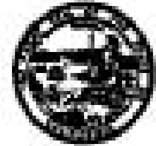
STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



NING-PING CHAN, Charging Party, v. REGENTS OF THE UNIVERSITY OF CALIFORNIA, Respondent.	Case No. SF-CE-398-H PERB Decision No. 1069-H November 23, 1994

Appearance: Ning-Ping Chan, on her own behalf.

Before Blair, Chair; Carlyle and Garcia, Members.

DECISION

BLAIR, Chair: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Ning-Ping Chan (Chan) of a Board agent's dismissal (attached hereto) of her unfair practice charge. In her charge, Chan alleged that the Regents of the University of California violated section 3571 of the Higher Education Employer-Employee Relations Act (HEERA)[1] by undertaking various discriminatory acts against her.

[1]**HEERA** 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 Chan's appeal, the warning and dismissal letters, and Chan's original and amended charges. The Board finds the warning and dismissal letters to be free of prejudicial error and adopts them as the decision of the Board itself.

DISCUSSION

PERB Regulation 32635(a)[2] provides that an appeal of the dismissal of a charge shall:

> (1) State the specific issues of procedure, fact, law or rationale to which the appeal is taken;
>
> (2) Identify the page or part of the dismissal to which each appeal is taken;
>
> (3) State the grounds for each issue stated.

On appeal, Chan simply asserts that the Board agent failed to address factual inaccuracies in the warning letter based on the information provided in her first amended charge. This appeal does not comply with PERB Regulation 32635 as it does not identify any specific factual error or address the timeliness of her unfair practice charge.

The Board has held that compliance with regulations governing appeals is required to afford the respondent and the Board with an adequate opportunity to address the issues raised, and noncompliance will warrant dismissal of the appeal. (Oakland Education Association (Baker) (1990) PERB Decision No. 827.) The

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[2] PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

Board, therefore, rejects the appeal for failure to comply with PERB regulations.

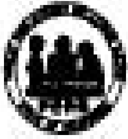
ORDER

The unfair practice charge in Case No. SF-CE-398-H is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Carlyle and Garcia joined in this Decision.

STATE OF CALIFORNIA PETE WILSON, *Governor*

PUBLIC EMPLOYMENT RELATIONS BOARD



San Francisco Regional Office
177 Post Street, 9th Floor
San Francisco, CA 94108-4737
(415) 557-1350

May 31, 1994

Ning-Ping Chan

Re: **DISMISSAL OF UNFAIR PRACTICE CHARGE/REFUSAL TO ISSUE COMPLAINT**
Ninq-Ping Chan v. Regents of the University of California
Unfair Practice Charge No. SF-CE-398-H

Dear Ms. Chan:

The above-referenced unfair practice charge, filed on April 7, 1994, alleges that the Regents of the University of California (University) miscalculated Ning-Ping Chan's years of professional service, disciplined her for participating in union activities^ demanded her resignation, failed to address an issue in a grievance, and discriminated against her because of her race, sex, and national origin. This conduct is alleged to violate Government Code section 3571 of the Higher Education Employer-Employee Relations Act (HEERA).

I indicated to you, in my attached letter dated May 18, 1994, 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. You were further advised that, unless you amended the charge to state a prima facie case or withdrew it prior to May 26, 1994, the charge would be dismissed. On May 31, 1994, you filed a five page letter and submitted an amended charge by facsimilie transmission containing additional factual allegations and corrections to the May 18, 1994 letter.

The additional allegations fail to establish that the charge is timely filed. Chan asserts that she did not know of or grieve the failure to grant a three-year appointment in her April 18, 1993 grievance, but that she only grieved the failure of the University to perform a post-six evaluation. The original charge contains copies of three grievances which appear to have been filed in 1993. Each form includes the date "4-18-93" after the section "Date of occurrence or date grievant had knowledge of alleged violation." While the grievances do not specifically allege the denial of a three-year appointment, it appears that the reason why this was not alleged is because two conditions precedent to a three-year appointment are required: (1) a University determination of a continuing need for instruction in the employee's field, and (2) a favorable evaluation conducted

"in accordance with applicable campus review procedures in effect at the time." (Art. VII, sec. C.2(a); see also Art. VII, sec. F.)

Nevertheless, the grievances also reflect an attempt to plead the denial of a three-year appointment in the alternative. In the second grievance, signed by Chan on August 6, 1993, under the section asking the grievant to state the action being grieved, the form contains the following statement: "in 1991 when grievant was incorrectly informed by UCB that the number of her years of accumulated service would not trigger the three-year appointment required by the contract." Chan's assertion clearly implies awareness of the University's improper denial of a three-year appointment. In addition, the grievance specifically cites Article VII, "Appointment," section 1, which provides, in subsection (b), that reappointments shall be made for three year periods for those reappointments commencing after six years of service. Chan received a post-six year appointment for only one year, which ended in the spring of 1993.

