STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

JACK EINHEBER, Charging Party, v. REGENTS OF THE UNIVERSITY OF CALIFORNIA, Respondent.	)	Case No. SF-CE-322-H PERB Decision No. 949-H August 13, 1992

Appearances: Jack Einheber, on his own behalf; Joyce Harlan, Labor Relations Representative, for the Regents of the University of California.

Before Camilli, Caffrey and Carlyle, Members.

DECISION AND ORDER

CAFFREY, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by Jack Einheber (Einheber) to the attached ruling on a motion to dismiss. The PERB administrative law judge (ALJ) dismissed the complaint which alleged that the University of California violated section 3571(a) of the Higher Education Employer-Employee Relations Act (HEERA)[1] when it dismissed Einheber from

[1]HEERA is codified at Government Code section 3560 et seq. HEERA section 3571 states, in pertinent part:

> It shall be unlawful for the higher education employer to do any of the following:
>
> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.

his position as a University police officer.

The Board has reviewed the entire record in this case, including the transcript, exhibits, proposed decision, Einheber's exceptions and the University's responses thereto. The Board finds the ALJ's findings of fact and conclusions of law to be free of prejudicial error and therefore adopts them as the decision of the Board itself.

The unfair practice charge and complaint in Case No. SF-CE-322-H are hereby DISMISSED.

Members Camilli and Carlyle joined in this Decision.

STATE OP CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

JACK EINHEBER, Charging Party, v. REGENTS OF THE UNIVERSITY OF CALIFORNIA, Respondent.	)	Unfair Practice Case No. SF-CE-322-H RULING ON A MOTION TO DISMISS (4/3/92)

Appearances: Jack Einheber, on his own behalf; Joyce Harlan, Labor Relations Representative, for the Regents of the University of California.

Before James W. Tamm, Administrative Law Judge.

PROCEDURAL HISTORY

On May 16, 1991, Dr. Jack Einheber (Charging Party or Einheber) filed this unfair practice charge against the Regents of the University of California (University). The charge alleges that Einheber was dismissed from his position as a university police officer at the Berkeley campus because he engaged in protected activities.

On July 23, 1991, the office of the General Counsel of the Public Employment Relations Board (PERB or Board) issued a complaint alleging a violation of section 3571(a) of the Higher Education Employer-Employee Relations Act.[1]

[1]*She* Higher Education Employer-Employee Relations Act is codified at Government Code section 3560 et seq. Section 3571 reads, in pertinent part:

A settlement conference was held on September 10, 1991, however, the matter remained unresolved. A prehearing conference was held November 19, 1991. A formal hearing was held November 25 through 27, 1991. At the conclusion of Charging Party's case in chief, the University made a motion to dismiss. The parties asked to brief the matter, transcripts were prepared and briefs were filed. After several party initiated extensions, the motion was submitted on March 10, 1992.

FINDINGS OF FACT

At all times relevant to this case the Charging Party was a police officer with the UC Berkeley Police Department (UCBPD). Charging Party had engaged in protected activities by preparing, circulating and presenting to the University, a questionnaire soliciting support for the position that outside candidates should be selected to fill the vacant Chief of Police position. Although Einheber's questionnaire soliciting support for outside candidates was not specifically critical of internal candidates, it implied that the internal candidates were not qualified to lead the department. In circulating the questionnaire, Einheber also freely shared with other officers his personal views that

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> It shall be unlawful for the higher education employer to:
>
> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.

internal candidates did not possess the necessary integrity and leadership skills. Einheber also met with Associate Vice Chancellor Phil Encinio in efforts to get the candidate pool for the Chief of Police position opened to people outside the department.

Approximately 14 fellow officers returned Einheber's questionnaire, some echoing Einheber's views and others opposing his position.

The search was opened to outside candidates, but then later, due to budget restrictions, it was once again limited to internal candidates. In September 1990, one of those internal candidates, Victoria Harrison, was named as Chief. After she became Chief, she learned of Einheber's questionnaire and his efforts to expand the search to outsiders.

On November 2, 1991, Einheber was involved in an off-duty incident which led to his dismissal. Einheber's part-time live-in girlfriend had been the subject of numerous outstanding traffic warrants and one outstanding felony arrest warrant.[2] Police officers from the City of Oakland Police Department (OPD) sought the assistance of the UCBPD in making an arrest, since they believed the suspect might be living in Einheber's

[2]Einheber was aware the warrants had been issued because he had, without proper authorization, accessed the department's computer system to check on the warrants issued for his girlfriend. The department listed this unauthorized use of the computer system as an additional reason for his dismissal. While it may have been a contributing factor, it is unlikely the department would have terminated Einheber if that had been his only offense.

apartment. Two OPD officers, accompanied by a UCBPD officer, went to Einheber's apartment. They met Einheber outside of his apartment. They told him of the outstanding warrants for the arrest of his girlfriend and asked if she was living with Einheber. He told them "no."[3] Then they asked him directly if she was in his apartment. Once again, Einheber told them "no." An OPD officer asked again reminding Einheber that it was a felony to harbor a fugitive. Einheber again repeated that she was not in the apartment. The officer then asked if they could go into the apartment and check for themselves. Einheber told them the apartment was messy and he would rather they didn't. They said they didn't care if the apartment was messy and asked again if they could look for themselves. Einheber once again denied them permission to look for themselves.

