STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

KENNETH EDWARD SCUDDER, Charging Party, v. THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, Respondent.	)	Case No. SF-CE-506-H PERB Decision No. 1285-H September 18, 1998

Appearances; Kenneth Edward Scudder, on his own behalf; Susan H. von Seeburg, University Counsel, for The Regents of the University of California.

Before Dyer, Amador and Jackson, Members.

DECISION

JACKSON, Member: This case is before the Public Employment Relations Board (Board) on appeal by Kenneth Edward Scudder (Scudder) of a Board agent's dismissal (attached) of his unfair practice charge. As amended, Scudder's charge alleges that The Regents of the University of California (University) violated section 3571(a) of the Higher Education Employer-Employee Relations Act (HEERA)[1] by laying him off from his position as a

[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 guaranteed by this chapter. For purposes of this subdivision, "employee" includes an

legal research analyst on July 11, 1997 and by dismissing his grievance on November 25, 1997.

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

ORDER

The unfair practice charge in Case No. SF-CE-506-H is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Dyer and Amador joined in this Decision.

applicant for employment or reemployment.

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
177 Post Street, 9th Floor
San Francisco, CA 94108-4737
(415) 439-6940

June 24, 1998

Doug Brown
University Professional & Technical Employees
P.O. Box 40123
Berkeley, CA 94704

Re: **DISMISSAL OF CHARGE/REFUSAL TO ISSUE COMPLAINT**
Kenneth Edward Scudder v. The Regents of the University of California
Unfair Practice Charge No. SF-CE-506-H

Dear Mr. Brown:

The above-referenced unfair practice charge, filed May 22, 1998, alleges the Regents of the University of California (University) discriminated against Kenneth Scudder by laying him off and by dismissing his grievance. Charging Party alleges this conduct violates Government Code section 3571(a) of the Higher Education Employer-Employee Relations Act (HEERA or Act).

I indicated to you, in my attached letter dated May 27, 1998, that the above-referenced charge did not state a prima facie case. You were advised that, if there were any factual inaccuracies or additional facts which would correct the deficiencies explained in that letter, you should amend the charge. You were further advised that, unless you amended the charge to state a prima facie case or withdrew it prior to June 3, 1998, the charge would be dismissed. I later extended this deadline until June 12, 1998.

On June 12, 1998, I received a first amended charge. The amended charge reiterates the allegations contained in the original charge and adds the following. Charging Party's original charge seemed to contend that the University laid Mr. Scudder off because of his protected activities. The amended charge clarifies that Mr. Scudder is alleging the University failed to properly process his grievance regarding the layoff, because of his protected activity.

On July 11, 1997, the University temporarily laid off Mr. Scudder and two fellow employees, Tom Hogan and Mujahidum Sumchai. On July 29, 1997, Mr. Scudder and his fellow employees filed grievances alleging the layoff failed to conform to PPSM Sections

60A-D. Mr. Scudder identified UPTE representative Doug Brown as his representative.

On August 6, 1997, University representative, Booker McClain, responded to Charging Party's grievance via a letter to Mr. Brown. Mr. McClain informed Mr. Brown that he needed further information regarding the grievance, as PPSM sections cited in the grievance did not appear to apply to Mr. Scudder's case. Mr. McClain set a deadline of August 18, 1997, for the information.

Apparently due to an incorrect address, Mr. Brown did not receive Mr. McClain's letter and failed to respond by the deadline. On September 25, 1997, Mr. McClain communicated to Charging Party that the grievance was "abandoned" as Mr. Brown had failed to respond. On October 15, 1997, Mr. McClain agreed to establish a new deadline for the requested information and Charging Party's appeal of Mr. McClain's previous decision. Charging Party and/or his representative failed to provide the requested information by the second deadline as well.

Despite Mr. McClain's prior statements that the grievance was abandoned, Mr. McClain again agreed to extend the deadline for the appeal until November 14, 1997. After speaking with Charging Party's attorney, Mr. McClain gave a final deadline of November 21, 1997.

On November 21, 1997, Charging Party placed the information Mr. McClain requested in an inter-office mail box. Mr. McClain did not receive the information until November 24, 1997, three days after the deadline. On November 25, 1997, Mr. McClain responded to Charging Party's appeal by stating that the appeal was denied as it was untimely filed.

Based on the above stated facts, the charge as presently written fails to state a prima facie violation, and is therefore dismissed.

