

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



COALITION OF UNIVERSITY EMPLOYEES,

Charging Party,

v.

REGENTS OF THE UNIVERSITY OF
CALIFORNIA,

Respondent.

Case No. SF-CE-768-H

PERB Decision No. 1851-H

August 21, 2006

Appearance: Terrence Ryan, Representative, for Coalition of University Employees.

Before Shek, McKeag and Neuwald, Members.

DECISION

NEUWALD, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the Coalition of University Employees (CUE) of a Board agent's dismissal (attached) of an unfair practice charge. The charge alleged that the Regents of the University of California violated the Higher Education Employer-Employee Relations Act (HEERA)¹ by issuing a counseling memo to bargaining unit member Bing Ong in response to his appeal of a performance evaluation. CUE alleged that this conduct constituted a violation of HEERA section 3571.

The Board has reviewed the unfair practice charge, the amended unfair practice charge² and attached documents, the warning and dismissal letters, and CUE's appeal of the dismissal.

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

²The amended charge was filed September 22, 2005, prior to the issuance of the warning letter. The Board agent did not receive any additional amendments to the charge prior to issuing the dismissal letter.

In light of its review, the Board finds the Board agent's dismissal to be free of prejudicial error and adopts it as a decision of the Board itself, subject to the discussion below.

DISCUSSION

CUE requests that the Board consider new supporting evidence offered for the first time on appeal. Consideration of new supporting evidence on appeal is controlled by PERB Regulation 32635(b)³ which provides, in pertinent part:

(b) Unless good cause is shown, a charging party may not present on appeal new charge allegations or new supporting evidence.

Interpreting this regulation, the Board has been reluctant to find that good cause existed to allow a party to raise new allegations or new evidence for the first time on appeal. The reason for this reluctance is stated in South San Francisco Unified School District (1990) PERB Decision No. 830.

The purpose of PERB Regulation 32635(b) is to require the charging party to present its allegations and supporting evidence to the Board agent in the first instance, so that the Board agent can fully investigate the charge prior to deciding whether to issue a complaint or dismiss the case. When a party has the opportunity to cure defects in a prima facie case at earlier stages and does not do so, the Board is reluctant to allow a party to raise such facts or evidence later. (Oakland Education Association (Freeman) (1994), PERB Decision No. 1057/) Here, CUE fails to demonstrate good cause.

CUE alleges that it did not receive the Board agent's warning letter. In State of California (Department of Corrections) (2006) PERB Decision No. 1806, the Board held that "[a] letter correctly addressed and properly mailed is presumed to have been received in the

³PERB regulations are codified at California Code of Regulations, title 8, section 31001, et seq.

ordinary course of mail." (Evidence Code sec. 641; 1 Witkin, Cal. Evidence (4th ed. 2000) Burden, subsec. 78.) This presumption can be rebutted by evidence that the letter was not received. If contrary evidence is introduced, the trier of fact weighs the evidence presented and makes a determination whether the letter was received. (Evidence Code sec. 604; Craig v. Brown & Root, Inc. (2000) 84 Cal.App.4th 416 [100 Cal.Rptr.2d 818].) Here, CUE alleges that it did not receive the letter "[a]lthough addressed correctly." This evidence does not rebut the presumption that the letter was received. As such, CUE fails to demonstrate good cause to allow it to raise new allegations or new evidence for the first time on appeal.

ORDER

The unfair practice charge in Case No. SF-CE-768-H is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Shek and McKeag joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD



San Francisco Regional Office
1330 Broadway, Suite 1532
Oakland, CA 94612-2514
Telephone: (510) 622-1022
Fax: (510) 622-1027



April 26, 2006

Terrence Ryan, Union Representative
Coalition of University Employees, Local 6
1659 Divisadero St., #2
San Francisco, CA 94115-3009

Re: Coalition of University Employees v. Regents of the University of California
Unfair Practice Charge No. SF-CE-768-H; First Amended Charge
DISMISSAL LETTER

Dear Mr. Ryan:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on September 9, 2005. The Coalition of University Employees alleges that the Regents of the University of California violated the Higher Education Employer-Employee Relations Act (HEERA)¹ by issuing a counseling memo to bargaining unit member Bing Ong.

I indicated to you in my attached letter dated March 13, 2006, 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 March 20, 2006, the charge would be dismissed. Via an electronic message, I later extended this deadline to March 31, 2006.

I have not received either an amended charge or a request for withdrawal. Therefore, I am dismissing the charge based on the facts and reasons contained in my March 13, 2006 letter.

Right to Appeal

Pursuant to PERB Regulations,² 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. (Regulation 32635(a).) Any document filed with the Board must contain the case name and number, and the original and five (5) copies of all documents must be provided to the Board.

¹HEERA is codified at Government Code section 3560 et seq. The text of the HEERA and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

² PERB's Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

A document is considered "filed" when actually received before the close of business (5 p.m.) on the last day set for filing. (Regulations 32135(a) and 32130.) A document is also considered "filed" when received by facsimile transmission before the close of business on the last day for filing together with a Facsimile Transmission Cover Sheet which meets the requirements of Regulation 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Regulations 32135(b), (c) and (d); see also Regulations 32090 and 32130.)

