, in order to demonstrate a breach of the duty of fair representation, you must allege sufficient evidence to support the finding that the union's handling of your case contributed to an erroneous outcome. Hardee v. North Carolina Allstate Service, Inc. (4th Cir. 1976) 537 F.2d 1255. In this instance, the authority of the arbitrator to grant you tenure is limited by contract to those "extreme cases" where it

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is found that the final campus decision "was not based on reasoned judgment," where it can be stated "with certainty" that tenure would have been granted and no other alternative remedy is demonstrated by the evidence. No evidence that you would have met this burden but for the Association's conduct appears in the charge. When measured against this standard, the alleged misconduct of CFA falls short of that necessary to establish a duty of fair representation prima facie case. Indeed, the courts have clearly held that the union's failure to raise certain arguments on a grievant's behalf or the failure to present certain evidence does not amount to a duty of fair representation breach. Cannon v. Consolidated Freightways Corp. (7th Cir. 1975) 524 F.2d 290; Franklin v. Southern Pacific Transport Co. (9th Cir. 1979) 593 F.2d 899.

In sum, the conduct set forth above does not establish arbitrary, discriminatory or bad faith conduct. The Association representatives met with you, discussed the issues to be raised, interviewed witnesses, requested and received documents and prepared a legal brief which the arbitrator read and referred to in his decision. The fact that your representative did not elect to call each witnesses you suggested, declined to make each argument you raised, failed to agree with your assessment of the correct way to proceed are differences in judgment that do not amount to breaches of the duty of fair representation.

For these reasons, Charge No. SF-CO-16-H, as presently written, does not state a prima facie case. If you feel that there are any factual inaccuracies in this letter or any additional facts which would correct the deficiencies explained above, please amend the charge accordingly. The amended charge should be prepared on a standard PERB unfair practice charge clearly labeled First Amended Charge, contain all facts and allegations you wish to make, and be signed under penalty of perjury by the Charging Party. The amended charge must be served on the Respondent and the original proof of service must be filed with PERB. If I do not receive an amended charge or withdrawal from you before November 18, 1987, I shall dismiss your charge. If you have any questions on how to proceed, please call me at (415) 557-1350.

Sincerely,

Carol A. Vendrillo
Staff Attorney