Charging Party contends the University discriminated against him in the processing of his grievance by failing to allow the appeal of his grievance to be processed. In support of this allegation, Charging Party contends the grievances filed by his fellow employees were processed in a timely fashion without incident.

To demonstrate a violation of HEERA section 3571(a), the charging party must show that: (1) the employee exercised rights under HEERA; (2) the employer had knowledge of the exercise of those rights; and (3) the employer imposed or threatened to impose reprisals, discriminated or threatened to discriminate, or otherwise interfered with, restrained or coerced the employees because of the exercise of those rights. (Novato Unified School

District (1982) PERB Decision No. 210; 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 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.) As presently written, this charge fails to demonstrate any of these factors and therefore does not state a prima facie violation of HEERA section 3571(a).

Charging Party engaged in protected activity by filing a grievance regarding his layoff. However, Charging Party fails to demonstrate the University denied his appeal because of his protected activity. Charging Party contends the University's discriminatory motive is demonstrated by the fact that his fellow employees had their grievances resolved in a timely fashion. However, such an assertion does not demonstrate disparate treatment.

Charging Party and his fellow employees engaged in the same protected activity. However, only Charging Party's appeal was denied. Facts provided by the Charging Party fail to demonstrate the University denied his appeal for any reason other than that provided by the University. The University granted Charging Party and his representatives three extensions of time to file the appeal. Charging Party failed to meet any of these deadlines. While Charging Party may feel such a procedural dismissal is arbitrary, the University's actions demonstrate Mr. Scudder had ample opportunity to provide the University with an appeal. As such, it appears the appeal was denied as it was untimely filed, and not for discriminatory reasons. Therefore, the charge is dismissed.

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. (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

By
Kristin L. Rosi
Regional Attorney

Attachment

cc: Susan Von Seeburg, Esq.
Booker McClain, Human Resource Manager

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
177 Post Street, 9th Floor
San Francisco, CA 94108-4737
(415) 439-6940

May 27, 1998

Kenneth Edward Scudder
2300 Shattuck Avenue
Berkeley, CA 94704

Re: **WARNING LETTER**
~~Kenneth Edward Scudder v. The Regents of the University of California~~
Unfair Practice Charge No. SF-CE-506-H

Dear Mr. Scudder:

The above-referenced unfair practice charge, filed May 22, 1998, alleges the Regents of the University of California (University) discriminated against you by laying you off and by dismissing your grievance. You allege this conduct violates Government Code section 3571(a) of the Higher Education Employer-Employee Relations Act (HEERA or Act).

Investigation of the charge revealed the following. Until July 1997, you were employed at the Continuing Education of the Bar (CEB), as a legal research analyst. As a research analyst, you are part of the bargaining unit represented by the University Professional and Technical Employees (UPTE). UPTE and the University do not have a collective bargaining agreement, thus the University's Policies and Procedures Manual (PPSM) is status quo between the employees and the University.

On July 1, 1997, you received an electronic message regarding a meeting to be held on July 3, 1997. You were informed that the meeting was between yourself and your supervisor to discuss "personal issues." After receiving clarification from fellow employees who received the same meeting notice, you were informed that the meeting concerned "personnel issues."

On July 3, 1997, during the above-referenced meeting, you received notification from the University of your temporary layoff, effective July 11, 1997 through November 14, 1997. Attached to the letter regarding layoff, was the University's benefits package. Additionally, the University stated that all questions concerning your layoff should be directed to Booker McClain, Human Resources Manager. On that same day, you contend your computer and telephone were disconnected, and you were further informed not to come onto University property.

On July 29, 1997, you, along with your two fellow co-workers who were also laid off, filed a grievance alleging your layoff failed to conform with PPSM Sections 60A-D. Section 60 states in pertinent part: "It is the policy of the University to minimize the effects of indefinite layoffs..." The grievance alleges the University failed to minimize the effects of your layoff by sending you an electronic message about the meeting, disconnecting the telephones and computer, and by failing to discuss alternatives to your layoff. The grievance also alleges Mr. McClain singled you out for layoff because of "productivity" issues. You contend productivity is not a valid reason to single someone out for layoff.

On August 6, 1997, Mr. McClain responded to Charging Party's grievance, by sending a letter to Dave Brown, Charging Party's UPTE representative. Mr. McClain noted that Section 60A-C did not apply to Charging Party, as Charging Party's layoff was temporary, not indefinite. With regard to Section 60D, Temporary Layoff. Mr. McClain informed Mr. Brown that more information was needed in order to process the grievance. Mr. McClain provided an August 18, 1997, deadline to receive this information.