Einheber knew that his girlfriend was in his apartment at the time, but testified that he sought to protect his girlfriend out of concern for her physical and mental well being. Einheber feared she was suicidal and had been on medication. He feared that because he was scheduled to undergo an operation later that day, if his girlfriend were jailed she would run out of medication before he would be able to get her prescription filled.

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[3]Einheber testified that his answer was accurate because his girlfriend was basically homeless and only stayed with him for short periods of time, rather than actually "living" with him. I find this testimony to be unconvincing and evasive. I find Einheber was aware the officers were seeking to arrest his girlfriend and he was trying to hide her.

There is contradictory testimony about what happened next. According to Einheber, he realized he was making a mistake, then changed his mind, told the officers that she was in the apartment and offered to assist them. According to the UCBPD internal affairs investigator, one OPD officer told the other one to go knock on the apartment door to see if the suspect would open it. Only then, once Einheber suspected he would be caught harboring a fugitive, did he change his story and admit that the suspect was in the apartment.

For purposes of this ruling, it is not necessary to resolve this disputed evidence. It is sufficient to find that at least on several occasions Einheber lied to the arresting officers about the presence of his girlfriend in his apartment and UCBPD believed Einheber would not have volunteered that his girlfriend was in his apartment if he could have gotten away with it.

The OPD officers were upset that Einheber impeded their arrest. One of the officers went so far as to speak to the District Attorney about bringing criminal charges against Einheber.

The UCBPD officer assisting the two OPD officers wrote a full report on the incident. The department then assigned an internal affairs investigator to conduct an investigation. The Chief's staff met with the Chief to review disciplinary recommendations. The staff recommended dismissal. The Chief considered the advice of her staff, then terminated Einheber.

DISCUSSION AND CONCLUSIONS

In order to prove a prima facie violation, the Charging Party needs to prove (1) that he engaged in protected activity, (2) that management had knowledge of his protected activity, (3) that the University took adverse action against him and (4) that the University took the adverse action against him because he had engaged in that protected activity. (Novato Unified School District (1982) PERB Decision No. 210; Carlsbad Unified School District (1979) PERB Decision No. 89; California State University (Sacramento) (1982) PERB Decision No. 211-H.)

Once the Charging Party has done that, the burden shifts to the University to prove that it would have dismissed Charging Party regardless of any protected activity. However, if the Charging Party has not proven a prima facie case, the burden does not shift to the University, and it is under no obligation to put forth any evidence.

I will briefly review the elements of Charging Party's case. The first requirement is that Einheber engaged in protected activity. The evidence of protected activity is twofold. First, that Einheber spoke out in a highly critical manner of department management, specifically, that Harrison lacked integrity and leadership ability. Second, that he went to some efforts to organize other employees to give similar feedback about the department's internal candidates for the Chief of Police position. I believe the combination of those two activities, make Charging Party's activities protected. (State

of California (Department of Personnel Administration) (1982) PERB Decision No. 257-S.)

The second element, that the employer had knowledge of the Charging Party's protected activity is not completely clear. Although Harrison knew of Einheber's questionnaire and efforts to expand the search to outsiders, it is unclear whether she, or anyone who recommended Einheber's termination, knew of Einheber's critical remarks about Harrison's leadership skills.

The third element, that the University took adverse action against the Charging Party, has been proven very clearly. They fired him.

The final element, that the adverse action was taken because the Charging Party had engaged in protected activity, is the element where there is a complete failure of proof. I am not convinced that the Charging Party's actions, in speaking out against Harrison as a manager and leader, and in circulating the questionnaire to increase the candidate pool for the new chief, had anything to do with Charging Party's dismissal.

Rarely are there cases with direct evidence of a nexus or causal connection between the protected activity and the adverse action. That is usually proven by circumstantial evidence. However, when you look at the types of indicators usually found in such cases, it does not support such a finding in this case.

For instance, if the Charging Party were treated in a disparate manner, that would be evidence of unlawful motivation. Here, however, there is a pattern of sworn officers of the

department consistently being held to a high standard of integrity. The department management legitimately felt the Charging Party had engaged in very serious conduct that had interfered with an investigation and arrest attempt of the OPD. They felt Einheber's actions reflected not only on the integrity and the judgment of the Charging Party, but also reflected poorly on the UCBPD as a whole in its relationship with the OPD. Interfering with a legitimate investigation and arrest of another police department, no matter how short the duration of the deception, or how legitimate the concerns were for the personal well being of the suspect strikes at the very heart of a police officer's duty as seen by the management of UCBPD.

