STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

MARY G. HIGGINS, et al.,	)	
	)	
Charging Parties,	)	Case No. SF-CE-430-H
	)	
v.	)	PERB Decision No. 1159-H
	)	
REGENTS OF THE UNIVERSITY OF CALIFORNIA,	)	June 18, 1996
	)	
	)	
Respondent.	)	
	)	

Appearances: Mary G. Higgins on behalf of Mary G. Higgins and Connie Foerster-Bourges; Leslie L. Van Houten, Attorney, for Regents of the University of California.

Before Garcia, Johnson and Dyer, Members.

DECISION AND ORDER

JOHNSON, Member: This case is before the Public Employment Relations Board (Board) on appeal of a Board agent's partial dismissal (attached) of an unfair practice charge filed by Mary G. Higgins (Higgins) and Connie Foerster-Bourges (collectively Charging Parties). The charge alleged that the Regents of the University of California (University) violated section 3571(a) and (b) of the Higher Education Employer-Employee Relations Act (HEERA)[1] when it discriminated against Higgins by

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[1]HEERA is codified at Government Code section 3560 et seq. Section 3571 provides, 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

investigating a complaint filed against her and interfered with Charging Parties' rights by threatening future investigations.

The Board has reviewed the entire record in this case, including the unfair practice charge, the warning and dismissal letters, Charging Parties' appeal and the University's response thereto. The Board finds the warning and dismissal letters to be free of prejudicial error and adopts them as the decision of the Board itself.[2]

The partial dismissal of the unfair practice charge in Case No. SF-CE-430-H is hereby AFFIRMED.

Member Dyer joined in this Decision.

Member Garcia's concurrence begins on page 3.

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

(b) Deny to employee organizations rights guaranteed to them by this chapter.

[2]Under PERB Regulation 32620(b)(6), the Board will defer to the contractual grievance and arbitration procedure only if arbitration is final and binding. (PERB regulations are codified at Cal. Code of Regs., tit. 8, sec. 31001 et seq.; Regents of the University of California (Higgins) (1994) PERB Decision No. 1058-H.) Deferral is inappropriate in this case because Article 4, section E.2. of the applicable collective bargaining agreement expressly excludes the subject of this unfair practice charge from final and binding arbitration.

GARCIA, Member, concurring: I concur with the majority's opinion to affirm the Public Employment Relations Board (PERB or Board) agent's dismissal, but my reasons are different. California law and policy considerations preclude the Board from taking jurisdiction of this case.

This charge alleges both a violation of the Higher Education Employer-Employee Relations Act (HEERA) and a violation of the parties' contract. Mary Higgins (Higgins) did not file a grievance; instead she filed an unfair practice charge. Although HEERA section 3563.2 does not require exhaustion of the contractual grievance procedure before PERB jurisdiction can attach, other legal principles preclude jurisdiction. California courts will refuse to consider disputes between parties to a collective bargaining agreement until the parties to the dispute have exhausted internal remedies under the terms of their grievance agreement. The Court of Appeal has held that:

> It is the general rule that a party to a collective bargaining contract which provides grievance and arbitration machinery for the settlement of disputes within the scope of such contract must exhaust these internal remedies before resorting to the courts in the absence of facts which would excuse him from pursuing such remedies. [Citations.] . . . Such procedures, which have been worked out and adopted by the parties themselves, must be pursued to their conclusion before judicial action may be instituted unless circumstances exist which would excuse the failure to follow through with the contract remedies. [Citations.]
>
> (Cone v. Union Oil Co. (1954) 129 Cal.App.2d 558, 563-564 [277 P.2d 464].)

The exhaustion doctrine is explained in Abelleira v. District Court of Appeal (1941) 17 Cal.2d 280 [109 P.2d 942] as follows:

> . . . the rule [of exhaustion of administrative remedies] is that where an administrative remedy is provided by statute, relief must be sought from the administrative body and this remedy exhausted before the courts will act. (Id. at 292.)

