

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



GEORGE SARKA,

Charging Party,

v.

REGENTS OF THE UNIVERSITY OF
CALIFORNIA,

Respondent.

Case No.LA-CE-811-H

PERB Decision No. 1771-H

June 24, 2005

Appearance: George Sarka, on his own behalf.

Before Duncan, Chairman; Whitehead and Shek, Members.

DECISION

WHITEHEAD, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by George Sarka (Sarka) of a Board agent's dismissal (attached) of his unfair practice charge. The unfair practice charge alleged that the Regents of the University of California (UC) violated the Higher Education Employer-Employee Relations Act (HEERA)¹ by violating his Skelly² rights in allowing his immediate supervisor to preside over the Skelly hearing and by failing to provide Sarka with documents prior to the Skelly meeting. Sarka further alleges that the Independent Party Reviewer improperly considered whether union activity was a basis for his termination. Sarka alleged that this conduct constituted a violation of HEERA section 3571.

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

²"Skelly" refers to Skelly v. State Personnel Bd. (1975) 15 Cal. 3d 194 [124 Cal.Rptr. 14], in which the California Supreme Court prescribed due process requirements before discipline may occur in public employment.

The Board has reviewed the entire record in this matter, including Sarka's unfair practice charge, UC's response, Sarka's amended unfair practice charge, the Board agent's warning and dismissal letters, and Sarka's appeal. The Board finds the Board agent's warning and dismissal letters to be free of prejudicial error and adopts the Board agent's dismissal as a decision of the Board itself except for the issues identified below. The Board also finds that Sarka's arguments raised on appeal are unpersuasive and that the Board agent adequately addressed these issues in the warning and dismissal letters.

DISCUSSION

Sarka filed his unfair practice charge on April 2, 2004. He argues that the issues surrounding his Skelly hearing were timely alleged in his charge.

HEERA section 3563.2(a) prohibits PERB from issuing a complaint with respect to "any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge." The limitations period begins to run once the charging party knows, or should have known, of the conduct underlying the charge. (Gavilan Joint Community College District (1996) PERB Decision No. 1177.) The statute of limitations is an affirmative defense which has been raised by UC in this case. (Long Beach Community College District (2003) PERB Decision No. 1564.) Therefore, Sarka now bears the burden of demonstrating that the charge is timely filed. (Cf. Tehachapi Unified School District (1993) PERB Decision No. 1024; State of California (Department of Insurance) (1997) PERB Decision No. 1197-S.)

Sarka first alleges that when his immediate supervisor, Edward Wiesmeier (Wiesmeier) conducted the Skelly hearing, UC violated his due process rights. The Skelly hearing was held on July 18, 2002. On August 16, 2002, UC issued Sarka a Final Dismissal Notice. However, Sarka knew that Wiesmeier had conducted his Skelly hearing on July 18, 2002, a date occurring well beyond the limitations period. Consequently, this allegation is untimely and is dismissed.

Second, Sarka asserts that UC did not provide him with documents before the Skelly hearing, which Wiesmeier considered as support for its decision to terminate him. According to Sarka, he did not learn about these documents until the May 6, 2003 fact-finding hearing. Therefore, as of May 6, 2003 at the latest, Sarka was aware that these documents were not provided to either him or his union representative Cliff Fried during the Skelly proceedings. Again, this date occurred long before the commencement of the six-month limitations period. As a result, this allegation is also untimely and is dismissed.

The Board agent further discussed the merits of the allegations related to the Skelly proceedings. Sarka had alleged that UC's conduct had violated his due process rights. Nevertheless, since these allegations are untimely, the Board declines to address the merits and dismisses them on the limitations issue alone.

Sarka also contends that the Independent Party Reviewer improperly considered whether Sarka was dismissed because of his union activities. However, there is no evidence presented in the charge that Charles Maxey (Maxey), the Independent Party Reviewer, was an agent of UC. (Inglewood Teachers Assn. v. PERB (1991) 227 Cal.App.3d 767, 780 [278 Cal.Rptr. 228].) Although Sarka believes that Maxey behaved like an agent of UC, this does not suffice to support an allegation of agency.³ PERB Regulation 32615(a)(5)⁴ requires that a charge contain "a clear and concise statement of the facts and conduct alleged to

³The Board applies common law principles to determine the existence of agency. Inglewood Unified School District (1990) PERB Decision No. 792, affd., Inglewood Teachers Assn. v. PERB (1991) 227 Cal.App.3d 767 [278 Cal.Rptr. 228].) The burden of proof is on the party asserting the existence of the agency. (Id) The charging party must prove the agency by actual or apparent authority by establishing representation by the principal (UC) of the agency; justifiable reliance by the charging party on that representation, and a change in position by the charging party as a result of the agency. (Id) "Mere surmise as to the authority of an agent is insufficient to impose liability on a principal based on a theory of apparent authority." (Id at p. 20, cit. omitted.)