There is evidence of similar action (i.e., notice of intent to terminate or pressuring individuals to resign) in other cases involving potential criminal activity or actions which put the reputation of the UCBPD at jeopardy. There is also evidence of other harsh punishment imposed because it involved a question of integrity. A good example of this is a case where an off-duty police officer was improperly using a parking permit. Any other employee of the University would have merely been required to pay restitution for the lost parking revenues (in this case about $40). But, since the case involved a police officer, that officer was also given a one week suspension without pay.

The cases put forth by Charging Party as evidence of disparate treatment were either based on hearsay or double hearsay, were factually inaccurate, or were so remote in time and

having no connection with the current Chief and current management staff, that they do not support a finding of disparate treatment.

Additionally, there is ample evidence that other police officers engaged in similar protected activity. Others criticized the internal candidates for Chief, and sought a broader candidate pool. Sergeant Dillard was president of the Police Officers' Association and was more active than the Charging Party. There was no evidence that Dillard was singled out or retaliated against for his participation. One witness testified in a very credible manner, that about 25 percent of the officers he met with spoke up at meetings on the subject and that some were much more caustic in their comments than the Charging Party. According to one witness, compared to some officers the Charging Party appeared very reasonable and reasoned in his approach. The Charging Party confirmed that at least one officer was more angry, vociferous and emotionally charged on this issue than the Charging Party. I therefore, do not believe that the Charging Party was singled out and treated in a disparate manner.

Nor is there evidence of any departure from standard practices and procedures. The Charging Party appears to have been given the due process rights he was entitled to. There is no evidence supporting Charging Party's allegation that the internal affairs investigating officer was selected by the Chief because she had some ax to grind against the Charging Party or because the investigating officers supported the Chief.

Nor is there any evidence of inconsistent or shifting justifications ever being offered for Einheber's dismissal. Nor are suspicions raised by the time proximity. Einheber's protected activity took place almost six months prior to his dismissal.

Finally, I wish to note the credibility of 3 witnesses because their testimony was instrumental in my reaching the conclusions that I have reached. The testimony of all 3 was very credible and supported a finding that the Charging Party was dismissed because of the November 2 incident and not because of his protected activity.

The first was Lieutenant Beckford, a member of the Chief's staff, who recommended the dismissal of Einheber. I found his testimony forthright, very extemporaneous, and appearing to hide nothing, even when it was clearly to his detriment. He volunteered potentially damaging comments and freely admitted that the Charging Party was a thorn in his side. Beckford, however, also spoke eloquently about the trust police officers are given and the responsibility that goes with that trust. Beckford felt Einheber was an experienced senior officer within the department who deliberately violated the trust given him, thereby tarnishing the reputation of police in general and the UCBPD, in particular. This seemed particularly upsetting to Beckford, who felt the UCBPD is not always seen with the same stature as municipal police departments, and that this incident would be a setback for the department.

Another particularly credible witness was Lieutenant Foley, also on the Chief's staff, and who also recommended dismissal. Foley testified credibly about his own personal views on the amount of integrity necessary to be a good police officer. His views were clearly long standing, deeply held, and well tested as a new lieutenant years ago, when he made a similar recommendation for dismissal of a different officer for a breach of integrity.

The third witness I found particularly credible was Pat Forneret, also a member of the Chief's staff. I found her credible, not because of the details she provided about the dismissal discussion, because actually her recollection of details was not at all clear. However, being the only non-sworn manager at the meeting, she comes closer to being a disinterested outsider than any of the others. It was her testimony about the tone of the meeting, the solemn nature of the discussions, and the difficulty of the other sworn managers, in deciding to dismiss "one of their own" that I found very persuasive.

I therefore conclude, based upon the Charging Party's own evidence, that he was terminated because of the November 2, 1990 off-duty incident, rather than because he engaged in protected conduct.

The University's motion to dismiss is therefore granted. This complaint is DISMISSED.

Pursuant to California Code of Regulations, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the

Board itself at the headquarters office in Sacramento within 20 days of service of this Decision. In accordance with PERB Regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. (See Cal. Code of Reg., tit. 8, sec. 32300.) A document is considered "filed" when actually received before the close of business (5:00 p.m.) on the last day set for filing ". . .or when sent by telegraph or certified or Express United States mail, postmarked not later than the last day set for filing . . . ." (See Cal. Code of Regs., title 8, sec. 32135; Code Civ. Proc, sec. 1013 shall apply.) Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or filed with the Board itself. (See Cal. Code of Regs., tit. 8, secs. 32300, 32305 and 32140.)

Dated: April 3, 1992

James W. Tamm
Administrative Law Judge