

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



CHENG T. WANG,)
)
 Charging Party,) Case No. LA-CE-255-H
)
 v.) PERB Decision No. 813-H
)
 CALIFORNIA STATE UNIVERSITY,) June 13, 1990
)
 Respondent.)
_____)

Appearances; Cheng T. Wang, on his own behalf; William B. Haughton, Attorney, for California State University.

Before Hesse, Chairperson; Craib and Camilli, Members.

DECISION AND ORDER

CAMILLI, Member: This case is before the Public Employment Relations Board (Board) on appeal by Cheng T. Wang of a Board agent's dismissal (attached hereto) of his charge that the California State University violated sections 3571, 3572, and 3561(b) of the Higher Education Employer-Employee Relations Act (HEERA)¹ and Education Code section 89542.5. We have reviewed the dismissal and, finding it to be free of prejudicial error, adopt it as the decision of the Board itself, insofar as it finds the charge to be untimely filed.

The unfair practice charge in Case No. LA-CE-255-H is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chairperson Hesse and Member Craib joined in this Decision.

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

PUBLIC EMPLOYMENT RELATIONS BOARD



Headquarters Office
1031 18th Street
Sacramento, CA 95814-4174
(916) 322-3088



Office of the General Counsel
(916)323-8015

April 30, 1990

Dr. Cheng T. Wang, Ph.D.
Device Research Institute
3848 Carson Street, Ste. 109
Torrance, CA 90503

Re: Cheng T. Wang v. California State University
Unfair Practice Charge No. LA-CE-255-H

DISMISSAL OF UNFAIR PRACTICE CHARGE AND REFUSAL TO ISSUE
COMPLAINT

Dear Dr. Wang:

The above-referenced charge was filed with the Public Employment Relations Board (PERB) Los Angeles Regional Office on May 3, 1989 and served as the basis of your request for injunctive relief; that request, entitled Cheng T. Wang v. California State University (1989), Case No. IR No. 295, was denied with prejudice to renewal on May 18, 1989.

As I indicated to you in my attached letter dated March 23, 1990, 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 March 30, 1990, the charge would be dismissed.

I have not received either a request for withdrawal or an amended charge. Your March 26, 1990 letter specifically disavowed your intent to amend or withdraw the charge. Your March 26 letter offered certain "corrections" to the findings of fact which did not alter the substantive legal conclusions regarding the HEERA statute of limitations, standing and HEERA section 3572.5. I am therefore dismissing the charge based on the facts and reasons contained in my March 23, 1990 letter without leave to amend.

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

Dr. Cheng T. Wang, Ph.D.
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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.

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**.

Very truly yours,

Christine A. Bologna
General Counsel

Attachment

cc: William Haughton, Esq.

PUBLIC EMPLOYMENT RELATIONS BOARD



Headquarters Office
1031 18th Street
Sacramento, CA 95814-4174
322-3198



Office of the General Counsel
916/323-8015

March 23, 1990

Dr. Cheng T. Wang, Ph.D.
Device Research Institute
3848 Carson Street, Ste. 109
Torrance, CA 90503

Re: Cheng T. Wang v. California State University
Unfair Practice Charge No. LA-CE-255-H

Dear Dr. Wang:

The above-referenced charge was filed with the Public Employment Relations Board (PERB) Los Angeles Regional Office on May 3, 1989, and served as the basis of your request for injunctive relief.¹

The charge alleges that you were denied your right to a faculty committee hearing in disciplinary and grievance proceedings to contest your termination, an entitlement conferred by Education Code section 89542.5, due to the bad faith collective bargaining conduct of respondent California State University (CSU). The charge further alleges that CSU's conduct violated the Higher Education Employer-Employee Relations Act (HEERA), specifically sections 3571, 3572 and 3561(b). Finally, the charge alleges a violation of Education Code section 89542.5.

My investigation has revealed the following facts.

In 1987, Dr. Cheng T. Wang (Dr. Wang) was employed as an Associate Professor of Chemical Engineering at the Long Beach campus of the CSU. Respondent CSU and the California Faculty Association (CFA) the exclusive representative of CSU faculty employees, such as Dr. Wang, assigned to CSU bargaining unit 3, are parties to a collective bargaining agreement (CBA) effective

¹ That request, entitled Cheng T. Wang v. California State University (IR No. 295) was denied with prejudice to renewal on May 18, 1989.

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July 1, 1987 through June 30, 1991. This agreement is a successor to the 1983-1986 CBA.²

In January 1987, Dr. Cheng T. Wang (Dr. Wang) was scheduled to meet with CSU Vice President of Faculty and Staff Relations June Cooper (V.P. Cooper). Dr. Wang asked about the purpose of the meeting and V.P. Cooper allegedly refused to supply one. Dr. Wang then reported this exchange in a February 5 letter to CSU-Long Beach President Stephen Horn. On February 16, President Horn wrote a letter to Dr. Wang, advising him of the grievance procedure available in the CBA and providing the name of the CFA campus representative.

