

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



ERIC ALAN CHEMELLO,

Charging Party,

v.

STATE EMPLOYEES TRADES COUNCIL-
UNITED,

Respondent.

Case No. SA-CO-109-H

PERB Decision No. 1867-H

December 14, 2006

Appearances: Eric Alan Chemello, on his own behalf; Leonard Carder by Francisco M. Ugarte, Attorney, for State Employees Trades Council-United.

Before Duncan, Chairman; McKeag and Neuwald, Members.

DECISION

DUNCAN, Chairman: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Eric Alan Chemello (Chemello) of a Board agent's dismissal (attached) of his unfair practice charge. The charge alleged that the State Employees Trades Council-United (SETC-U) violated the Higher Education Employer-Employee Relations Act (HEERA)¹ by failing to represent him and discriminating against him.

On appeal, Chemello also raised new allegations of contract violations that were not raised in the original charge. PERB Regulation 32635(b)² provides that "[u]nless good cause is shown, a charging party may not present on appeal new charge allegations or new supporting evidence." Chemello failed to show good cause for charging new allegations on appeal.

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

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

SETC-U seeks an award of attorney's fees and costs as well as a cease and desist order preventing Chemello from filing another charge. PERB has determined that an award of attorneys' fees and costs is appropriate where a case is without merit, frivolous, vexatious, dilatory, pursued in bad faith or otherwise an abuse of process. (Los Angeles Unified School District (1993) PERB Decision No. 1013, p. 2; Chula Vista City School District (1990) PERB Decision No. 834, pp. 73-74; see United Professors of California (Watts) (1984) PERB Decision No. 398-H, p. 2, awarding attorneys' fees where a party acted in defiance of a Board order; Los Angeles Unified School District (1982) PERB Decision No. 181a, p. 6.) SETC-U's request for an award of attorney's fees and costs, and for a cease and desist order preventing Chemello from filing another charge are both denied.

The Board has reviewed the entire record, including, but not limited to, the unfair practice charge, the first, second and third amended unfair practice charge, the additional information filed by Chemello on January 30, 2006, SETC-U's responses to Chemello's original and amended charge, the warning and dismissal letters, Chemello's appeal and SETC-U's response to the appeal. The Board finds the Board agent's warning and dismissal letters to be without prejudicial error³ and adopts them as the decision of the Board itself.

ORDER

The unfair practice charge in Case No. SA-CO-109-H is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members McKeag and Neuwald joined in this Decision.

³Although both the warning and dismissal letters erroneously refer to the original charge being filed on December 8, 2006, in portions of the letter, the charge was originally filed on December 8, 2005.

PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
1031 18th Street
Sacramento, CA 95814-4174
Telephone: (916) 327-8383
Fax: (916) 327-6377



August 25, 2006

Eric Alan Chemello

Re: Eric Alan Chemello v. State Employees Trades Council United
Unfair Practice Charge No. SA-CO-109-H
DISMISSAL LETTER

Dear Mr. Chemello:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on December 8, 2005. A First Amended Charge was filed on December 29, 2005, and additional information in support of the charge was filed on January 30, 2006. Eric Alan Chemello alleges that the State Employees Trades Council United (SETCU) violated the Higher Education Employer-Employee Relations Act (HEERA)¹ by failing to represent him, and discriminating against him.²

By the attached letter dated July 31, 2006, General Counsel Robert Thompson indicated to you 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 August 11, 2006, the charge would be dismissed. Your subsequent request for an extension was granted.

On August 24, 2006, you filed a Third Amended Charge.

Discussion

In his letter, Mr. Thompson summarized the deficiencies in your charge as follows:

The events described above that occurred more than six months prior to the filing of this charge on December 8, 2006 are outside the statute of limitations and must be dismissed as untimely. In

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.

