

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



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|------------------------------|---|--------------------------|
| PAUL ATHANS, |) | |
| |) | |
| Charging Party, |) | Case No. LA-CE-380-H |
| |) | |
| v. |) | PERB Decision No. 1035-H |
| |) | |
| REGENTS OF THE UNIVERSITY OF |) | February 3, 1994 |
| CALIFORNIA (UCLA), |) | |
| |) | |
| Respondent. |) | |

Appearance; Paul Athans, on his own behalf.

Before Blair, Chair; Caffrey and Garcia, Members.

DECISION AND ORDER

CAFFREY, Member: This case is before the Public Employment Relations Board (Board) on appeal by Paul Athans (Athans) of a Board agent's dismissal (attached hereto) of his unfair practice charge. Athans alleged that the Regents of the University of California violated section 3571(a) of the Higher Education Employer-Employee Relations Act (HEERA)¹ by denying his request for arbitration of a grievance he filed challenging his termination.

¹HEERA is codified at Government Code section 3560 et seq. 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.

The Board has reviewed the entire record in this case, including Athans' charge, the Board agent's dismissal letter and Athans' appeal. The Board finds the Board agent's dismissal to be free of prejudicial error and adopts it as the decision of the Board itself.

The unfair practice charge in Case No. LA-CE-380-H is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chair Blair and Member Garcia joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD



Los Angeles Regional Office
3530 Wilshire Blvd., Suite 650
Los Angeles, CA 90010-2334
(213)736-3127



November 18, 1993

Paul Athans

Re: DISMISSAL AND REFUSAL TO ISSUE COMPLAINT, Unfair Practice
Charge No. LA-CE-380-H, Paul Athans v. Regents of the
University of California (UCLA)

Dear Mr. Athans: _____

In the above-referenced charge, filed October 20, 1993, you allege that UCLA committed an unfair practice, violating the Higher Education Employer-Employee Relations Act (HEERA), by disallowing your representative's request for arbitration involving a grievance filed over your termination. You have chosen not to be represented by the exclusive representative, the International Union of Operating Engineers, Local 501 (IUOE).¹ During our telephone conversation on November 16, 1993, you waived the issuance of a Warning Letter prior to the issuance of this Dismissal and Refusal to Issue Complaint. On November 17, 1993, we briefly discussed this dismissal and your right to appeal to the Board.

My investigation and the charge reveal the following information. You claim UCLA terminated you around December 1992 regarding your extended sick leave. You filed a grievance (Grievance No. 501 GR 93-07). By letter dated March 26, 1993, you advised UCLA that your legal representative was Thomas J. Coleman, Jr., Esq., Law Offices of Leroy S. Walker. By letter dated May 27, 1993, Mr. Coleman requested arbitration on your behalf, under the Collective Bargaining Agreement. You have not requested that IUOE, the exclusive representative, represent you regarding your latest grievance. By letter dated June 4, 1993, UCLA advised Mr. Coleman that Article 26, section A (Request for Arbitration) provides in part, that a request for arbitration may only be made by IUOE. Thus, UCLA would not accept the arbitration request. Part of your charge alleges that "UCLA allows it [the grievance] to go through the steps under their control (within UCLA), but

¹I am treating your charge as alleging a reprisal/discrimination violation of HEERA section 3571(a) making it unlawful for the University to 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 guaranteed rights.

when it comes to be heard in front (sic) an objective trier of fact, (arbitration) they deny to proceed claiming a section of the contract that states, 'only the union can request arbitration'." In your charge, you ask whether UCLA's conduct is an unfair practice under the following facts. You are not a union member and IUOE is hostile to you and refuses to represent you. You base this on a previous sexual orientation discrimination grievance you filed against UCLA approximately one year prior to your December 1992 termination. You allege that in that matter, IUOE sent a representative supporting UCLA instead of supporting you. Next, it is alleged that you were terminated by a union member in good standing who teaches classes at the "Union school," and who is closely related with union management.² You believe that James Lowe and George Reich, two unit members, filed grievances long ago and were allowed to go to arbitration represented by non-union counsel. Thus, you are contending that you were treated in a disparate manner by riot being allowed to go to arbitration with your own attorney.

It appears from my investigation that Mr. Lowe was put on investigatory leave on May 12, 1984, and was given an Intent to Dismiss Notice on June 22, 1984.³ The Notice of Dismissal was effective July 24, 1984. A grievance alleging discrimination was filed on August 8, 1984. It alleged violations of the Staff Personnel Policy (SPP), not of the collective bargaining agreement. The matter proceeded to arbitration and Mr. Lowe had a non-union representative.

Mr. Reich was placed on investigatory leave on May 11, 1984. On June 19, 1984, he was given an Intent to Dismiss Notice. The Notice of Dismissal was effective July 23, 1984. A grievance alleging discrimination was filed on August 8, 1993. It alleged violations of the SPP, not violations of the collective bargaining agreement. The matter proceeded to arbitration and Mr. Reich had a non-union representative.

