STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

WILLIE E. JENKINS, Charging Party, v. CALIFORNIA STATE UNIVERSITY, Respondent.	)	Case No. LA-CE-265-H PERB Decision No. 853-H December 5, 1990

Appearance: Willie E. Jenkins, on his own behalf.

Before Hesse, Chairperson; Camilli and Cunningham, Members.

DECISION

CAMILLI, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by charging party, Willie E. Jenkins (Jenkins), of the regional attorney's dismissal, attached hereto, of an amended unfair practice charge for failure to state a prima facie case. Jenkins alleged that the California State University (University) violated his rights under the Higher Education Employer-Employee Relations Act (HEERA)[1] when it discriminated/retaliated against him for having engaged in protected activities. Although Jenkins did not identify a specific section of HEERA that was violated,[2] the regional attorney, after conducting an investigation, concluded

[1]HEERA is codified at Government Code section 3560 et seq. Unless otherwise indicated, all statutory references are to the Government Code.

[2]Jenkins alleged that the University violated "HEERA Article 1 Thru [sic] 6.5."

he was attempting to allege a violation of section 3571(a)[3] on the grounds that he was discriminatorily demoted from the position of Mailroom Supervisor I[4] to Mailroom Leadperson. On appeal, Jenkins asserts 16 exceptions to the dismissal of his charge. Included with the appeal are a variety of exhibits. One exhibit, in particular, is entitled "Listing of Events" and contains an itemized statement of 38 incidents, complete with dates, apparently offered in support of his claim of discrimination/retaliation. Some of the enumerated incidents contained in the exhibit appear to be restatements of allegations contained in the third amended charge, but include additional factual information establishing the dates of the alleged incidents. Other incidents identified in the exhibit, as well as in the third amended charge, appear to describe conduct not previously alleged by Jenkins.

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[3]Section 3571(a) states:

> 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. For purposes of this subdivision, "employee" includes an applicant for employment or reemployment.

[4]The title for this position, as it appears in the collective bargaining agreement, is "Mail Services Supervisor I" (Class. Code 1504).

We have reviewed the dismissal and, finding it to be free of prejudicial error, adopt it as the Decision of the Board itself consistent with the discussion below.

FACTS

Jenkins filed his original charge on November 7, 1989. Thereafter, the charge was amended three times. The first amended charge was filed on November 28, 1989; the second amended charge was also filed on November 28, 1989. With the exception of a single word change in the second amended charge, the two amended charges are identical to the original charge and provided no new factual information to support Jenkins' claim. On June 12, 1990, the regional attorney sent a warning letter notifying Jenkins that unless additional information was provided, his charge would be dismissed on the following grounds: (1) if Jenkins' claim is that he has been demoted from a supervisory position to a member of the bargaining unit, then the charge must be dismissed because, under HEERA section 3580, supervisory employees do not have the right to file an unfair practice charge to remedy violations of their rights; alternatively, (2) if his position is not supervisory,[5] then the charge must be dismissed because he has failed to state sufficient facts to establish a prima facie case of

[5]The regional attorney's investigation revealed that, notwithstanding inclusion of the word "supervisor" in Jenkins' job title, the position is, in fact, not a supervisory position, but rather, is included in bargaining Unit 7, exclusively represented by the California State Employees Association, and covered by a collective bargaining agreement.

discrimination/retaliation. The regional attorney further noted that Jenkins alleged only in very general terms that he had engaged in protected activity and failed to indicate how the demotion constituted an adverse action by the employer, as there was no change in salary or working conditions, but rather, a change in title only.

A third amended charge was filed by Jenkins on June 26, 1990,[6] in which he: (1) reasserted his discrimination claim and supporting facts; (2) alleged that the University violated specific provisions of the collective bargaining agreement when it changed his job title, duties, and job description, and failed to give notice prior to those changes; and, (3) according to the regional attorney, Jenkins appeared to state new facts alleging discriminatory conduct by the University. As a result of the alleged violations of the contract, the regional attorney determined that the entire charge must be dismissed and deferred to arbitration.[7] The regional attorney also concluded:

> . . . many of the allegations of adverse actions attached to the third amended charge at numbers 1 through 39, pages 2 and 3, are also dismissed as falling outside the six month statute of limitations period, HEERA

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[6]The third amended charge was originally due to be filed not later than June 19, 1990. The regional attorney, however, granted Jenkins a one week extension, until June 26, 1990, in which to file his amended charge.