The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95814-4174
FAX: (916) 327-7960

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. (Regulation 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 Regulation 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. A document filed by facsimile transmission may be concurrently served via facsimile transmission on all parties to the proceeding. (Regulation 32135(c).)

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. (Regulation 32132.)

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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
General Counsel

By_
Kristin L. Rosi
Regional Attorney

Attachment

cc: Steven Weglarz

PUBLIC EMPLOYMENT RELATIONS BOARD



San Francisco Regional Office
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March 13,2006

Terrence Ryan, Union Representative
Coalition of University Employees, Local 6
1659 Divisadero St., #2
San Francisco, CA 94115-3009

Re: Coalition of University Employees v. Regents of the University of California
Unfair Practice Charge No. SF-CE-768-H; First Amended Charge
WARNING LETTER

Dear Mr. Ryan:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on September 9, 2005. The Coalition of University Employees alleges that the Regents of the University of California violated the Higher Education Employer-Employee Relations Act (HEERA)¹ by issuing a counseling memo to bargaining unit member Bing Ong.

Investigation of the charge revealed the following. CUE is the exclusive bargaining representative for the University's clerical and allied services bargaining unit. Mr. Ong is employed by the University of California, San Francisco, in the Nutrition and Food Service Department, as a clerical employee. As such, Mr. Ong is exclusively represented by CUE.

The University and CUE are parties to a collective bargaining agreement that expires on September 30, 2008. However, at the time of the underlying allegations, the parties were operating under an expired collective bargaining agreement. With regard to counseling memos, Article 27, Section A of the Agreement provides as follows:

c. With the exception of performance evaluations, documents such as letter of disciplinary action, counseling memoranda and/or written records of discussions, shall, upon written request of the employee, be removed from the employees' personnel file(s). . . Counseling memoranda and/or written records of discussion, in and of themselves, are not discipline nor are they grievable/arbitrable.

Prior to August 2004, Mr. Ong served as CUE's local chapter Vice President. In June 2005, Mr. Ong received a "Meets or Exceeds Expectations" evaluation. Although a copy of the

¹HEERA is codified at Government Code section 3560 et seq. The text of the HEERA and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

evaluation was not provided with the charge, apparently the evaluation downgraded Mr. Ong because of his support of the AFSCME strike. Mr. Ong appealed the evaluation and the University deleted the reference to the AFSCME strike and revised his evaluation to "Consistently Exceeds Expectations."

On or about September 1, 2005, Mr. Ong's supervisor, Jack Henderson, issued Mr. Ong a counseling memorandum regarding Mr. Ong's alleged disrespectful behavior. A copy of the counseling memo was not provided with the charge. CUE contends the counseling memo was issued because of Mr. Ong's protected activity of appealing his earlier performance evaluation.

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

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 Decision No. 210 (Novato); Carlsbad Unified School District (1979) PERB Decision No. 89.)

Although the timing of the employer's adverse action in close temporal proximity to the employee's protected conduct is an important factor (North Sacramento School District (1982) PERB Decision No. 264), 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 (State of California (Department of Transportation) (1984) PERB Decision No. 459-S); (2) the employer's departure from established procedures and standards when dealing with the employee (Santa Clara Unified School District (1979) PERB Decision No. 104.); (3) the employer's inconsistent or contradictory justifications for its actions (State of California (Department of Parks and Recreation) (1983) PERB Decision No. 328-S); (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; (6) employer animosity towards union activists (Cupertino Union Elementary School District (1986) PERB Decision No. 572.); or (7) any other facts which might demonstrate the employer's unlawful motive. (Novato; North Sacramento School District, supra, PERB Decision No. 264.)

Mr. Ong engaged in protected activity by appealing his evaluation in June 2005, and it is assumed that Mr. Henderson issued this evaluation, although as noted above, a copy of the evaluation was not provided. Assuming the counseling memo is an adverse action, the charge

fails to demonstrate the requisite nexus.² First, Mr. Ong's protected activity occurred two months prior to the counseling memo. Additionally, the charge is devoid of any facts demonstrating disparate treatment or failure to follow established procedures. Moreover, as a copy of the memo was not provided with the charge, it is impossible for PERB to determine if the University offered shifting justifications for its actions or expressed outward animosity towards his protected activity. As such, must be dismissed.

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 that 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 Second 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 have the case number written on the top right hand corner of the charge form. The amended charge must be served on the respondent's representative and the original proof of service must be filed with PERB. If I do not receive an amended charge or withdrawal from you before March 20, 2006, I shall dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Kristin L. Rosi
Regional Attorney

KLR

² As noted above, counseling memos are not considered discipline under the parties collective bargaining agreement. As such, an argument could be made that such memos are not adverse actions. However, as the charge fails to demonstrate the requisite nexus, I will not address the issue of adverse action.