²Prior to an August 2004 layoff, Humboldt State University, a campus in the California State University (CSU) system, employed you as a Facilities Worker II. SETCU is the exclusive representative of CSU Bargaining Unit 6 – Skilled Crafts, which includes positions classified as a Facilities Worker II.

addition, your employment with CSUH terminated with your layoff in August 2004. At that time, SETC-U's obligation to represent you also terminated. All of the events described in this letter as well as those described in your charge occurred after the termination of your employment. During this period SETC-U did not owe you a duty of fair representation. (Government Code section 3571.1(e).)

In your Third Amended Charge, you re-allege that SETCU discriminated against you in your layoff proceedings and concerning your rehire rights. The recent amendment, however, focuses primarily on allegations that SETCU is defrauding Humboldt State University and the California State Employees Union (CSEA) by collecting dues from employees and representing employees in the Skilled Crafts unit who do not perform skilled crafts level work and who should be included in a bargaining unit represented by CSEA.³ You further contend that SETCU has defrauded you by collecting dues from you despite lacking jurisdiction to represent you, and further that SETCU has committed perjury through its statements in response to your charge.

Your Third Amended Charge largely concerns a dispute as to the proper unit placement of the Facilities Worker II classification. The Board has long held that individual employees lack standing to challenge unit configuration (Riverside Unified School District (1985) PERB Decision No. 512) or to file a unit modification petition (Riverside Unified School District (1985) PERB Order No. Ad-148).⁴ Thus, your charge must be dismissed. Likewise, to the extent that the charge alleges harm to CSEA, the charge must be dismissed as individuals lack standing to allege violations of an employee organization's rights. Regents of the University of California (2006) PERB Decision No. 1804-H; Regents of the University of California (1993) PERB Decision No. 983-H.)

With respect to the statute of limitations, you assert that you "knew of the conduct underlying the charge as early as January 17, 2005" and thus a charge filed in June 2005 is timely filed within the six months statute of limitations period. However, as noted above and in Mr. Thompson's letter, the instant charge was filed on December 8, 2005, or nearly 11 months following the date that you admit you had knowledge of the complained-of conduct.⁵ Thus, the charge is time barred by HEERA section 3563.2(a) and must be dismissed for this reason.

³ Five CSU bargaining units are represented by the California State University Employees Union, SEIU Local 2579, an affiliate of CSEA. One of these units is CSU Bargaining Unit 5 – Operations-Support Services.

⁴ On June 30, 2005, a unit modification petition that you filed concerning this same dispute was dismissed in PERB Case No. LA-UM-746-H.

⁵ You did file a related, but separate, charge in June 2005. That charge (PERB Unfair Practice Charge No. SA-CE-238-H) was filed against CSU on June 29, 2005. However, the filing date of a separate action does not establish the filing date of the matter at issue here.

Therefore, I am dismissing the charge based on the facts and reasons set forth above as well as those contained in Mr. Thompson's July 31, 2006 letter.

Right to Appeal

Pursuant to PERB Regulations,⁶ 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 during a regular PERB business day. (Regulations 32135(a) and 32130; see also Government Code section 11020(a).) A document is also considered "filed" when received by facsimile transmission before the close of business 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
(916) 322-8231
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.) The document will be considered properly "served" when personally delivered or deposited in the mail or deposited with a delivery service and properly addressed. A document may also be concurrently served via facsimile transmission on all parties to the proceeding. (Regulation 32135(c).)

⁶ PERB's Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

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,

ROBIN WESLEY
Acting General Counsel

By _____
Les Chisholm
Regional Director

Attachments

cc: Hina Shah

PUBLIC EMPLOYMENT RELATIONS BOARD

Office of the General Counsel
1031 18th Street
Sacramento, CA 95814-4174
Telephone: (916) 327-8381
Fax: (916) 327-6377



July 31, 2006

Eric Alan Chemello

Re: Eric Alan Chemello v. State Employees Trades Council United
Unfair Practice Charge No. SA-CO-109-H
WARNING LETTER

Dear Mr. Chemello:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on December 8, 2005. Eric Alan Chemello alleges that the State Employees Trades Council United violated the Higher Education Employer-Employee Relations Act (HEERA)¹ by failing to represent him, and discriminating against him.