⁴PERB regulations are codified at California Code of Regulations, title 8, section 31001, et seq.

constitute an unfair practice." In United Teachers-Los Angeles (Ragsdale) (1992) PERB

Decision No. 944, the Board declared:

The Charging Party must allege with specificity who, what when, where and how (of the alleged violation). Mere speculation, conjecture or legal conclusions are insufficient.

Sarka's "belief that Maxey, the Independent Party Reviewer, is an agent of UC comprises "mere speculation, conjecture or legal conclusions." Therefore, Maxey's conduct cannot be attributed to UC and this allegation is dismissed.

ORDER

The unfair practice charge in Case No. LA-CE-811-H is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chairman Duncan and Member Shek joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD



Sacramento Regional Office
1031 18th Street
Sacramento, CA 95814-4174
Telephone: (916)327-8384
Fax: (916)327-6377



November 17, 2004

Karen G. Sarames
10339 Keokuk Avenue
Chatsworth, CA 91311

Re: George Sarka v. Regents of the University of California
Unfair Practice Charge No. LA-CE-811-H, First Amended Charge
DISMISSAL LETTER

Dear Ms. Sarames:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on April 2, 2004. George Sarka alleges that the Regents of the University of California violated the Higher Education Employer-Employee Relations Act (HEERA)¹ by violating his Skelly rights, considering Sarka's union activity during a fact-finding hearing, and retaliating against him for his participation in protected activities.

I indicated to Sarka in my attached letter dated October 18, 2004, that the above-referenced charge did not state a prima facie case. Sarka was advised that, if there were any factual inaccuracies or additional facts which would correct the deficiencies explained in that letter, he should amend the charge. He was further advised that, unless he amended the charge to state a prima facie case or withdrew it prior to October 28, 2004, the charge would be dismissed.

After sending the Warning Letter, I received a call from an attorney on Sarka's behalf. On October 22, 2004, I sent Sarka a letter regarding that conversation, and granted him an extension to file an amended charge to November 11, 2004.²

The Warning Letter indicated that the charge's three allegations, (1) that the University violated Sarka's Skelly rights by allowing Sarka's immediate supervisor, Edward Wiesmeier, to participate and conduct the Skelly meeting; (2) that the University violated Sarka's Skelly rights by failing to provide him with documents prior to the Skelly meeting; and (3) that the Independent Party Reviewer erroneously considered whether union activity was the basis for Sarka's termination; did not state a prima facie violation.

On November 10, 2004, I received the first amended charge, which makes the following allegations: (a) the University failed to provide information requested by Sarka's union; (b) the unfair labor practice charge is timely filed; and (c) Sarka alleged sufficient facts to

¹HEERA is codified at Government Code section 3560 et seq. The text of the HEERA and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

²That letter is attached.

establish that the University dismissed him because he engaged in protected activity. The allegations from the original and first amended charges are addressed below.³

Due Process Rights: Supervisor's Participation in Skelly Hearing

The original charge indicated that the University violated the Act by allowing Sarka's supervisor to participate in the Skelly meeting. The Warning Letter indicated that this allegation was untimely filed and that PERB's jurisdiction did not include enforcement of due process rights under the U.S. or California Constitutions. The first amended charge does not provide additional facts regarding this allegation. Thus, this allegation is dismissed.

Due Process Rights: Failure to Provide Information

The original charge indicated that the University violated Sarka's Skelly rights by failing to provide him with documents prior to the Skelly meeting. More specifically, the charge alleged that the University relied on three documents when dismissing Sarka and that the University did not provide him with those documents prior to the Skelly hearing. The Warning Letter indicated that this allegation was untimely filed and that the charge failed to demonstrate how the University's action violated the HEERA as PERB's jurisdiction is limited.

The first amended charge alleges that under HEERA the University was required to provide Sarka and his union representative with the information they requested. The first amended charge contends the University's action violates the HEERA because an exclusive representative has a right to information under the Act.⁴ The first amended charge also argues this allegation is timely filed.

