

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



NAPIER'S EMPLOYMENT SECURITY)
AGENCY (NESA),)
)
Charging Party,) Case No. LA-CE-240-H
)
v.) PERB Decision No. 735-H
)
UCLA LABOR RELATIONS DIVISION,) May 4, 1989
)
Respondent.)
_____)

Appearances: Lloyd Napier, President, for Napier's Employment Security Agency (NESA); Susan Benjamin, University Counsel, UCLA Labor Relations Division.

Before Hesse, Chairperson; Porter, Craib, Shank and Camilli, Members.

DECISION AND ORDER

This case is before the Public Employment Relations Board (Board) on appeal by the charging party of the Board agent's dismissal, attached hereto, of its charge that the respondent violated sections 3565 and 3567 of the Higher Education Employer-Employee Relations Act. We have reviewed the dismissal and, finding it to be free of prejudicial error, adopt it as the decision of the Board itself.

The unfair practice charge in Case No. LA-CE-240-H is hereby DISMISSED WITHOUT LEAVE TO AMEND.

By the BOARD

PUBLIC EMPLOYMENT RELATIONS BOARD



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



October 20, 1988

Lloyd Napier, President
Napier's Employment Security Agency
4602 Crenshaw Blvd., Suite 4
Los Angeles, California 90043

RE: DISMISSAL AND REFUSAL TO ISSUE COMPLAINT, Unfair Practice
Charge No. LA-CE-240-H; Napier's Employment Security Agency
(NESA) v. UCLA Labor Relations Division

Dear Mr. Napier:

I indicated to you in my attached letter dated September 15, 1988, 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 that 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 it prior to October 3, 1988, the charge would be dismissed.

I have not received either a request for withdrawal or an amended charge. I am therefore dismissing the charge based on the facts and reasons contained in my September 15 letter.

In a letter dated October 3, 1988, you argued that the six-month statute of limitations should run not from December 21, 1987, when your protest letter makes clear that you had knowledge of the University's handling of Gonzalez's grievances, but from January 11, 1988, when you received the University's response to your letter and "knew there was a possible Unfair Labor Practice." PERB has held, however, that the statute runs from the discovery of the conduct constituting the unfair practice, not from the discovery of the legal significance of that conduct. Fairfield-Suisun Unified School District (1985) PERB Decision No. 547. The charge should therefore have been filed no later than June 21, 1988, unless there was "equitable tolling" or a "continuing violation." For the reasons contained in my September 15 letter, neither your protest letter nor the University's allegedly dilatory and arrogant response to your letter is enough to make these doctrines applicable here.

In your October 3 letter, you asked that I withhold further action for one week, while you completed your research on this issue. I have waited two weeks and have received no further

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communication from you. I shall therefore wait no longer to dismiss 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 (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 (California Administrative Code, title 8, 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 (California Administrative Code, title 8, 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 California Administrative Code, title 8, 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 (California Administrative Code, title 8, 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,

CHRISTINE A. BOLOGNA
General Counsel

By

THOMAS J. ALLEN
Regional Attorney

Attachment

cc: Susan M. Benjamin

PUBLIC EMPLOYMENT RELATIONS BOARD

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



September 15, 1988

Lloyd Napier, President
Napier's Employment Security Agency
4602 Crenshaw Blvd., Suite 4
Los Angeles, California 90043

Re: Warning Letter, Unfair Practice Charge No. LA-CE-240-H
Napier's Employment Security Agency (NESA) v.
UCLA Labor Relations Division

Dear Mr. Napier:

The above-referenced charge, filed on July 8, 1988, on behalf of Napier's Employment Security Agency (NESA) and Felipe Gonzalez, alleges that the UCLA Labor Relations Division (the University)¹ returned a grievance filed on Gonzalez' behalf by NESA, then accepted the withdrawal of a similar grievance previously filed on Gonzalez' behalf by the American Federation of State, County and Municipal Employees (AFSCME), and then failed to reinstate the grievance filed by NESA, leaving Gonzalez without a grievance. This conduct is alleged to violate Government Code sections 3565 and 3567 of the Higher Education Employer-Employee Relations Act (HEERA).

My investigation of the charge revealed the following information.

Felipe Gonzalez was employed as a storekeeper for UCLA. On July 16, 1987, he was suspended without pay for 15 1/2 days for alleged sexual harassment. On August 24, 1987, AFSCME, the exclusive representative for the Service Unit to which Gonzalez belonged, filed a grievance on his behalf (GR 88-2 SVC) concerning the suspension. On September 14, 1987, Gonzalez was terminated for an alleged additional incident of sexual harassment. On October 2, 1987, AFSCME filed a new grievance (GR-88-3 SVC) concerning the termination, alleging a violation

¹Technically, the Regents of the University of California should have been named as Respondent in the charge. The Office of the General Counsel of the University was served with the charge, as provided by Public Employment Relations Board (PERB) Regulation 32142 (c) (3) (A).

of Article 8, section B of the collective bargaining agreement and seeking reinstatement and backpay.

Gonzalez decided that he wanted AFSCME to represent him concerning the suspension but wanted NESAs to represent him concerning the termination. On October 3, 1987, he signed a document retaining NESAs to represent him, and on October 28, 1987, NESAs filed a grievance on his behalf concerning his termination, alleging violations of Article 8, sections A.1 and C, of the collective bargaining agreement and seeking reinstatement, backpay, and transfer to another position. On November 3, 1987, the University returned this grievance to NESAs on the grounds that it "clearly sets forth the same allegations as those in GR 88-3 SVC," which was pending at Step 2.

