

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



EDWARD A. YEARY,

Charging Party,

v.

REGENTS OF THE UNIVERSITY OF
CALIFORNIA,

Respondent.

Case No. SF-CE-121-H

PERB Decision No. 615-H

March 3, 1987

Appearances: Robert J. Bezemek, Attorney for Edward A. Yeary;
Glenn R. Woods, Office of the General Counsel, for the Regents
of the University of California.

Before Hesse, Chairperson; Burt and Porter, Members.

DECISION

BURT, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by Edward A. Yeary (Yeary) to the proposed decision of a PERB administrative law judge (ALJ) dismissing charges of discrimination because of protected activity. In his proposed decision, attached hereto, the ALJ concluded that the University of California (UC) did not act with an unlawful discriminatory motive in handling two appeals filed by Yeary, one protesting the denial of a promotion, the other concerning the actions of a UC representative in processing the first appeal. Based on our review of the entire record and the exceptions filed by Yeary, we agree.

SUMMARY OF FACTS

We find the ALJ's extensive findings of fact to be free from prejudicial error and adopt them as the findings of the Board itself, to the extent they are consistent with the following summary and our discussion.

Background

Yeary has been employed by UC's Cooperative Extension (Extension) since 1947; since 1961 he has held the position of statewide advisor for farm management, receiving numerous promotions and progressing by 1974 to step V in the rank of Extension Specialist/Advisor. In 1977 and 1979 he sought, but was denied, promotion to step VI of that rank. In 1980 he again sought the promotion and in June 1981 was notified by his program director, Gordon Rowe, that the promotion had been denied by the director of Extension.

During the summer of 1981 Yeary sought information from UC concerning previous evaluations and the reason for the denial. UC provided a seven-sentence statement written by the Extension director concerning the denial. UC also agreed to provide a comprehensive summary of the confidential portion of Yeary's promotion review files for eight previous years. Citing UC policy prohibitions against revealing certain specifics in these files, UC refused to release the whole file to Yeary.

The ALJ found that Yeary was a member of California State Employees Association (CSEA), a nonexclusive representative of Extension employees. In September, Yeary telephoned Robert

Bradfield, a former UC professor of clinical nutrition who had worked for Extension, to ask for help. The ALJ found that Bradfield had been active with CSEA. However, there was insufficient evidence in the record to support the ALJ's findings regarding Yeary's or Bradfield's CSEA affiliation.

Appeal No. 1

On September 29, 1981, Yeary filed a charge of age discrimination with the California Department of Fair Employment and Housing (DFEH). On October 19, he filed a written appeal with Warren Schoonover, director of administrative services for Extension, alleging that the denial of his promotion was based on his age.¹

Upon receipt of the appeal Schoonover asked William Wood, Yeary's new program director and a colleague of Yeary's for several years, to approach Yeary and attempt an informal conciliation of the grievance. Yeary testified that Wood told him that the administration was "mad as hell" that Yeary had filed the complaint with DFEH. Yeary also testified that Wood said that since Extension "only had to answer one question" in order to respond to that complaint, Yeary should withdraw it.

¹Section 370 of Extension's Administrative Handbook for Academic Personnel (Handbook) provides that academic employees may file appeals concerning "arbitrary, capricious or unreasonable actions by administrative officers," or concerning salary matters if the adverse actions are alleged to result from unlawful discrimination. Although Yeary filed what were denominated appeals, the parties in the course of this unfair practice proceeding have referred to them interchangeably as grievances and appeals; this Decision will do likewise.

Wood is further alleged to have said that if Yeary did not withdraw the DFEH complaint, it was unlikely that he would get an administrative hearing on his UC grievance. In Wood's testimony before PERB, however, he denied saying that the administration was "mad as hell," or relaying any sort of threat in an attempt to get Yeary to withdraw the DFEH complaint. Yeary testified that Wood made a similar threat during a brief meeting between them in November. Wood acknowledged that the meeting had occurred but again denied the threat.

Extension's appeals procedure gives the employee the right to choose one of three types of arbiters: a UC hearing officer, a UC hearing committee, and a non-UC hearing officer. When his appeal was filed, Yeary had opted for a UC hearing officer. The appeal procedure also provides that "the Vice-President [of the UC division of which Extension is a part] shall select and appoint" the hearing officer. Schoonover, who reports to the vice-president, administers the appeal process on his behalf.

In January 1982, Schoonover, "as a courtesy," asked Yeary to concur in the selection of a particular law professor as hearing officer. When Yeary did not respond to Schoonover's request for concurrence by the date Schoonover gave as a deadline, Schoonover contacted the law professor to confirm the appointment but learned that he was no longer available. Schoonover then suggested to Yeary the name of professor

emeritus Van Dusen Kennedy, who was likely to be available, and gave Yeary one day in which to concur in the selection. One week later, Yeary did so, thinking he had no choice. Kennedy was appointed as hearing officer and a hearing date in late March 1982 was established.