[7]The regional attorney's investigation revealed, among other things, that Article V, section 5.14 of the contract provides that "an employee shall not suffer reprisals for participation in union activities." Also, Article VII, sections 7.16 and 7.22, provides for final and binding arbitration of grievances and that only the Association may request arbitration.

> section 3563.2(a) (applies to all of these adverse actions except 4, 5, 6, 7, 10, 11, 12, 13, 15, 22, and 39). The original charge was filed on or about November 7, 1989. The third amended charge was filed on June 25, 1990, and many of these adverse actions appear to raise new discriminatory/ retaliatory conduct not found within the original charge, or which appear to be unrelated to the initial charge. Since, in most cases, you have not provided dates or alleged whether the adverse actions occurred on December 25, 1989 or thereafter, the aforementioned allegations are dismissed as untimely. See The Regents of the University of California (1990) PERB Decision No. 826-H. (Regional Attorney Dismissal, p. 7.)

DISCUSSION

While we agree with the regional attorney's conclusions that Jenkins has failed to state a prima facie case of discrimination and that the entire charge must be deferred to arbitration under Article V of the collective bargaining agreement, it is not clear that all of the allegations were correctly addressed or dismissed by the letter of dismissal.

Specifically, the regional attorney states that "many" of the allegations fall outside the six-month statute of limitations period and, therefore, cannot be used to support the unfair practice charge. The statement is then qualified by the conclusion that this analysis "applies to all . . . adverse actions except [those specifically listed in parenthesis above]." This phrase could be read to mean that anything not included in the listed exceptions is dismissed as untimely. We note, however, that Jenkins alleged in his third amended charge:

> Since the original charge was filed, other unlawful acts have occurred.[8] The CSU has committed the following Unfair Labor Practice acts against me:
>
> 1. Wrongful suspension and termination beginning on 11 May 1990 for misconduct.

We do not view this allegation as falling outside the six-month statute of limitations period applicable to the third amended charge. Accordingly, Jenkins' contention that he was "suspended and terminated" on May 11, 1990, for engaging in protected activity is not dismissed as untimely. The allegation is, however, as the regional attorney also correctly analyzed, deferred to arbitration because Article V, section 5.14 of the collective bargaining agreement prohibits the employer from taking reprisals against an employee for participation in union activities.[9]

It is also not clear what the regional attorney meant by his statement that the third amended charge:

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[8]It appears that Jenkins alleged 39 separate acts of discriminatory/retaliatory conduct by the University have occurred "since the original charge was filed." However, after comparing the latest allegations with those in the original, first and second amended charges, it is apparent that the third amended charge merely reasserts several allegations contained in the original charge. Specifically, allegations numbered 4, 5, 6, 7, 8, 10, 11, 12, 14, 20, 22 and 38 appear to allege adverse actions which were contained in or related to the original charge. Thus, it is clear those allegations could not have occurred "since the original charge was filed." (Emphasis added.)

[9]The regional attorney also found that Jenkins did not request arbitration of grievances and failed to present sufficient information demonstrating futility.

> appear[s] to raise new discriminatory/ retaliatory conduct not found within the original charge, or which appear[s] to be unrelated to the initial charge.
> (Emphasis added.)

Because of the use of the word "or," the above statement could be interpreted as dismissing Jenkins' new allegations on two additional but distinct grounds; i.e., that they (1) were not found within the original charge; and (2) were unrelated to the initial charge.

New allegations may not, however, be dismissed merely because they are "not found within the original charge." Rather, new factual allegations unrelated to the original charge may be used to support an entirely new charge, provided the new allegations describe conduct which occurred within six months of the date of the new charge. (Riverside Unified School District (1985) PERB Decision No. 553.)