Likewise, in George Arakelian Farms, Inc. v. Agricultural Labor Relations Bd. (1985) 40 Cal.3d 654 [221 Cal.Rptr. 488] the California Supreme Court refused to consider the appeal of a plaintiff who had failed to complete the Agricultural Labor Relations Board appeal process, stating that his failure to exhaust his administrative remedy precluded jurisdiction. (Id. at 663.)

In County of Contra Costa v. State of California (1986) 177 Cal.App.3d 62 [222 Cal.Rptr. 750], the court emphasized that the exhaustion of remedies doctrine operates as a limit on jurisdiction unless the party can establish an exception to the rule, such as futility or inadequate remedy. (Id. at 77-78.) If no exception applies, the court held that "judicial action without exhausting [administrative] remedies must be considered premature." (Id. at 76-77.)

Turning to the facts of this case, Higgins is a union steward who knows the grievance procedure and appears to believe that a possible contractual violation occurred, since she indicated on her unfair practice charge form that a grievance would be filed. Both under HEERA section 3567 and pursuant to the parties' contract, Higgins has the right to file a grievance

in her own name, and there are no facts to indicate that resort to the grievance procedure would have been futile or that it could not have provided an adequate remedy. In response to footnote 2 in the majority opinion, I point out that PERB has no legislative authority to exercise its jurisdiction to issue a complaint until or unless the grievance process is exhausted or futility is demonstrated. (Eureka City School District (1988) PERB Decision No. 702, at p. 7, citing Lake Elsinore School District (1987) PERB Decision No. 646.)

When the Legislature enacted public employee collective bargaining statutes, it was careful to refrain from imposing arbitration on the parties. Nowhere in HEERA is arbitration mentioned as a pre-condition to deferral. PERB has no authority to create a deferral doctrine conditioned on arbitration through a regulation that promotes a policy the Legislature avoided and which is contrary to California law.

As a quasi-judicial appellate board operating under California law, it would be error for us to take jurisdiction of this charge. Furthermore, it would not be good policy because it promotes imposed decisions over negotiated settlements and encourages parties to collective bargaining agreements to ignore the contractual remedy they agreed to.

PUBLIC EMPLOYMENT RELATIONS BOARD

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

February 9, 1996

Mary G. Higgins

Re: Unfair Practice Charge No. SF-CE-430-H, Mary Higgins. et al. v. Regents of the University of California
NOTICE OF PARTIAL DISMISSAL

Dear Ms. Higgins:

The above-referenced charge alleges, in part, the University of California at San Francisco (University) is conducting an investigation into the activities of union steward Mary Higgins in retaliation for her participation in a grievance proceeding. The charge alleges this conduct violates Higher Education Employer-Employee Relations Act (HEERA or Act) sections 3567 and 3571(a) and (b).

I indicated to you, in my attached letter dated January 2, 1996, that certain allegations contained in the 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 these allegations to state a prima facie case or withdrew them prior to January 12, 1996, the allegations would be dismissed. I later extended this deadline to January 20, 1996.

I have not received either an amended charge or a request for withdrawal. Therefore, I am dismissing those allegations which fail to state a prima facie case based on the facts and reasons contained in my January 2, 1996 letter.

Right to Appeal

Pursuant to Public Employment Relations Board regulations, you may obtain a review of this dismissal of certain allegations contained in 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

Tammy L.Samsel
Regional Attorney

Attachment

PUBLIC EMPLOYMENT RELATIONS BOARD

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

January 2, 199 6

Mary G. Higgins

Re: Unfair Practice Charge No. SF-CE-430-H, Mary Higgins. et al. v. Regents of the University of California
PARTIAL WARNING LETTER

Dear Ms. Higgins:

The above-referenced charge alleges, in part, the University of California at San Francisco (University) is conducting an investigation into the activities of union steward Mary Higgins in retaliation for her participation in a grievance proceeding. The charge alleges this conduct violates Higher Education Employer-Employee Relations Act (HEERA or Act) sections 3567 and 3571(a) and (b). My investigation revealed the following information.

