

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



RANDOLPH D. ROCK,

Charging Party,

v.

REGENTS OF THE UNIVERSITY OF
CALIFORNIA,

Respondent.

Case No. LA-CE-868-H

PERB Decision No. 1804-H

January 4, 2006

Appearances: Randolph D. Rock, on his own behalf; Consulting Services and Labor Relations, University of California, Irvine by Ann T. Finan, Manager, for Regents of the University of California.

Before Duncan, Chairman; Whitehead, Shek and McKeag, Members.

DECISION

WHITEHEAD, Member: This case comes before the Public Employment Relations Board (PERB or Board) on appeal by Randolph D. Rock (Rock) of a Board agent's dismissal of his unfair practice charge (attached). The unfair practice charge alleged that the Regents of the University of California (University) violated the Higher Education Employer-Employee Relations Act (HEERA)¹ by failing to reclassify Rock's position because of his protected activity. Rock alleged that this conduct constituted a violation of HEERA section 3571(a), (b) and (c).

The Board has reviewed the entire record in this matter, including the unfair practice charge, the University's response, the Board agent's warning and dismissal letters, Rock's appeal, and the University's response to Rock's appeal. In light of our review, the Board finds

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

the Board agent's dismissal to be free from prejudicial error and adopts the dismissal as the decision of the Board itself.²

ORDER

The unfair practice charge in Case No. LA-CE-868-H is hereby DISMISSED
WITHOUT LEAVE TO AMEND.

Chairman Duncan, Members Shek and McKeag joined in this Decision.

²The Board will not consider the June 19, 2005 amended appeals letter, which was filed a month after the case was docketed and notice was issued that filings were complete. Not only is this addendum late-filed but it provides new information without any showing of good cause. (PERB Regulation 32635(b); PERB regs. are codified at Cal. Code Regs., tit. 8, sec. 31001, et seq.)

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
1330 Broadway, Suite 1532
Oakland, CA 94612-2514
Telephone: (510) 622-1020
Fax: (510) 622-1027



April 13, 2005

Randolph D. Rock

Re: Randolph D. Rock v. Regents of the University of California
Unfair Practice Charge No. LA-CE-868-H
DISMISSAL LETTER

Dear Mr. Rock:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on February 17, 2005. You allege that the Regents of the University of California, Irvine violated the Higher Education Employer-Employee Relations Act (HEERA)¹ by discriminating against you because of your protected activity.

I indicated to you in my attached letter dated March 29, 2005, 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 April 8, 2005, the charge would be dismissed.

I have not received either an amended charge or a request for withdrawal. Therefore, I am dismissing the charge based on the facts and reasons contained in my March 29, 2005 letter.

Right to Appeal

Pursuant to PERB Regulations,² 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.

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

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.

²PERB's Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

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 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 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.)

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

LA-CE-868-H
April 13, 2005
Page 3

By _____
Anita I. Martinez
Regional Director

Attachment

cc: Ann T. Finan
Therese Leone

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
1330 Broadway, Suite 1532
Oakland, CA 94612-2514
Telephone: (510) 622-1020
Fax: (510) 622-1027



March 29, 2005

Randolph D. Rock

Re: Randolph D. Rock v. Regents of the University of California
Unfair Practice Charge No. LA-CE-868-H
WARNING LETTER

Dear Mr. Rock :

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on February 17, 2005. You allege that the Regents of the University of California, Irvine violated the Higher Education Employer-Employee Relations Act (HEERA)¹ by discriminating against you because of your protected activity.

My investigation revealed the following. You were employed on August 23, 2000² at UC Irvine in the Graduate School of Management as an Administrative Assistant II, a classification which is exclusively represented by the Coalition of University Employees (CUE). In October 2000, you received your original job description. In May 2002, the job description was revised to include graduation support.

On September 17, 2002, you requested that your classification be reclassified to Administrative Specialist. The request was evaluated and ultimately denied by Department Manager Katherine Gonzalez on November 19, 2002.³ On November 15, 2002, you filed a grievance regarding the reclassification issue. The step one response issued on December 5, 2002, denied the grievance; however, Central Human Resources reviewed the classification matter. On December 17, 2002, the reclassification request was denied. After several information requests, you withdrew the grievance on March 13, 2003.

On August 16, 2004, you voluntarily gave notice of your intent to resign. Your last day of work at the University was August 27, 2004. During the approximate time of your departure, a

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.

² October 16, 2000 was also given as the date of hire. Whichever date is correct has no bearing on the outcome of the unfair practice charge.