Apparently due to an incorrect address, Mr. Brown did not receive Mr. McClain's August 6, 1997, letter and failed to respond by the deadline. On September 25, 1997, Mr. McClain communicated to Charging Party that he understood the grievance to be "abandoned" as Mr. Brown failed to respond in a timely fashion. On October 15, 1997, during settlement negotiations regarding your co-workers grievances, Mr. McClain agreed to allow Mr. Brown to refile your grievance and established new deadlines for the information requested. Mr. Brown failed to provide Mr. McClain with the information.

On October 28, 1997, Charging Party states he attempted to "reinstate" his grievance. On November 6, 1997, Mr. McClain sent Charging Party an electronic message stating in relevant part that Charging Party could not manage his own grievance without indicating that he no longer wished to have Mr. Brown as his representative. As Mr. Brown was the representative-of-record, Mr. McClain stated he needed Mr. Brown to provide him with the information requested. As neither Charging Party, nor Mr. Brown, had provided Mr. McClain with the requested information, the grievance was considered "abandoned" for a second time.

Despite Mr. McClain's statements in the electronic message, on November 7, 1997, Mr. McClain agreed to extend Charging Party's deadline to provide information until November 14, 1997. On November 11, 1997, Charging Party's attorney made a request for settlement to Mr. McClain. Mr. McClain rejected the settlement

offer, and further extended Charging Party's deadline until 5:00 p.m., November 21, 1997.

On November 21, 1997 at approximately 9:30 a.m., Charging Party placed his letter to Mr. McClain in the inter-office mail box. Mr. McClain did not receive the letter until November 24, 1997. On November 25, 1997, Mr. McClain responded to Charging Party's appeal by stating that the appeal was denied as it was untimely filed, and that no further action would be taken.

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

Charging Party contends:

> McClain acted in bad faith throughout the grievance process, five times . . . denying my grievance and subsequent appeal on frivolous grounds, and twice rejecting out of hand reasonable settlement offers. His actions in so doing are clear violations of Government Code section 3571(a)--unlawful discrimination, retaliation, and bad faith.

Charging Party contends the University laid him off for discriminatory reasons. Government Code section 3563.2(a) provides that the Board 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. On July 3, 1997, Charging Party was informed of his temporary layoff. As the charge was filed more than six months after the notice of layoff, allegations regarding the layoff itself are untimely, and therefore must be dismissed.

Even assuming all allegations to be timely filed, the charge still fails to state a prima facie case. To demonstrate a violation of HEERA section 3571(a), the charging party must show that: (1) the employee exercised rights under HEERA; (2) the employer had knowledge of the exercise of those rights; and (3) the employer imposed or threatened to impose reprisals, discriminated or threatened to discriminate, or otherwise interfered with, restrained or coerced the employees because of the exercise of those rights. (Novato Unified School District (1982) PERB Decision No. 210; 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.)

In the instant charge, Charging Party contends that the University failed to follow proper procedures in processing his grievance and singled him out for layoff for an improper reason, i.e. his productivity. However, in order to state a prima facie claim of retaliation or discrimination, Charging Party must demonstrate he engaged in some protected activity, and that the University chose to lay him off and/or refused to process his grievance, because of the protected activity. Charging Party fails to demonstrate he engaged in any protected activity prior to his layoff, and fails to demonstrate the University laid him off for reasons other than those provided by the University. As such, the charge fails to state a prima facie case.

To the extent that Charging Party is alleging the University failed to follow its own procedures in processing the grievance, the charge fails to state a prima facie case. Such an allegation is properly analyzed as a unilateral change or as bad faith bargaining. However, Charging Party lacks standing to allege a unilateral change or bad faith, and as such, the allegation fails to state a prima facie case. (Oxnard School District (1988) PERB Decision No. 667.)

For these reasons the charge, as presently written, does not state a prima facie case. If there are any factual inaccuracies in this letter or additional facts 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 have the case number written on the top right hand corner of the charge form. The amended charge must be served on the respondent's representative and the original proof of service must be filed with PERB. If I do not receive an amended charge or withdrawal from you before June 3, 1998. I shall dismiss your charge. If you have any questions, please call me at (415) 439-6940.

Sincerely,

Kristin L. Rosi
Regional Attorney