Union Representative Cliff Fried and Sarka, in his capacity as a Union Steward, requested information from the University on July 10, 2002, July 18, 2002, July 19, 2002, December 19, 2002, and January 3, 2003. On May 6, 2003, Wiesmeier testified at a fact finding hearing that he relied on three documents to dismiss Sarka. Fried and Sarka requested these documents during the fact finding hearing. Although the first amended charge alleges the information request, "was an ongoing request, which did not end until charging party was

³ As the first amended charge's allegations do not specifically follow the original charge's allegations, this letter addresses the three original allegations as set forth in the Warning Letter and incorporates the first amended charge's allegations into those headings where possible. This letter includes a fourth heading to address the first amended charge's allegation that the University terminated Sarka for his protected activity.

⁴ Although not dispositive of the charge, the charge does not provide facts demonstrating UPTC is Sarka's exclusive representative under the HEERA. An employee organization's right to information may vary from that of an exclusive representative. (See Regents of the University of California v. Public Employment Relations Board (1985) 168 Cal. App. 3d 937, indicating that non-exclusive employee organizations have no right to represent employees under HEERA.)

dismissed from UCLA on October 2, 2003," the original charge indicates, "critical documents relied upon by UCLA and Dr. Wiesmeier to support my dismissal were withheld until June 3, 2003, the third day of the hearing."

The charge's argument that the request for information allegation is timely filed, is unpersuasive. The statute of limitations period begins to run once the charging party knows, or should have known, of the conduct underlying the charge. (Gavilan Joint Community College District (1996) PERB Decision No. 1177.) On May 6, 2003, Sarka learned that Wiesmeier relied on three documents, which Sarka had not received from the University, when he dismissed him. Therefore, Sarka was aware of the conduct underlying the charge on May 6, 2003. Sarka did not file this charge within six months of the conduct underlying the charge, and therefore this allegation must be dismissed as untimely filed.

Even if timely filed, this allegation fails to state a prima facie violation of the Act. The Warning Letter explained that PERB's jurisdiction does not include enforcement of due process rights under the U.S. or California Constitutions and cited Los Angeles Unified School District (1990) PERB Decision No. 835. The first amended charge cites Los Angeles, supra for the proposition that the failure to provide requested information to the employee organization is a violation of the Act and notes that Sarka, in his capacity as a union steward, and his union representative both requested information. However, the Charging Party in this charge, as noted on the unfair practice charge form, is an employee, not an employee organization. As an employee, Sarka lacks standing to file a unfair practice charge alleging a violation of 3571(c). (See Regents of the University of California (1993) PERB Decision No. 1002-H.) Thus, this allegation is dismissed.

Independent Party Reviewer's Conduct

The original charge alleged the Independent Party Reviewer erroneously considered whether union activity was the basis for Sarka's termination. The Warning Letter indicated this allegation did not state a timely filed prima facie violation as the charge did not indicate when Sarka became aware of the IPR's report and did not demonstrate the IPR was an agent of the University.

The first amended charge alleges Sarka received the IPR's report for the first time on October 3, 2003. As Sarka filed the charge on April 2, 2004, this allegation is timely filed. However, the Warning Letter also indicated that the charge did not present facts demonstrating the IPR's conduct was attributable to the University. The first amended charge does not address the deficiency noted in the Warning Letter. As such, this allegation is dismissed.

Retaliatory Dismissal

The first amended charge alleges the University terminated Sarka's employment for his participation in protected conduct. The first amended charge alleges Sarka did not know his employment was terminated until October 3, 2003, and that under Romano v. Rockwell

International Inc. (1996) 14 Cal.4th 479, the statute of limitations begins to run when Sarka was notified his discharge was being upheld.

This issue was previously addressed in Unfair Practice Charge LA-CE-748-H, which resulted in Regents of the University of California (Sarka) (2004) PERB Decision No. 1585-H. In that decision, the Board adopted the rule in Romano, supra and applied it to the facts of Sarka's case. The Board reasoned:

In this matter, Sarka received notice on July 2, 2002, that UCLA intended to terminate him and received a final notice of termination on August 16, 2002. Sarka was actually terminated on August 23, 2002. This charge was not filed until February 24, 2003. Accordingly, Sarka's charge is untimely if either the July 2 or August 16 notices triggered the running of the statute of limitations. Under [Regents of the University of California (1999) PERB Decision No. 1327-H], Sarka's charge would only be timely if the limitations period began to run on August 23, his actual date of termination.