Prior to an August 2004 layoff, California State University Humboldt (CSUH) employed you as a "Facilities Worker II." The State Employees Trades Council United (SETC-U) represented you while employed as a Facility Worker II in Bargaining Unit 6. CSUH defines the Facility Worker II position in the following manner:

Under general supervision, the Facilities Worker II independently performs a wider range of more complex semi-skilled and basic skilled facilities and system maintenance, repair and renovation work; however, the work of a Facilities Worker II does not require full journey-level skills..."

On April 8, 2004, CSUH notified several Unit 6 members of future planned lay-offs. CSUH did not meet with SETC-U prior to the lay-off notices. SETC-U filed grievances on behalf of the affected employees and participated in impact negotiations in Long Beach, in a committee format, resulting in a Settlement Agreement, dated December 17, 2004. Following discussions between the Union and CSUH, all but two lay-offs were averted. Eric Chemello and Andrew Betts were set for lay-off in July 2004.

Fellow "Facility Worker II" Colin Livasy had fewer seniority points than you but was not laid off. CSUH rescinded Livasy's lay-off after a successful MOU, Article 29.8 challenge, based on his documented journey-level skill sets. You also wrote a letter to CSUH's President

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.

requesting you be passed over for lay-off because of your specialized skills and abilities, however, you were unsuccessful.

A copy of the December 2004 Settlement Agreement was discussed with all potential lay-off candidates by Craig West, SETC-U Executive Board Member in or around January 2005. Chemello and Andrew Betts were laid off in August 2004, but in accordance with the Settlement Agreement, you were granted a right of first refusal for general maintenance work at CSUH and placed on a re-hire list for five years.

Following the lay-offs, you applied for several positions at CSUH, but have not been rehired. The jobs you have applied for are either outside Bargaining Unit 6 or are higher classification positions and not included in the right of first refusal agreement. In January 2005, you applied for, but were not selected for an available Carpenter I position. CSUH re-hired Clark Keeney as a Carpenter I for the 30 day position. When laid off, Keeney was classified as a Facility Worker I, Temporary and was junior to you. In response to a SETC-U inquiry by Robert Herriot, SETC-U Bargaining Representative, CSUH responded that the position Keeney was rehired for required journey level expertise and Keeney met the necessary skill set.

On May 25, 2005, you filed a Level III grievance with the President of CSUH regarding the Keeney re-hire. On June 7, 2005, CSUH responded to the grievance and advised you had no standing to file because you were not currently employed by CSUH. You assert you are a Union Steward, and as such, have standing to file a grievance. You notified SETC-U of the grievance you had filed in or around June 2005. You then filed Unfair Practice Charge No. SA-CO-78-H against the SETC-U regarding these matters with PERB on June 29, 2005. That charge was dismissed on October 14, 2005 and the dismissal was not appealed to the Board itself. To this date, you have not been re-hired at CSUH. You filed this charge on December 8, 2005.

You allege in general terms that during the fall of 2005, SETC-U has not actively enforced its agreement with CSUH. This includes SETC-U's failure to challenge CSUH's use of students to perform bargaining unit work such as gardening, to allow positions to remain unfilled, and allow CSEA represented employees to perform bargaining unit work.

Based on the information above, this charge does not state a prima facie case 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))

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PERB Decision No. 1024; State of California (Department of Insurance) (1997) PERB Decision No. 1197-S.

The events described above that occurred more than six months prior to the filing of this charge on December 8, 2006 are outside the statute of limitations and must be dismissed as untimely. In addition, your employment with CSUH terminated with your layoff in August 2004. At that time, SETC-U's obligation to represent you also terminated. All of the events described in this letter as well as those described in your charge occurred after the termination of your employment. During this period SETC-U did not owe you a duty of fair representation. (Government Code section 3571.1(e).)

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 August 11, 2006, I shall dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Robert Thompson
General Counsel