In the present case, Jenkins filed his third amended charge on June 26, 1990 and appears to state several new allegations of discriminatory conduct by the University. However, as noted in the regional attorney's dismissal letter, Jenkins failed to provide any dates indicating whether the newly alleged conduct occurred before or after December 25, 1989 and, further, failed to describe how the new allegations were related to the original charge, if at all.[10] Accordingly, the new allegations may not be

[10]Many of Jenkins' 39 allegations are stated in such general terms that it is impossible to discern when they occurred. Specifically, Jenkins failed to provide sufficient information to determine when the following alleged adverse actions occurred: allegation numbers 2, 3, 14, 15, 16, 17, 18, 19, 21, 23, 24, 25,

used to support a new charge because it is not clear they describe conduct occurring after December 25, 1989. Further, since the new allegations are not alleged to have occurred within six months of the original charge and Jenkins has not identified how the new allegations are related to the original charge, the new allegations cannot be used to support the original charge under the relation back doctrine. (Regents of the University of California (UC-AFT) (1990) PERB Decision No. 826-H, p. 6; Regents of the University of California (1987) PERB Decision No. 640-H, p. 15; cf., Burbank Unified School District (1986) PERB Decision No. 589; Monrovia Unified School District (1984) PERB Decision No. 460.) Therefore, the new allegations are insufficient to establish a prima facie case of discrimination or retaliation.

In addition to the separately numbered allegations, Jenkins further alleged:

> CSU manager, John Sturgeon, instituted a set of "work rules" which was for disparate impact against employees who participated in Union activities. Mr. Sturgeon further stated in a meeting that, "I can relax these rules or make them more stringent based on whether grievances are filed."

These statements also fail to establish a prima facie case of discrimination/retaliation.[11] PERB Regulation 32615[12] provides, in pertinent part, that a charge alleging an unfair

26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36 and 37.

[11]Even if these allegations were sufficient to establish a prima facie case, as previously stated, Article V of the collective bargaining agreement would require that the charge be deferred to arbitration.

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

practice must contain "(5) A clear and concise statement of the facts and conduct alleged to constitute an unfair practice." The above allegation fails to satisfy this requirement because Jenkins does not identify when the rules were instituted, what specific rules were enforced, what union activity(s) the rules were instituted in response to, and when the statements by Sturgeon were allegedly made. The allegation is, therefore, dismissed.

Finally, PERB Regulation 32635(b) states:

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

Jenkins has failed to allege any facts that would satisfy the good cause standard. Accordingly, the additional information contained in Jenkins' appeal identifying when previously alleged conduct occurred or describing new conduct not previously alleged may not be considered when determining whether a prima facia case has been stated.

ORDER

For the reasons stated above, the Board DENIES Jenkins' appeal and AFFIRMS the regional attorney's dismissal in Case No. LA-CE-265-H, WITHOUT LEAVE TO AMEND.

Chairperson Hesse and Member Cunningham joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD

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

July 25, 1990

Willie Jenkins

Re: Jenkins v. California State University
Unfair Practice Charge No. LA-CE-265-H, Third Amended Charge
DISMISSAL OF CHARGE AND REFUSAL TO ISSUE COMPLAINT

Dear Mr. Jenkins:

In my warning letter to you dated June 12, 1990, attached hereto, I stated to you in part, that the Second Amended Charge failed to state a prima facie case of discrimination.[1] You were given until June 19, 1990 to withdraw the charge or file a third amended charge. On June 19, 1990, I granted you a one week extension to June 26, 1990. On June 26, 1990, I received your "3rd Amendment" (appears to be a third amended charge, replacing the second amended charge). The third amended charge alleges in part that California State University (University) unlawfully retaliated/discriminated against you for your union activity by changing your job title, duty responsibilities, and through all the allegations in the charge.

The third amended charge alleges[2] essentially the following:

1. Wrongful suspension and termination beginning on 11 May 1990 for misconduct.
2. Many letters of reprimand for self serving purposes.

[1]The second amended charge alleges that you were discriminatorily demoted from your position as Mailroom Supervisor I (or Mail Service Supervisor) to mailroom leadperson. This conduct is alleged to violate Article 1 through 6.5 of the Higher Education Employer-Employee Relations Act (HEERA).

[2]Although you claim that HEERA Article 1 through 6.5 and the collective bargaining agreement (Agreement) between the parties, Articles 16.7, 16.12 and 5.14, have been violated, it appears that the basis of your charge is that the University has unlawfully discriminated against you by its conduct. Accordingly, this charge will be treated as if it alleged a violation of section 3571(a).