The agreement between the Regents and IUOE was effective through June 30, 1993. Pursuant to Article 25, section A.2, a grievance may be brought to the attention of the University by an individual employee or by the union. Article 25, section A.4 gives to the employee the right to be represented at all steps of the grievance procedure by a person of the employee's choice. Article 25, section B.3 provides, in part, that IUOE may appeal the grievance to arbitration.

²You indicate that this is a conflict of interest.

³The first agreement between The Regents and IUOE became effective on July 19, 1984, and contained similar language giving only to the union the right to request arbitration.

On November 5, 1993, we discussed the above action by UCLA on June 4, 1993 whereby it refused to accept your representative's request for arbitration. I indicated that you needed to demonstrate that the University's action was taken in retaliation for your prior protected activity (nexus). You indicated that UCLA alleges that you were guilty of job abandonment which you deny. You contend that Article 26, section A, giving only to the union the right to request arbitration, is a "bad" contract provision. Also, you believe that your termination in December 1992 was due to sexual discrimination.⁴ You believe that these factors demonstrate nexus.

Based on the facts stated above, the charge does not state a prima facie violation of HEERA, for the reasons that follow. First, Government Code section 3567 of HEERA states in relevant part, "any employee or group of employees may at any time, either individually or through a representative of their own choosing, present grievances to the employer and have such grievances adjusted, without the intervention of the exclusive representative; provided, the adjustment is reached prior to arbitration [emphasis added]." Thus, when a grievance reaches the arbitration stage, the employee's individual statutory right to present grievances through the employee's chosen representative, and have them adjusted without the intervention of the exclusive representative, comes to an end. (University of California. San Diego (1989) PERB Decision No 781-H. This, plus the language of the contract giving IUOE the sole authority to make a request for arbitration, appears to validate the University's action in refusing to accept your non-union representative's request for arbitration. Also, you might have requested that IUOE represent you on this grievance and/or elevate it to arbitration. This you chose not to do.

Next, to demonstrate a reprisal/discrimination violation of HEERA section 3571(a), the you must show that: (1) you exercised rights under HEERA; (2) the employer had knowledge of the exercise of those rights; and (3) the employer imposed or threatened to impose reprisals, discriminated or threatened to discriminate, or otherwise interfered with, restrained or coerced you because of the exercise of those rights. (Novato Unified School District (1982) PERB Decision No. 210; Carlsbad Unified School District (1979) PERB Decision No. 89; Department of Developmental Services (1982) PERB Decision No. 228-S; California State University (Sacramento) (1982) PERB Decision No. 211-H.)

⁴You are aware of the six month statute of limitations. Thus, an allegation of reprisal as to your December 1992 dismissal is untimely. There is no tolling of the six month period under the Higher Education Employer-Employee Relations Act.

Although the timing of the employer's adverse action in close temporal proximity to the employee's protected conduct is an important factor, 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; (2) the employer's departure from established procedures and standards when dealing with the employee; (3) the employer's inconsistent or contradictory justifications for its actions; (4) the employer's cursory investigation of the employee's misconduct; (5) the employer's failure to offer the employee justification at the time it took action or the offering of exaggerated, vague, or ambiguous reasons; or (6) any other facts which might demonstrate the employer's unlawful motive. (Novato Unified School District, supra; North Sacramento School District (1982) PERB Decision No. 264.) As presently written, this charge fails to demonstrate any of these factors and therefore does not state a prima facie violation.

You have failed to demonstrate that the University had an unlawful motive, or that there was a nexus between your protected activity and the University's refusal to accept your representative's request for arbitration. On the contrary, the University's actions appear to follow the law and the requirements of the collective bargaining agreement. Disparate treatment has not been shown by the examples you provided involving Mr. Lowe and Mr. Reich. This is because the adverse actions in those two cases did not allege violations of the contract, but rather, alleged violations of the SPP. Thus, it was not improper for those two cases to go to arbitration while the employees were represented by non-union counsel. Without the critical element of nexus, a prima facie case has not been stated. I am therefore dismissing the charge.

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. (Cal. Code of Regs., tit. 8, sec. 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 p.m.) or sent by telegraph, certified or Express United States mail postmarked no later than the last date set for filing. (Cal. Code of Regs., tit. 8, sec. 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 (20) calendar days following the date of service of the appeal. (Cal. Code of Regs., tit. 8, sec. 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 Cal. Code of Regs., tit. 8, sec. 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

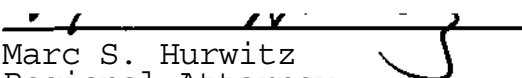
A request for an extension of time, in which to file a document with the Board itself, must be in writing and filed with the Board at the previously noted address. A request for an extension must be filed at least three (3) calendar days before the expiration of the time required for filing the document. 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. (Cal. Code of Regs., tit. 8, sec. 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,

ROBERT THOMPSON
Deputy General Counsel

By 
Marc S. Hurwitz
Regional Attorney

cc: Ms. Merle Kaufman, UCLA Campus Human Resources