The Board held, "the statute of limitations on Sarka's charge alleging termination for protected activities does not begin to run until the date of actual termination." Sarka's declaration in support of the charge states, "I was employed by UCLA Student Health Service between November 1988 and August 23, 2002."

Although the previous Board Decision and Sarka's own declaration indicate he was terminated on August 23, 2002, in the first amended charge, Sarka contends that the statute of limitations period did not begin to run until October 3, 2003, when he received notice from the Independent Party Reviewer and the Executive Vice Chancellor that his discharge was being upheld. Romano, supra indicates the statute of limitations begins to run on the date of actual termination, rather than when the employee receives notice of his impending termination. That case does not delay the triggering of the statute of limitations to a later date when a termination decision is upheld. Moreover, the Board specifically applied Romano, supra and indicated that the statute of limitations period began to run on Sarka's actual termination date, August 23, 2002. Therefore, this allegation is dismissed as untimely.

Right to Appeal

Pursuant to PERB Regulations,⁵ 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. (Regulation 32635(a).) Any document filed with the Board must contain the case name and number, and the original and five (5) copies of all documents must be provided to the Board.

⁵ PERB's Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

A document is considered "filed" when actually received before the close of business (5 p.m.) on the last day set for filing. (Regulations 32135(a) and 32130.) A document is also considered "filed" when received by facsimile transmission before the close of business on the last day for filing together with a Facsimile Transmission Cover Sheet which meets the requirements of Regulation 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Regulations 32135(b), (c) and (d); see also Regulations 32090 and 32130.)

The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95814-4174
FAX: (916) 327-7960

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. (Regulation 3263 5(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 Regulation 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. A document filed by facsimile transmission may be concurrently served via facsimile transmission on all parties to the proceeding. (Regulation 32135(c).)

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. (Regulation 32132.)

LA-CE-811-H
November 17, 2004
Page 6

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
General Counsel

By _____
Tammy Samsel
Regional Attorney

Attachments

cc: Lynne Thompson

PUBLIC EMPLOYMENT RELATIONS BOARD



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October 18, 2004

George Sarka
27471 Maverick Circle
Laguna Hills, CA 92653

Re: George Sarka v. Regents of the University of California
Unfair Practice Charge No. LA-CE-811-H
WARNING LETTER

Dear Mr. Sarka:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on April 2, 2004. George Sarka alleges that the Regents of the University of California violated the Higher Education Employer-Employee Relations Act (HEERA)¹ by violating his Skelly rights and considering Sarka's union activity during a fact-finding hearing. My investigation revealed the following information.²

On July 2, 2002, the University issued Sarka a Notice of Intent to Dismiss, which indicated his termination would be effective July 15, 2002. On July 11, 2002, Sarka requested that the Skelly hearing scheduled for July 12, 2002, be postponed since the Notice of Intent to Dismiss indicated that Sarka had until July 15, 2002 to respond to its allegations. On July 18, 2002, the University held a Skelly meeting. On August 16, 2002, the University issued Sarka a Final Dismissal Notice.

The charge makes three allegations: (1) the University violated Sarka's Skelly rights by allowing Sarka's immediate supervisor, Edward Wiesmeier, to participate and conduct the Skelly meeting; (2) the University violated Sarka's Skelly rights by failing to provide him with

¹ HEERA is codified at Government Code section 3560 et seq. The text of the HEERA and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

² The charge's procedural history includes the following information. On April 8, 2004, Sarka requested my disqualification as the board agent assigned to this charge. On April 9, 2004, I denied Sarka's request to disqualify myself. On April 16, 2004, Sarka requested special permission to appeal my denial to the Board. On June 8, 2004, the Board issued Regents of the University of California (2004) PERB Order Ad-337-H, denying Sarka's request. On June 18, 2004, Sarka made a request for reconsideration of that order. On August 19, 2004, the Board issued Regents of the University of California (2004) PERB Order Ad-337a-H, denying Sarka's request. On September 7, 2004, Sarka filed a request for reconsideration of Ad-337a-H. On September 14, 2004, the Appeals Assistant notified Sarka that his administrative remedies had been exhausted.

documents prior to the Skelly meeting; and (3) the Independent Party Reviewer erroneously considered whether union activity was the basis for Sarka's termination.

Prior to the Skelly meeting the University did not provide Sarka with several documents related to his termination. The charge indicates, "The only document they gave me was the Notice of Intent to Dismiss along with memos, e-mails, and other summaries." During the Skelly meeting, Wiesmeier and Michael Beasley represented the University and Cliff Fried represented Sarka. Sarka's private attorney was excluded from the meeting.