3. Retaliation by suspension for 15 days.
4. Unlawful change of my job title under HEERA Article 6.5, Section 3506.3 from mailroom supervisor to mailroom leadperson.
5. Unlawful change of my job duties.
6. Refused or failed to give the Union 15 days notice in writing before changing my job title as required by CSEA/CSU contract 16.12.
7. Refused or failed to give me my 7-days notice before altering my job description which is required by CSEA/CSU contract 16.7.
8. Under fraud and deceit changed my duty title and job description and through dishonesty claimed no changes had been made except clarification.
9. John Sturgeon threatened and carried out his threat that he could make it easy or hard for an employee depending on how many grievances they filed.
10. By ordering a management audit firm to do a mailroom review that set a precedent at the CO.
11. By publicizing the review to CO. staff to solicit complaints which set a precedent.
12. The Personnel staff conspired with managers to design and plot a scheme to insure the management audit team would come up with the finding they wanted.
13. Concealed a mailroom survey by hand-picked staff to prevent me from. seeing the result which must have been in my favor or at least not what they expected.
14. Suspended me for retaliation purposes because of Union activity.
15. Jackie Baird, my immediate supervisor, made untrue statements against me.
16. Ms. Baird refused to give me proper computer instruction and refused my coworker to help me so as to make it appear that I was refusing or failing to do my job.
17. Other actions were taken against me such as, close supervision, letters written against me for self-serving purposes, and sabotage of my effort to do my job.
18. I am denied due process of law by CSU management.
19. CSU management required me to wait up to 3 hours in Personnel for harassment and oppression.
20. Personnel manager admonished me in front of Personnel staff, and Jackie Baird and Pam Chapin have admonished me in front of other staff for embarrassment purposes.

21. **When the minutest mistake is made by me, excessive time is spent backtracking, blowing this completely out of proportion in order to discredit me.**
22. **Divide and conquer tactics are continuously used between me and the staff I once supervised.**
23. **I was constantly harassed over my medical appointments.**
24. **Management has refused to investigate my allegations against other managers.**
25. **My flex-time was refused, yet flex-time requests were being solicited from others.**
26. **Receiving a biased performance evaluation from management as retaliation during this period.**
27. **Refused to allow me to work because my doctor suggested I do not work for my present supervisor because of conflict and management refused to investigate but forced me to get doctor to change his recommendation.**
28. **Refused to remove me from under present supervisor for the purpose of oppression and to allow her to build a case against me for dismissal.**
29. **Solicited complaints against me from other employees and refused to allow** me **to** see them and kept them in a **secret file in violation of Union contract.**
30. **Refused to send me to a SCIF doctor after an industrial injury.**
31. Refused to provide me with IDL to which I am, entitled.
32. Attempted to force me to accept NDI instead of IDL.
33. Forced me to work with a severe back injury.
34. **Refused to investigate my industrial** injury **in good faith.**
35. **Required** me **to** bring in **medical** excuse if I am **out** for **one day even** though **I had medical** excused **(sic) from my doctor prior to appointment.**
36. Refusing to give me my yearly performance evaluation as required by Union contract.
37. Baird using **oppressive management style by requiring** me **to** tell her **whenever** I **am going to be out of the mailroom for more than 10 minutes when the responsibility of my job requires me to be in and out of the mailroom numerous times during the day. Baird's oppressive actions are not limited to this complaint.**
38. **By** using **my attendance** as **a** weapon.
39. From January 15, 1990 to **present** while on disability leave Baird refused to **forward my mail.**

My investigation and the charge also revealed additional information. During the period, April 1986 to November 2, 1989, you filed approximately seven grievances. You provided me with

five written grievances relating to this matter, filed around September 1, 1989, alleging violations of various Articles of the contract, Article XVI, sections 16.12 (now 17.12) and 16.7 (now 17.7), Article V, section 5.14, and Article VII, section 7.6. The grievances indicated that your CSEA representative was Richard Funderburg.