In the third grievance, signed by Chan on November 29, 1993, a factual summation of the grievance and the time of the contract violation states, in pertinent part:

> The grievant first had knowledge of the extent of UC's contractual violation on 4-18-93. The UC-AFT filed a formal grievance on her behalf in a timely manner on 5-18-93. This is in accordance with the Grievance Procedure listed in the MOU. She simply did not know that the University was required by the MOU to give her a three-year contract at that time until 4-18-93. Therefore she could hardly have filed a grievance earlier. Based on her post six year service (Ms. Joan Spangler informed her that she had accumulated 5.5 year [sic] of service by December 1991), all along she thought she was being evaluated as Current Long-Term Appointee. Neither the number of net total years of her service nor the termination date is subject to specification in an appointment letter to the extent to be inconsistent with the MOU [sic].

Chan also asserts that she did not know that the University had taken the position of denying her credit for service in certain titles until the University prepared its October 14, 1993 Step III response to the grievance.

While it may be alleged that Chan was not aware of the basis of the University's calculation, this does not cure the timeliness defects with the current charge. Chan has not established that she did not know, or did not have reason to know, of the University's violation of her rights prior to October 14, 1993. (Regents of the University of California (1983) PERB Dec. No. 369-H.)

Chan also alleges that the University interfered with her right to process a grievance by asking to have her grievance moved directly to Step III and by rewarding Chan's grievance representative with a promotion, "within six months of 4-7-94." These allegations fails to state a prima facie violation. (Calrsbad Unified School District (1979) PERB Dec. No. 89; Regents of the University of California (1983) PERB Dec. No. 308-H.)

Therefore, I am dismissing the charge based on the facts and reasons stated above and those contained in my May 18, 1994 letter.

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

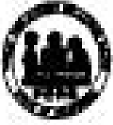
By ____________
DONN GINOZA
Regional Attorney

Attachment

cc: Debra Harrington

STATE OF CALIFORNIA PETE WILSON, *Governor*

PUBLIC EMPLOYMENT RELATIONS BOARD



San Francisco Regional Office
177 Post Street, 9th Floor
San Francisco, CA 94108-4737
(415)557-1350

May 18, 1994

Ning-Ping Chan

Re: **WARNING LETTER**
Ninq-Ping Chan v. Regents of the University of California
Unfair Practice Charge No. SF-CE-398-H

Dear Ms. Chan:

The above-referenced unfair practice charge, filed on April 7, 1994, alleges that the Regents of the University of California (University) miscalculated Ning-Ping Chan's years of professional service, disciplined her for participating in union activities, demanded her resignation, failed to address an issue in a grievance, and discriminated against her because of her race, sex, and national origin. This conduct is alleged to violate Government Code section 3571 of the Higher Education Employer-Employee Relations Act (HEERA).

Investigation of the charge revealed the following. Ning-Ping Chan began teaching Chinese at the University of California at Berkeley in the fall of 1971. Over the next twelve or more years, she taught Chinese for at least 18 quarters in the East Asian Languages Department. This service qualified her for the benefits under the Memorandum of Understanding (MOU) for the bargaining unit of non-Senate instructors, represented by the University Council - American Federation of Teachers (UC-AFT). During a portion of this instructional time she was also pursuing an advanced degree.

On September 17, 1991, Chan filed a grievance under the UC-AFT MOU after she was notified that her medical benefits coverage had lapsed due to a break in service. The charge does not indicate how this grievance concluded.

Sometime in approximately October 1992, the University also informed Chan that she would not be receiving a three-year appointment because she had only 5.5 years of qualified service. This constituted a violation of the UC-AFT MOU and the rights of post-six-year appointees. The University also failed to conduct a performance evaluation prior to November 1992, as required by the MOU.

In July 1993, the University sent Chan a form requesting a forwarding address, which Chan completed and returned. The form was a Notice of Resignation Form, which the University apparently

later asserted operated to deprive Chan of continuing employment.

Chan filed a grievance protesting these actions on May 18, 1993 and amended it on August 6, 1993. She was represented by Mary Ruth Gross of UC-AFT. A central issue in the dispute concerned whether time spent teaching while a graduate student in the title of Associate should count towards the six-year service requirement. Based on the 5.5 years of service calculation, which Chan chose not to dispute, she accepted a short term appointment in reliance on the incorrect calculation. When that term was completed she did not receive a three-year appointment and as a consequence filed her grievance. In an October 14, 1993 letter to Chan, responding to her grievance at Step III of the grievance procedure, University Labor Relations Manager Debra Harrington contended that the grievance was not timely filed because it should have been filed within six months after Chan was notified of the 5.5 year calculation. Harrington also refused to agree that the 5.5 year calculation was incorrect. These actions form the basis for Chan's claim that the University misrepresented her years of service.