On February 12, 1987, CSU-Long Beach Vice President for Academic Affairs John Beljan (V.P. Beljan) wrote to Dr. Wang, offering him a one-year reappointment; this letter also informed Dr. Wang that V.P. Cooper was bringing disciplinary action against him which could affect the reappointment. On February 23, Dr. Wang was notified of pending disciplinary action alleging that he had sexually harassed a student. On March 3, V.P. Beljan wrote to Dr. Wang, informing him that he had not responded to the offer of reappointment set forth in the February 12 letter within the requisite ten days, and thus the offer was withdrawn. A March 23 letter from President Horn, signed by V.P. Cooper, advised Dr. Wang that, following the President's review of the disciplinary action as required by the 1983-1986 CBA, he was dismissed from his position effective May 29, 1987. On March 25, University Counsel Thomas Trager (Trager) wrote to Dr. Wang, explaining that the March 23 letter was appropriately signed by President Horn or his designee, in accordance with existing disciplinary procedures applicable to CSU faculty.

Dr. Wang responded to all CSU correspondence and sought to stay the effective date of his termination. He did not follow the disciplinary procedures set forth in the CBA because he believed

² The interim period between June 30, 1986 and June 30, 1987, was not governed by a CBA due to an impasse in negotiations and the processing of various unfair practice charges by both CSU and CFA. When an agreement was subsequently reached, however, both parties requested the Board to vacate and dismiss the pending unfair practice charge proceedings. PERB agreed to such dismissals (California State University (1987) PERB Decision Nos. 621a-H, 633-H, 634-H and 635-H). The 1983-1986 CBA disciplinary procedures remained intact and available through the impasse procedures until the successor agreement was finalized. The successor CBA incorporated the very same disciplinary procedures into the current 1987-1991 CBA (see Anaheim City School District (1983) PERB Decision No. 364; Pittsburg Unified School District (1982) PERB Decision No. 199).

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the contract did not offer any chance to be heard in a campus setting. Dr. Wang ultimately contacted CFA representative Christine Maitland. Maitland advised that Dr. Wang's appeal under either of the CBA procedures was untimely; however, Maitland arranged a meeting with a CSU representative. Dr. Wang filed his own grievance on May 8, and the grievance was processed by CSU. On September 1, 1987, Dr. Wang requested information to investigate his grievance. On September 21, CSU Employee Relations Specialist Thomas Angell responded that the information had already been provided to Dr. Wang.

On September 16, 1987, Dr. Wang filed an unfair practice charge against CFA with PERB (Case No. LA-CO-11-H). On December 14, the Board Agent dismissed the charge and refused to issue a complaint due to failure to state a prima facie violation of HEERA. Dr. Wang appealed this determination to the Board. While the appeal was pending, on April 26, 1988, Dr. Wang filed a written complaint against CSU and request for administrative relief against CSU with the PERB Executive Director. PERB Executive Director Dennis Batchelder responded to Dr. Wang on May 5, advising that the conduct complained of and relief sought was not included within the Board's jurisdiction; Dr. Wang was also provided with an informational brochure entitled "How to File an Unfair Practice Charge." In California Faculty Association (Wang) (1988) PERB Decision No. 692-H, issued July 26, 1988, the Board affirmed the Board Agent's dismissal of the charge without leave to amend.

Dr. Wang sought reconsideration of the PERB decision and injunctive relief on August 5, 1988. The PERB General Counsel denied Dr. Wang's request for injunctive relief on August 9, on the ground that no jurisdictional basis for injunctive relief existed, given the Board's finding that an unfair practice complaint could not issue. Dr. Wang was also informed that the request for injunctive relief failed to comply with PERB regulations (tit. 8, Code of Regul., secs. 32450-32470). In California Faculty Association (Wang) (1988) PERB Decision No. 692a-H, issued December 29, 1988, the Board denied Dr. Wang's request for reconsideration.

In addition, Dr. Wang requested reconsideration of the denial of his August 9 request for injunctive relief on August 12 and September 7, 1988. On August 31 and September 27, respectively, PERB General Counsel advised Dr. Wang that his request for injunctive relief was denied due to noncompliance with the governing statute and PERB regulations. Dr. Wang was further informed that the conduct alleged in his April 26, 1988, correspondence to the PERB Executive Director could potentially be the subject of an unfair practice charge against CSU. The General Counsel cautioned Dr. Wang, however, that such a charge must be filed within the HEERA statute of limitations and set

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forth a prima facie violation of that Act. Again, Dr. Wang was provided with informative pamphlets and unfair practice charge forms and advised to contact the Los Angeles Regional Office for information and/or assistance.