During our telephone conversation on or about June 28, 1990, you advised me in part that Dr. Herbert Carter, Executive Vice Chancellor stopped or denied your grievances and that you have denial letters.[3] You indicated you did not ask the Union to take your grievances to Level V, binding arbitration. You believe the union told the University to change your title and you believe the union wanted you to drop the grievances and/or would not represent you. Your grievances, which were denied, were not elevated above Level III. You saw no need to elevate them to Level IV (Office of the Chancellor), as they had been automatically denied and those persons denying the grievances worked for Dr. Carter. You indicated you had filed eight or nine grievances and that the allegations in the third amended charge had been grieved by you.

The union, through Mr. Richard G. Funderburg, indicated to me on or about June 28, 19990 that it assisted you on the original grievance involving the change in title. It would have represented you further but you refused their advice, and did not give the Union an opportunity to represent you. Further, you alone dropped your grievances at or around the third level.

Your position was part of a bargaining unit exclusively represented by CSEA. CSEA and the University are parties to an agreement with the effective date of June 1, 1989 through May 31, 1992.

Article *1,* section 7.1 of the Agreement states,

> The term grievance' as used in this Article refers to the filed allegation by a grievant that there has been a violation, misapplication, or misinterpretation of a specific term(s) of this Agreement.

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[3]It has been impossible to reach you as you no longer have a telephone or a place where I can leave you a message to call me.

Article 7, section 7.2 defines a grievant, in part, as a permanent employee who alleges,

> that he/she has been directly wronged by a violation, misapplication, or a misinterpretation of a specific term(s) of this Agreement.

Article 7, section 7.3 defines a representative as a,

> Union Representative or an employee who at the grievants' request may be present at all levels thorough Level IV. Representation at Level V shall be by the Union only.

Article VII, sections 7.16 and 7.22 provide, in part, for final and binding arbitration and that if the grievance has not been settled at Level IV, the Union alone, may request arbitration.

Article V, section 5.14 provides that "An employee shall not suffer reprisals for participation in union activities."

Article VII, section 7.6 provides that the employee shall attempt to resolve the potential grievance informally with the immediate non-bargaining unit supervisor.

Article XVII, section 17.7 provides, in part, that if a position description will be altered, the employee shall receive a copy of the altered position description at least seven days prior to its effective date.

Article XVII, section 17.12 provides, in part, that when the University determines that a study to develop new classifications or to revise current classifications is necessary, the University shall notify the union. The union may then request a meeting with the University to discuss the classification study, within fifteen (15) days of being notified.

Based on the facts stated above and PERB Regulation 22620(b)(5) (California Administrative Code, title 8, section 32650(b)(5)), this charge must be dismissed and deferred to arbitration under the Agreement.

PERB Regulation 32620(b)(5) requires the board agent processing the charge to:

> Dismiss the charge or any part thereof as provided in section 32630 if . . . it is determined that a complaint may not be issued in light of Government Code sections 3514.5, 3541.5 or 3563.2 or because a dispute arising under HEERA is subject to final and binding arbitration.

In Dry Creek Joint Elementary School District (1980) PERB Order Mo. Ad-8la, the Board explained that:

> [W]hile there is no statutory deferral requirement imposed on the National Labor Relations Board (hereafter NLRB), that agency has voluntarily adopted such a policy both with regard to post-arbitral and pre-arbitral award situations. (Footnote omitted.) EERA section 3541.5(a) essentially codifies the policy developed by the NLRB regarding deferral to arbitration proceedings and awards. It is appropriate, therefore, to look for guidance to the private sector. (Footnote to Fire Fighters Union v. City of Vallejo (1974) 12 Cal.3d 608.)

Although this case arose under the Educational Employment Relations Act (EERA), and was overruled on statutory grounds, the rationale is still applicable to cases under HEERA. Regents of the University of California (1983) PERB Order No. Ad-139-H; California State University (1984) PERB Decision No. 392-H.

In Collyer Insulated Wire 192 NLRB 837, 77 LRRM 1931 (1971) and subsequent cases, the NLRB articulated standards under which deferral is appropriate in prearbitral situations. These requirements are: (1) the dispute must arise within a stable collective bargaining relationship where there is no enmity by the respondent toward the union; (2) the respondent must be ready and willing to proceed to arbitration and must waive contract-based procedural defenses; and (3) the contract and its meaning must lie at the center of the dispute.