On May 6, 2003, the University held a fact-finding hearing regarding Sarka's termination. During that hearing, Wiesmeier testified that he relied on three documents to dismiss Sarka. The University did not provide these documents to Sarka until the third day of the fact-finding hearing.

Independent Party Reviewer, Charles Maxey, presided over the fact-finding hearing. During the hearing, the parties agreed that Sarka's allegation that the University dismissed him in retaliation for his protected activities should be handled by PERB. Maxey indicated "Let PERB deal with PERB matters." On August 31, 2002, Maxey issued his decision indicating Sarka's termination was appropriate. Despite the parties' agreement to leave the retaliation allegation to PERB, Maxey's report concluded there was little evidence to support Sarka's retaliation claim. Sarka contends he did not present evidence on that issue because the parties agreed retaliation allegations would be heard elsewhere.

On October 1, 2003, Executive Chancellor Daniel Newman concurred with Maxey that Sarka's termination was appropriate.

The above-stated information fails to state a prima facie violation for the reasons that follow.

HEERA section 3563.2(a) prohibits PERB from issuing a complaint with respect to "any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge." The limitations period begins to run once the charging party knows, or should have known, of the conduct underlying the charge. (Gavilan Joint Community College District (1996) PERB Decision No. 1177.) The statute of limitations is an affirmative defense which has been raised by the respondent in this case. (Long Beach Community College District (2003) PERB Decision No. 1564.) Therefore, charging party now bears the burden of demonstrating that the charge is timely filed: (cf. Tehachapi Unified School District (1993) PERB Decision No. 1024; State of California (Department of Insurance) (1997) PERB Decision No. 1197-S.)

Sarka alleges the University violated the HEERA by allowing his immediate supervisor to conduct the Skelly meeting. Sarka was present at that meeting, and therefore Sarka knew of the conduct underlying the charge on July 18, 2002, more than six months prior to the filing of this charge. Thus, this allegation is untimely filed. Even if this allegation were timely filed, the charge fails to demonstrate the University violated the HEERA. Sarka contends the University's actions violated his due process rights. However, PERB's jurisdiction is limited

and does not extend to include the enforcement of due process rights of the United States Constitution or the California State Constitution. (See Los Angeles Unified School District (1990) PERB Decision No. 835.)

Sarka's second allegation is that the University violated his Skelly rights by failing to provide him documents before conducting the Skelly hearing. As the Skelly hearing occurred on July 18, 2002, the charge is untimely filed. Even if timely filed, the charge fails to demonstrate how the University's conduct violates the HEERA. As stated previously, PERB's jurisdiction is limited.

Sarka's final allegation is that the Independent Party Reviewer erroneously considered the issue of whether union activity was the basis for Sarka's termination. Maxey finished the report August 31, 2003, more than six months prior to the filing of this charge. It is unclear from the charge when Sarka first received Maxey's report and knew of the conduct underlying this allegation. As stated previously, on October 1, 2002, Newman issued a letter concurring with Maxey's report. On October 2, 2003, the University sent Sarka a copy of the report with Newman's determination. It is unclear from the charge whether Sarka had a copy of Maxey's report and requested Newman's review, or whether Sarka received the report for the first time on October 2, 2003. Thus, the charge fails to demonstrate this allegation is timely filed. Even if timely filed, the charge fails to demonstrate how the University's conduct violates the HEERA.

The charge references HEERA section 3571, but does not otherwise set forth a particular legal theory of this violation. HEERA section 3571 prohibits higher education employers from taking certain actions. The term higher education employer includes a person acting as an agent of the employer. (HEERA section 3562(g).) The charge indicates that Maxey improperly considered issues that were not appropriately before him. The charge does not provide facts demonstrating that Maxey as an Independent Party Reviewer is an agent of the University. The burden of proving agency rests upon the Charging Party. (See Inglewood Teachers Assn. v. Public Employment Relations Board (1991) 227 Cal.App.3d 767.) It appears Maxey presided over Sarka's hearing. It does not appear Maxey acted in a capacity of advocating the University's position, but rather acted as a neutral fact finder during this hearing. Thus, Maxey's conduct does not appear attributable to the University and the charge fails to provide facts demonstrating how the University violated the HEERA. (United Teachers-Los Angeles (Ragsdale) (1992) PERB Decision 944.)

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 that 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

LA-CE-811-H
October 18, 2004
Page 4

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 October 28, 2004, I shall dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Tammy Samsel
Regional Attorney

TLS