Connie Foerster filed a grievance against her immediate supervisor, Gary Beyrouti. On April 11, 1995, Mary Higgins attended a step II grievance meeting as Foerster's union steward. Prior to that meeting Foerster told Higgins other female employees had experienced problems with Beyrouti. During the presentation of the union's contentions at the step II meeting, Higgins referred to a possible history of misconduct by Beyrouti. In response to Higgins' contention, Beyrouti filed a sex discrimination complaint against Higgins. The University's Department of Affirmative Action/Equal Employment Opportunity (Department) initiated an investigation into the matter pursuant to federal law.

The charge requests PERB stop the Department's investigation. However, the Director of the Department issued a letter on October 30, 1995, which concluded the investigation and found Higgins did not discriminate against Beyrouti on the basis of sex.

To demonstrate a violation of HEERA section 3571(a), the charging party must show: (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. (California State University (Sacramento) (1982) PERB Decision No. 211-H.)

Although the timing of the employer's adverse action in close temporal proximity to the employee's protected conduct is an important factor, 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; (2) the employer's departure from established procedures and standards when dealing with the employee; (3) the employer's inconsistent or contradictory justifications for its actions; (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; or (6) any other facts which might demonstrate the employer's unlawful motive. (Novato Unified School District, supra; North Sacramento School District (1982) PERB Decision No. 264.)

The charge appears to allege two distinct adverse actions: (1) the filing of the complaint by Beyrouti, and (2) the Department's subsequent investigation of that complaint. This letter addresses only the Department's act of investigating the complaint.

The allegations against the University for the Department's conduct fails to present a prima facie violation. Higgins is not protected from an investigation by the Department merely because she is acting as a union steward. (See Kaady v. Los Angeles Unified School District (1992) PERB Decision No. 957.) The Department may investigate Higgins' conduct pursuant to its rules as it would investigate the conduct of any other employee alleged to have engaged in misconduct. To establish a prima facie discrimination violation, the charge must present facts demonstrating the University initiated the investigation, or conducted it in a discriminatory manner, because Higgins exercised protected rights. (See Novato Unified School District (1982) PERB Decision No. 210; California State University (Sacramento) (1982) PERB Decision No. 211-H.)

The charge does not establish the Department investigated Higgins because of her union activities. First, the charge does not present any facts indicating the Department's investigation would not have occurred if Higgins had not been speaking in her capacity as a union steward. The charge also fails to present any facts suggesting the University departed from the rules established for the investigation of complaints alleging discrimination based on sex. For example, the charge does not present facts demonstrating the Department exercised discretion in singling Higgins out for investigation while allowing complaints against other employees to go on without investigation. Nor does the charge present facts establishing the investigation was unjustified under the federal regulations implementing Title IX of the Education Amendments of 1972. For these reasons, this allegation fails to demonstrate the required nexus between Higgins' speech and the Department's investigation. Accordingly, the allegation that the University violated the Act by its investigation is dismissed.

The charge also alleges the University is involved in an "elaborate attempt to deny [Foerster] the use of negative evidence in her future arbitrations." My understanding of the charging party's theory is that although the University's investigation resulted in a finding of "no cause," Higgins may be subject to further complaints and investigations if she repeats her statement about Beyrouti in future grievance arenas. Higgins contends the parties' contract required her to mention Beyrouti's possible past conduct during the formal meeting to reserve the right to use that information during arbitration. Higgins also alleges the possibility of future investigations is interfering with her right to represent, and Foerster's right to be represented.

A prima facie case of an interference violation requires the charging party to demonstrate the employer's conduct tends to or does result in some harm to employee's rights, but does not require the charging party to prove unlawful intent. (See Carlsbad Unified School District (1979) PERB Decision No. 89; Novato Unified School District (1982) PERB Decision No. 210; Regents of the University of California (1983) PERB Decision No. 308-H.) The charge presents no facts demonstrating the University's conduct tends to or does result in some harm to Higgins' or Foerster's rights. Higgins' allegation that she may be subject to investigation at a future time is not sufficient. The charge does not contain any facts establishing the University is involved in any effort to deny Foerster the use of any evidence in the grievance process.

For these reasons the allegation that the University discriminated against you by its investigation of Beyrouti's complaint, 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 January 12, 1996, I shall dismiss the above-described allegation from your charge. If you have any questions, please call me at (213) 736-7508.

Sincerely,.

Tammy L. Samsel
Regional Attorney