These standards are met with respect to this case. First, no evidence has been produced to indicate that the Respondent and the Union are not operating within a stable collective bargaining relationship. Second, by the attached letter from its representative, William B. Haughton, Esq. dated June 28, 1990, the Respondent has indicated its willingness to proceed to

arbitration and to waive all procedural defenses. Finally, the issue raised by this charge that the Respondent has unlawfully discriminated against you in violation of section 3571(a) directly involves an interpretation of Articles of the Agreement including Article V, section 5.14, Article XVII, sections 17.7 and 17.12, and Article VII, section 7.6.

Although you have argued that this case is not appropriate for arbitration based upon your disagreement with, distrust of, or dislike for the Union, you have not presented enough information to show futility and/or that the Union expressly refused to arbitrate your grievances, had they gotten to the appropriate level. See State of California (Dept. of Corrections) (Schwartzman) (1986) PERB Decision No. 561.

Accordingly, this charge must be deferred to arbitration and will be dismissed without leave to amend. Such dismissal is without prejudice to the Charging Party's right, after arbitration, to seek a repugnancy review by PERB of the arbitrator's decision under the Dry Creek criteria. See PERB Regulation 32661 (California Administrative Code, title 8, section 32661; Los Angeles Unified School District (1982) PERB Decision No. 218; Dry Creek Joint Elementary School District, supra.

In addition, many of the allegations of adverse actions attached to the third amended charge at numbers 1 through 39, pages 2 and 3, are also dismissed as falling outside the six month statute of limitations period, HEERA section 3563.2(a) (applies to all of these adverse actions except 4, 5, 6, 7, 10, 11, 12, 13, 15, 22, and 39). The original charge was filed on or about November 7, 1989. The third amended charge was filed on June 25, 1990, and many of these adverse actions appear to raise new discriminatory/retaliatory conduct not found within the original charge, or which appear to be unrelated to the initial charge. Since, in most cases, you have not provided dates or alleged whether the adverse actions occurred on December 25, 1989 or thereafter, the aforementioned allegations are dismissed as untimely. See The Regents of the University of California (1990) PERB Decision No. 826-H.

This charge is also dismissed for the reasons indicated in the attached warning letter dated June 12, 1990, to the extent your third amended charge reasserts allegations contained in your second amended 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.

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,

JOHN W. SPITTLER
General Counsel

By _____
Marc S. Hurwitz
Regional Attorney

Attachments

cc: William B. Haughton, Esq.

PUBLIC EMPLOYMENT RELATIONS BOARD

Los Angeles Regional Office
3330 Wilshire Boulevard. Suite 650
Los Angeles, CA 90010-2334
(213)736-3127

June 12, 1990

Willie Jenkins

Re: Jenkins v. California State University
Unfair Practice Charge No. LA-CE-265-H
Second Amended Charge
WARNING LETTER

Dear Mr. Jenkins:

The above-referenced second amended charge alleges that you were discriminatorily demoted from your position as Mailroom Supervisor I (or Mail Service Supervisor I) to mailroom leadperson. This conduct is alleged to violate Article 1 through 6.5 of the Higher Education Employer-Employee Relations Act (HEERA).

My investigation revealed the following information.[1] Mr. Jenkins has worked in the mailroom for California State University (University) for approximately 13 years, most recently as a Mailroom Supervisor I. On August 8, 1989 he was officially notified he would be reclassified as a mailroom leadperson. This reclassification was the result of a June 1989 study of the mailroom conducted by a private consulting firm. One of the consulting firm's recommendations was to establish a "working supervisor" in the mailroom. As a result, the University decided to retitle Mr. Jenkins' position as mailroom leadperson without any substantive change in assigned duties and no change in pay. This description was reviewed by CSEA representative Rick Funderburg. Members of the mailroom staff received a memorandum dated August 8 which requested them to meet with an administrator to discuss the job descriptions. Mr. Jenkins was the only member of the mailroom to decline this invitation.