On November 13, 1987, AFSCME informed the University by memo that Gonzalez "has asked someone else to represent him on grievance GR 88-3. As of November 11, 1987, Felipe Gonzalez no longer wants AFSCME to represent him on grievance GR 88-3 (Dismissal)." On November 24, 1987, AFSCME told the University by memo, "Felipe Gonzalez has chosen Attorney Lloyd Napier [President of NESAs] to represent him on GR 88-3; therefore AFSCME is withdrawing grievance GR 88-3." The University accepted this withdrawal of the grievance. A copy of AFSCME's withdrawal memo was sent to NESAs on November 30, 1987.

On December 21, 1987, NESAs sent a letter to AFSCME, criticizing its withdrawal of the grievance and urging it to "issue a letter to UCLA preserving this employee's right to arbitration." Also on December 21, 1987, NESAs sent a letter to the University, protesting the return of the grievance filed by NESAs on October 28, 1987. The letter stated that the University's decision "could be irreparably damaging to Gonzalez unless you reinstate my grievance forthwith." It further stated that "if [AFSCME] Steward [Mamie] Penn's letter [of November 24, 1987] effectively cancelled all grievance and left Mr. Gonzalez stripped naked of any grievance or representative, it was your office's obligation to so inform me and other concerned individuals, particularly since it was your office that created this situation. Hopefully, you will rectify this matter at once."

In a letter to NESAs dated January 6, 1988, and postmarked January 8, 1988, the University defended its actions. It stated, "Mr Gonzalez could have filed a letter substituting you for AFSCME Steward Mamie Penn and proceeded with the Step 2 meeting [on the AFSCME-filed grievance, GR 88-3 SVC]. He did not do so; rather he attempted to commence the process anew [with the NESAs-filed grievance]." It further stated, "AFSCME

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could have decided to substitute your representation for its in GR 88-3 SVC but it decided, instead, to withdraw the grievance." It observed, "You could, of course, file a grievance at this time regarding Mr. Gonzalez¹ dismissal but it would be untimely." The letter concluded, "While it is unfortunate that Mr. Gonzalez does not have an appeal route, I do not believe our office acted in any way or at any time to abuse its discretion in this matter." NESAs received the letter on January 11, 1988.

Sometime on or before January 19, 1988, AFSCME Executive Director Nadra Floyd responded by telephone to NESAs letter to AFSCME dated December 21, 1988. The Executive Director indicated that the University's practice in this matter was unethical and that she would file the appropriate complaint. On January 19, 1988, NESAs sent the Executive Director copies of correspondence, relating to Gonzalez' grievances and requested, "Kindly review and advise me as to your course of action in this matter as soon as possible." On May 26, 1988, after not hearing from the Executive Director, NESAs wrote again, requesting, "Please advise as to whether you have taken any action in this matter."

The unfair practice charge was finally filed with the Public Employment Relations Board (PERB) by NESAs President Lloyd Napier on July 8, 1988.

Based on the facts stated above, the charge does not state a prima facie case, for the reasons that follow.

Under Government Code section 3563.2, PERB "shall not issue a complaint in respect of any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge." Six months prior to the filing of the charge in the* present case was January 8, 1988. If an unfair practice occurred or continued on or after January 8, 1988, or if the charging parties (NESAs and Gonzalez) knew or should have know about an unfair practice for the first time on or after January 8, 1988, then the charge is timely as to that practice. Regents of the University of California (1983) PERB Decision No. 359-H.

Both the University's return of the NESAs-filed grievance and its acceptance of the withdrawal of the AFSCME-filed grievance (GR 88-3 SVE), however, occurred in November 1987 (on November 3 and November 24, respectively). The charging parties knew about both of these actions no later than December 1987, as evidenced by NESAs protest letter to the University dated December 21, 1987. The only additional knowledge gained by the charging parties on or after January 8, 1988, was that NESAs protest letter produced no change in the University's position on the grievances.

The charge would be timely if the University's failure to change its position constituted a "continuing violation". In San Dieguito Union High School District (1982) PERB Decision No. 194, however, PERB determined that a "continuing violation would only be found where active conduct or grievances occurred within the limitations period that independently constituted an unfair practice. However, a continuing violation would not be found where the employer's conduct during the limitations period constituted an unfair practice only by its relation to the original offense." El Dorado Union High School District (1984) PERB Decision No. 382, at p. 4 (citations omitted). The University's response to NESAs protest letter, which indicated no change in the University's position, cannot be said to be "active conduct" that constituted an unfair practice independent of its original handling of the grievances.

The charge might still be timely if NESAs protest letter to the University, or its letters to AFSCME, justified application of the doctrine of equitable telling, which PERB has approved in appropriate cases. California Dept. of Water Resources (1981) PERB Decision No. Ad-122-S. That doctrine is applicable, however, only where a respondent is given notice of potential litigation by a charging party's pursuit of an alternative legal remedy in another forum. California State University, Fullerton (1986) PERB Decision No. 353-H; California Department of Health Services (1982) PERB Decision No. 269-S; Los Angeles Unified School District (1982) PERB Decision No. 237. NESAs letters did not invoke the established grievance procedure, nor did they pursue a legal remedy in any other forum, so as to give the University notice of potential litigation. The doctrine of equitable tolling is therefore inapplicable to the present case.

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 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 form clearly labeled First Amended Charge, contain all the facts and allegations you wish to make, and must 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 September 15, 1988, I shall dismiss your charge. If you have any questions, please call me at (213) 736-3127.

Sincerely,

Thomas J. Alien
Regional Attorney

TJA:djm