³ Your supervisor until December 2002, Clare Lorenzo, submitted a letter to PERB on your behalf indicating that she felt you were worthy of a salary increase, including a re-class, as early as September 2001. However, she conceded that the decision to approve an increase was beyond her level of authority.

new Dean of the Graduate School was appointed (August 1, 2004), along with two new Assistant Deans (July 26 and August 16, 2004). A major restructuring of the office occurred during which the Deans identified new support needs. A new position description was written, evaluated and classified, which included the need for executive assistant level support. Duties included supporting the new Assistant Dean, including counseling PhD students and conducting research and analysis on potential donors, analytical projects for the Dean and Associate Deans, development and weekly presentation of a highly public electronic event display, and serving as Executive Assistant to the Associate Dean. The new position was classified as an Assistant Administrative Analyst and excluded from the CUE clerical unit. The position was posted on September 1 and filled on October 4, 2004. Your former position was either eliminated or reorganized. Your former duties were either eliminated, or reassigned to the Assistant Administrative Analyst, the Executive Assistant to the Dean, the Development Coordinator, the faculty Assistant Supervisor, the Business Office or the Instructional Support staff.

CUE filed a grievance on your behalf on October 1, 2004 alleging violations of various contract articles. On February 1, 2005, the University denied the grievance and the requested remedies for various reasons, including Article 7.D which states that grievances filed by individuals who resign their employment are deemed withdrawn. CUE filed for arbitration on March 1, 2005.

You indicate that you have exercised protected rights by participating in CUE activities. Your participation includes the following: interim secretary for Irvine CUE local (January 2002-February 2003); sympathy strike effort with AFT (October 1-16, 2002); promotional poster with newspaper article (October 22, 2002); candidate for Irvine local bargainer (March-June 2001); bargainer training sessions (March-June 2001); delivery of flyers at union campaigns (March 2001-August 2004); participant at statewide Executive Board meetings (April 2001-November 2002); UC Irvine campus discussions regarding CUE (January 2001-August 2004); CUE statewide trustee (January 2002-December 2002); Irvine CUE local meetings participant (October 2000-March 2003 and January 2004-August 2004); CUE/UC bargaining sessions attendee/participant (June 2003 and August 2004); wearing of union buttons; and, staffing the CUE table at the staff picnic.

You also allege that "decision makers at GSM were hostile to Unions and its activities." You indicate that your last supervisor told you directly that she disagreed with unions, that the previous Senior Assistant to the Dean strongly opposed your activity, and that you had to keep silent your union activities especially when you used vacation days to perform duties with the Union.

Although you do not provide a specific legal theory to support your charge, it is appropriate to evaluate your allegations using a both a discrimination and interference analysis. Simply stated, you argue that the University did not grant your reclassification requests because of your protected activity. Confirmation of your suspicions is demonstrated by the actions taken by the University upon your resignation, i.e., an employee was hired at a higher classification

(Assistant Administrative Analyst)⁴ than your former classification (AAII), and the new classification was excluded from the CUE unit.

The statute of limitations under HEERA is six (6) months. (HEERA sec.3563.2(a). It is well-settled that the limitations period begins to run once a charging party knows or should have known of the conduct underlying the charge. (Fairfield-Suisun Unified School District (1985) PERB Decision No. 547.) In addition, a charging party's belated discovery of the legal significance of the underlying conduct does not excuse an otherwise untimely filing. (UCLA Labor Relations Division (1989) PERB Decision No. 735-H (UCLA.) In this case, you were informed of the decisions regarding your reclassification request on November 19, 2002 and, as part of the grievance process, on December 17, 2002. You withdrew your reclassification grievance on March 13, 2003. Your discovery of the University's creation of a new position or reclassification of your former position after you gave notice and departed does not re-start the limitations period. Accordingly, your allegation that the University discriminated against you by denying your reclassification requests for protected activities is untimely.

Even if your charge were timely filed, it fails to state a prima facie case for the reasons that follow. 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 (Novato); Carlsbad Unified School District (1979) PERB Decision No. 89.)

Although the timing of the employer's adverse action in close temporal proximity to the employee's protected conduct is an important factor (North Sacramento School District (1982) PERB Decision No. 264), 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 (State of California (Department of Transportation) (1984) PERB Decision No. 459-S); (2) the employer's departure from established procedures and standards when dealing with the employee (Santa Clara Unified School District (1979) PERB Decision No. 104.); (3) the employer's inconsistent or contradictory justifications for its actions (State of California (Department of Parks and Recreation) (1983) PERB Decision No. 328-S; (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; (6) employer animosity towards union activists (Cupertino Union Elementary School District) (1986) PERB Decision No. 572.); or (7) any other facts which might demonstrate the employer's unlawful motive. (Novato; North Sacramento School District, supra, PERB Decision No. 264.)