On August 9 Mr. Jenkins met with Charlie Fernandez, the Manager of Personnel Services, for the University to discuss the change in job title. During this discussion Mr. Jenkins indicated that he wanted an apology because the contract had been violated when

[1]On May 10, 1990 I called and left a message for you at your work telephone number. The other two home telephone numbers I had for you were no longer in service. You did not return my call. On June 8 I attempted to contact you at work and was told you were no longer employed there.

he was not provided seven days written notice of the change in job title.

On August 11 Mr. Jenkins met with Mr. Funderburg and was later joined by Mr. Hernandez. After a lengthy discussion, it became apparent that Mr. Jenkins would not be satisfied with any of the proposed solutions and the meeting ended. Thereafter Mr. Jenkins filed a grievance.

Based on the facts described above, this charge does not state a prima facie violation of the HEERA for the reasons which follow.

Although you claim that HEERA Article 1 through 6.5 has been violated, it appears that the basis of your charge is that the University has unlawfully discriminated against you by demoting you from Mailroom Supervisor I to mailroom leadperson. Accordingly, this charge will be treated as if it alleged a violation of section 3571(a).

You assert in the charge that your position as Mailroom Supervisor I is supervisory under the definition of HEERA.[2] Accepting this as true (San Juan Unified School District (1977) EERB Decision No. 12), it would appear that your charge should be dismissed. HEERA section 3580 provides:

> Except as provided by this article, supervisory employees shall not have the rights, or be covered by, any provision or definition established by this chapter.

Since your right to file an unfair practice charge is established in section 3563.2, supervisory employees do not have the right to file an unfair practice charge to remedy violations of their supervisory rights. This position has been specifically upheld by the Board in the State of California, Department of Health (1979) PERB Decision No. 86-S. In that case, the Board dismissed an unfair practice charge filed by a supervisor under the Ralph Dills Act which contains language identical to that contained in HEERA.

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[2]The University asserts that your position, Mail Service Supervisor I is in bargaining unit 7 which is exclusively represented by CSEA. This is confirmed by Appendix A of the most recent collective bargaining agreement between CSEA and the University effective June 1, 1989 through May 31, 1992, which lists the position in the bargaining unit.

Assuming for sake of argument that your position is not supervisory, then your charge must state the elements of a prima facie case of discrimination in order for a complaint to issue.

To demonstrate a violation of HEERA section 3571(a), the charging party must show that: (1) the employee exercised rights under the EERA, (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; 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.

Although your charge alleges in very general terms that you have engaged in protected activity, it does not specifically describe these activities. In addition, you have not indicated that your demotion constitutes adverse action by the employer. There appears to be no change in salary or working conditions, but rather only a change in title. This may be insufficient to constitute adverse action. Palo Verde Unified School District (1988) PERB Decision No. 689. Finally, there is no evidence that the University's decision to demote you was caused by or because of previous protected activity. Without clear facts which support all of the elements of prima facie case, a complaint may not issue.

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 Third 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 June 19, 1990. I shall dismiss your charge. If you have any questions, please call me at (213) 736-3127.

Sincerely,

Marc S. Hurwitz
Regional Attorney

MSH:eb

THE CALIFORNIA STATE UNIVERSITY

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SAN MARCOS • SONOMA • STANISLAUS

OFFICE OF GENERAL COUNSEL
TELEPHONE: (213) 590-5629

TELEFAX. (213)8[illegible]
8-435-6040

June 28, 1990

By DHL Worldwide Express

Marc S. Hurwitz
Regional Attorney
Public Employment Relations Board
3530 Wilshire Blvd., Suite 650
Los Angeles, California 90010-2334

Re: Unfair Practice Charge No. LA-CE-265-H - Willie Jenkins v. California State University; Our File No. L89-1490

Dear Mark:

We have recently been served with a copy of the third amended unfair practice charge in this matter.

Several of the allegations therein refer to pending contractual grievances as well as contract violations. It is CSU's position that all of these matters should be dismissed by PERB and deferred to binding arbitration. Under the Collyer doctrine, all of the requirements for deferral exist in this case.

If these allegations are dismissed by PERB and deferred to arbitration, CSU will waive its procedural defenses to arbitrating any of these matters including timeliness.

Sincerely,

MAYER CHAPMAN
Vice Chancellor
and General Counsel

William B Haughton

William B. Haughton
Senior Labor Relations Counsel

WBH:mks:0114E