Based on the facts stated above, the charge as presently written fails to state a prima facie violation of the HEERA.

Of the various allegations listed in the charge, PERB has jurisdiction only over the claim that the University disciplined Chan for participating in union activities. (See Gov. Code, sec. 3563.2(b); Oxnard School District (1988) PERB Dec. No. 667 [no jurisdiction to enforce collective bargaining agreements or other statutory schemes].) Under section 3571(a), the University is prohibited from discriminating against employees because of the exercise of rights guaranteed by the HEERA. Such rights include the right to present grievances through an employee organization such as UC-AFT. (Gov. Code, sec. 3567.)

To demonstrate a 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; and (3) the employer imposed or threatened to impose reprisals, discriminated or threatened to discriminate, or otherwise interfered with, restrained or coerced the employees because of the exercise of those rights. (Novato Unified School District (1982) PERB Dec. No. 210; Carlsbad Unified School District (1979) PERB Dec. No. 89; Department of Developmental Services (1982) PERB Dec. No. 228-S; California State University (Sacramento) (1982) PERB Dec. No. 211-H.)

Although the charge does allege protected activity, it is unclear what form the reprisals or discrimination took. The charge only

alleges that the University "disciplined" Chan. (Cal. Code of Regs., tit. 8, sec. 32615(a)(5) ["clear and concise" statement of conduct constituting unfair practice required].) It is not clear who disciplined Chan or that that person had knowledge of her protected activities. The charge does not establish that these reprisals took place within six months of the filing of the charge (i.e., on or after October 7, 1993) as required by HEERA section 3563.2(a). Assuming that the reprisals involved the failure to grant a three year appointment beginning in the fall of 1993 and the "forced resignation," these actions occurred before October 7, 1993. The only conduct that appears to be timely is the October 14, 1993 letter from Debra Harrington responding to Chan's grievance at Step III of the grievance procedure.

In a letter to the undersigned dated May 9, 1994, Chan asserts that the charge is timely for the following reasons: (1) the University had never disclosed a basis for its calculation of service until Harrington wrote the October 14, 1993 Step III response to the grievance; (2) Chan is entitled to challenge the assumptions that underlie the University's statements each time a contact occurs; (3) in May 1993, Joan Spangler, a University administrator involved in the dispute asserted to UC-AFT representative Gross that she and Chan agreed that Chan did not have the necessary time as a lecturer to qualify for a three-year appointment but that she would "look into the issue of whether the hiring procedure for the full-time lecturer position was fair or not;" (4) in the summer of 1993, Harrington asked for a copy of Chan's service calculation; and (5) in January 1994, Harrington told Chan that re-appointment was a possibility. In a May 28, 1993 grievance form and a November 27, 1993 letter to Harrington, however, Chan asserts that she "had knowledge of UC's contractual violation [i.e. denial of three year appointment] on 4-18-93." Chan's additional allegations fail to establish that she reasonably discovered the occurrence of the unfair practice on or after October 14, 1993. (Regents of the University of California (1983) PERB Dec. No. 359-H.)

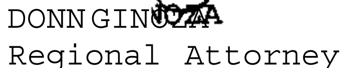
The charge also fails to demonstrate the necessary connection or "nexus" between the adverse action and the protected conduct. Facts establishing one or more of the following additional factors must also be present: (1) the timing of the employer's adverse action in close temporal proximity to the employee's protected conduct (not sufficient alone, but in connection with one of the following factors); (2) the employer's disparate treatment of the employee; (3) the employer's departure from established procedures and standards when dealing with the employee; (4) the employer's inconsistent or contradictory justifications for its actions; (5) the employer's cursory

investigation of the employee's misconduct; (6) 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 (7) any other facts which might demonstrate the employer's unlawful motive. (Novato Unified School District, supra, PERB Dec. No. 210; Moreland Elementary School District (1982) PERB Dec. No. 227; North Sacramento School District (1982) PERB Dec. No. 264.)

As presently written, the charge fails to demonstrate the required factors and therefore does not state a prima facie violation of HEERA section 3571(a).

For these reasons the charge, as presently written, does not state a prima facie case. If there are any factual inaccuracies in this letter or additional facts which would correct the deficiencies, explained above, please amend the charge. The amended charge should be prepared on a standard PERB unfair practice charge form, clearly labeled First Amended Charge, contain all the 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 **May 26, 1994**, I shall dismiss your charge. If you have any questions, please call me at (415) 557-1350.

Sincerely,



DONN GINOZA
Regional Attorney