⁴ The Assistant Administrative Analyst is a higher classification than the reclassification you sought to Administrative Specialist.

Evidence of adverse action is also required to support a claim of discrimination or reprisal under the Novato standard. (Palo Verde Unified School District (1988) PERB Decision No. 689.) In determining whether such evidence is established, the Board uses an objective test and will not rely upon the subjective reactions of the employee. (Ibid.) In a later decision, the Board further explained that:

The test which must be satisfied is not whether the employee found the employer's action to be adverse, but whether a reasonable person under the same circumstances would consider the action to have an adverse impact on the employee's employment. [Newark Unified School District (1991) PERB Decision No. 864; emphasis added; footnote omitted.]

There is no question that you exercised rights under HEERA as evidenced by the wide range of activities in which you participated on behalf of CUE. The University apparently had knowledge of some of the activities in which you were involved during your active four year tenure, as evidenced by your receipt of authorized time to attend union functions and activities. However, you do not provide information that demonstrates that you were denied your reclassification or suffered any other adverse actions because of the exercise of those rights. The allegation that the University denied your reclassification requests for discriminatory reasons would also have to be dismissed for this reason.

PERB Regulation 32615(a)(5) requires, inter alia, that an unfair practice charge include a "clear and concise statement of the facts and conduct alleged to constitute an unfair practice." Thus, the charging party's burden includes alleging the "who, what, when, where and how" of an unfair practice. (State of California (Department of Food and Agriculture) (1994) PERB Decision No. 1071-S, citing United Teachers-Los Angeles (Ragsdale) (1992) PERB Decision No. 944.) Mere legal conclusions are not sufficient to state a prima facie case. (Ibid.; Charter Oak Unified School District (1991) PERB Decision No. 873.)

You provide no specifics in order to evaluate your interference allegations. You do not provide information regarding *when* and *what* was specifically said by your last supervisor when she expressed her dislike of unions. Similarly, you do not indicate *when* and by *what* actions or speech the Senior Assistant strongly opposed your union activity.

The test for whether a respondent has interfered with the rights of employees under the HEERA does not require that unlawful motive be established, only that at least slight harm to employee rights results from the conduct. The Board described the standard as follows:

[I]n order to establish a prima facie case of unlawful interference, the charging party must establish that the respondent's conduct tends to or does result in some harm to employee rights granted under EERA. (State of California (Department of Developmental Services) (1983) PERB Decision No. 344-S, citing Carlsbad

Unified School District (1979) PERB Decision No. 89; Service Employees International Union, Local 99 (Kimmett) (1979) PERB Decision No. 106.)

Under the above-described test, a violation may only be found if HEERA provides the claimed rights. In Clovis Unified School District (1984) PERB Decision No. 389, the Board held that a finding of coercion does not require evidence that the employee actually felt threatened or intimidated or was in fact discouraged from participating in protected activity. As stated above, your interference allegations are not supported with information to support a prima facie violation.

In addition, you do not provide information regarding a constructive discharge. To establish a prima facie case of constructive discharge, a charging party must demonstrate: (1) that the burden imposed upon the employee must cause, and be intended to cause, a change in the employee's working conditions so difficult or unpleasant as to force the employee to resign; and (2) the burden was imposed because of the employee's protected activity. (Hacienda La Puente Unified School District (1988) PERB Decision No. 685.) You voluntarily gave notice and resigned your position on August 27, 2004. You did not receive negative evaluations or any other adverse actions because of your protected activity. The only apparent adverse action, i.e., denial of your reclassification request, occurred on December 17, 2002, well outside PERB's six months statute of limitations. Since you provide no information which demonstrates that your resignation was forced or coerced due to your participation in union affairs, this allegation does not state a prima facie violation.

Finally, the Board has held that an individual employee does not have standing to pursue violations of the rights of an employee organization. (State of California (Department of Corrections) (1993) PERB Decision No. 972-S.) CUE, as the exclusive representative of the clerical unit, is the sole entity that is entitled to question, challenge, or bargain the effects related to the University's elimination of a classification, or its creation of a new classification, including whether or not the new classification belongs in the clerical unit.

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 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 **April 8, 2005**, I shall dismiss your charge. If you have any questions, please call me at the above telephone number.

LA-CE-868-H
March 29, 2005
Page 6

Sincerely,

Anita I. Martinez
Regional Director

AIM