On April 18, 1989, Dr. Wang requested the Board to issue an immediate complaint against the CFA. As grounds, Dr. Wang asserted that the Los Angeles Superior Court had upheld Board jurisdiction over his allegations against CFA in a March 18 demurrer hearing in his lawsuit against CFA, and that this jurisdiction had been previously denied by PERB. On May 1, 1989, the PERB General Counsel responded to Dr. Wang, informing him that PERB possesses exclusive jurisdiction to determine whether unfair practice charges are established under HEERA section 3563.2, and the Board exercised this jurisdiction when it determined that his charge did not state a prima facie violation of HEERA. (California Faculty Association (Wang) PERB Decision Nos. 692-H and 692a-H, supra). The PERB General Counsel further advised Dr. Wang that PERB Decision Nos. 692-H and 692a-H were final and could not be reopened since he had not filed timely appeals of those decisions. Therefore, the PERB General Counsel advised Dr. Wang that the Board would not grant his request for relief.

Based on the facts as alleged above, this charge does not present a prima facie violation of the HEERA for the reasons that follow.

First, the charge is untimely filed under HEERA section 3563.2(a). Your dismissal from CSU employment occurred on May 29, 1987, while you filed the unfair practice charge on May 3, 1989, approximately two years later. Board precedent holds that the six-month limitation period set forth in HEERA section 3563.2(a) is a jurisdictional limitation upon the Board's authority to issue a complaint. (California State University, San Diego (1989) PERB Decision No. 718-H).

Moreover, you have failed to establish good cause for the late filing of the charge. You contend that CSU's conduct is a continuing violation and thus you could not timely file the charge because PERB earlier refused to assert jurisdiction. No supporting legal authority is presented for this proposition. You assert only that you did not know of the McCammion v. Los Angeles Unified School District (1987) 195 Cal.App.3d 661, ruling until the March 31, 1989 demurrer hearing. An examination of the McCammion case demonstrates that it is inapplicable to conduct attributed to the CSU in this unfair practice charge. The McCammion decision held that an exclusive representative's conduct in negotiating a contract may violate its duty of fair representation and constitute an unfair practice. Simply put, the McCammion case is irrelevant to evaluation of a charge against an employer. Finally, insofar as the charge alleges employer bad

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faith bargaining, it too is untimely filed since you contest the alternative disciplinary appeal procedure negotiated in 1983 in your May 1989 charge filed some six years thereafter.

The doctrine of laches also applies to prevent excusal of your refusal to comply with the limitations period on an equitable basis. In May 1988, and again in September 1988, you were provided with information relevant to filing unfair practice charges yet you did not file the instant charge until May 3, 1989. (see Wood v. Elling Corporation (1977) 20 Cal.3d 353, 362, holding that statutes of limitations, like laches, apply to bar stale claims).

The allegation that CSU deprived you of a faculty hearing in disciplinary and grievance proceedings is premised on the allegation that CSU secured an alternate appeal procedure through bad faith collective bargaining in violation of HEERA section 3571(c). This claim must fail under the Board precedential holding of Oxnard School District (1988) PERB Decision No. 667. In Oxnard, the Board held that an individual employee lacks standing to maintain bad faith bargaining allegations against an employer under the Educational Employment Relations Act (EERA). HEERA section 3571(c) is virtually identical to EERA section 3543.5(c). Accordingly, you lack the requisite standing to pursue the charged violation and there is no jurisdictional basis upon which a complaint may issue.

Your claim that CSU improperly conspired to violate Education Code section 89542.5 by securing the supersession language set forth in that statute is also fatally defective. You rely on the McCannon case, supra, arguing that the relationship between EERA section 3543.2(d) and Education Code section 45028 is equivalent to that of HEERA section 3572.5 and Education Code section 89542.5. EERA section 3543.2(d) provides that:

Notwithstanding section 45028 of the Education Code, the public school employer and exclusive representative shall meet and negotiate regarding payment of additional compensation based upon criteria other than years of training and years of experience. If the public school employer and exclusive representative do not reach mutual agreement, then Education Code section 45028 shall apply. (Emphasis added.)

By contrast, HEERA section 3572.5 specifically supercedes Education Code section 89542.5 when there is an agreement that contains different provisions. HEERA section 3572.5 affirmatively provides that the memorandum of understanding or collective bargaining agreement shall be controlling. The

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statutory language of EERA section 3542(d) and HEERA section 3572.5 are thus in no way comparable.

For the foregoing reasons, your unfair practice charge No. LA-CE-255-H, as presently written, does not state a prima facie case of violation of HEERA. The charge is subject to the absolute jurisdictional bar of the six-month statute of limitations as untimely filed, you lack standing to pursue a bad faith bargaining allegation against the CSU employer and HEERA section 3572.5 is not the statutory parallel of EERA section 3543.2(d).

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 that 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 March 30, 1990. I shall dismiss your charge without leave to amend.

Sincerely,

Christine Bologna
General Counsel