In March Yeary designated Bradfield as his representative in the case. Two days before the scheduled hearing, Bradfield met with Judy McConnell, an employee relations specialist, and gave her an extensive request for information that he wanted provided before the hearing. Unable to provide the information within that time, McConnell telephoned Kennedy ex parte the next day and obtained a continuance of the hearing until she had an opportunity to respond to Bradfield's request for information. McConnell immediately notified Bradfield of the continuance, but she did not inform him until March 30 that the new date of the hearing was April 5. In the March 30 conversation, Bradfield told her that neither he nor Yeary, who was then in Southern California on a scheduled vacation, would be available on April 5. Bradfield wrote McConnell asking that the hearing officer be changed because it had been learned that Kennedy, as an emeritus professor, was no longer a UC employee as required of hearing officers by UC's personnel manual. Bradfield also asked McConnell to remove herself from the case because of her ex parte conduct in having the hearing continued.

On April 5, Kennedy convened a proceeding at which neither Yeary nor Bradfield was present. McConnell moved to dismiss

the case, a tactic that Schoonover testified he felt was ill-advised. Kennedy denied the motion; instead, he continued the hearing because of Yeary's absence and because of the question raised about Kennedy's eligibility to serve.

Also on April 5, Bradfield filed on Yeary's behalf a second appeal pursuant to the Extension Handbook, concerning McConnell's conduct in the first appeal.

In April 1982 Schoonover relieved Kennedy as hearing officer, as it was determined that Kennedy was ineligible to serve, and Schoonover and Bradfield agreed to a "strike-off" procedure to select the new hearing officer. Schoonover sent Bradfield a list of eligible hearing officers and, according to a cover letter, a separate sheet containing a description of

2

the strike-off process. Bradfield denied receiving the description of the process. The evidence was persuasive, however, that Bradfield either did receive the sheet containing the process description or, if he didn't receive it, that he unreasonably failed to inquire about it.

In May Bradfield and Schoonover engaged in the strike-off. With two names remaining, UC had the last strike and struck Herb Gross, an attorney for California Continuing Education of the Bar, leaving Berkeley law professor and labor arbitrator

²In this process, the parties alternate striking names from the list until only one name remains. That person then is selected arbiter. If the person selected by the strike-off is not available for a hearing within thirty days, the parties return to the last name struck.

Jan Vetter. When contacted on May 13, however, Vetter said he was not available until the end of June. Schoonover thus contacted Gross, who was appointed, and the hearing was set for May 27.

Before the hearing, Bradfield telephoned Desmond Jolly, an Extension employee at UC Davis who had served on Yeary's promotion peer review committee, to ask whether Jolly would testify on Yeary's behalf concerning the committee's deliberations and recommendation. Before deciding whether to do so, Jolly contacted Schoonover, who in turn spoke to Glen Woods of UC's general counsel's office. Woods told Schoonover that the proceedings of peer review committees were confidential, and Schoonover then relayed this information to Jolly.³ Jolly testified that Schoonover had told him that he "shouldn't or couldn't testify or something like that . . . that [his] testimony would be illegal or against the rules."

When Jolly told Bradfield the next day that he would not testify, they discussed a statement that Bradfield could present at the hearing on the following day. Bradfield drafted, and Jolly approved at the time, the following language: "When my senior administrative officer tells me not

³University policy states that certain materials concerning promotion reviews are deemed confidential and must not be disclosed to the employee seeking promotion. These include letters of evaluation, departmental recommendations, reports and recommendations from ad hoc and standing committees.

to testify, I cannot testify." After Jolly got off the telephone, he felt that he'd been "manipulated" by Bradfield. Unable to reach Bradfield, he called McConnell's office and left the message that his statement should not be introduced at the hearing.

Bradfield testified that Jolly told him that he would not appear as a witness because he had "been hassled by Siebert [Jolly's and Yeary's former Executive Director] for years and I'm a minority employee. Now I've got an order from Schoonover and the lawyers not to come. So I'm not." At the PERB hearing, Jolly denied making these statements and denied that he felt that his job would be jeopardized by testifying.

The May 27 hearing convened with Bradfield and Yeary present and UC Counsel Glen Woods appearing for UC. As the hearing opened, Bradfield requested a continuance on several grounds, including that Yeary had not approved of the "change" in hearing officers from Vetter to Gross and the unfair surprise in UC's change in representation, from McConnell to Woods, shortly before the hearing. Regarding the latter ground, Bradfield said that despite his law degree, he was not admitted to the bar and had not practiced law, and he felt that Woods' representation of UC placed Yeary at a disadvantage. The parties then stipulated that the hearing would be continued on the condition that Yeary attempt to hire a licensed attorney to represent him and, after that occurred, UC would deal with that attorney and Bradfield would no longer represent Yeary.

Hearing Officer Gross granted the continuance on the condition stated and set the hearing for September 15, subject to the new attorney's schedule. In early June, however, Gross wrote to the parties confirming the continued hearing date, noting the condition for it and stating that he "no longer recognize[d] Mr. Bradfield as Mr. Yeary's representative."

Yeary testified that between May 27 and early August, he contacted a total of 57 lawyers in the Fresno area by

4

telephone. He testified that 17 showed some interest in the case and that he talked to some of these 17 for as long as an hour, although not in their offices. In the end, however, he did not hire an attorney. Most of the attorneys, he said, wanted to see certain documents that he told them he expected UC to provide. The record demonstrated, however, that UC had responded to every request for information, providing most of the material sought, and that Yeary knew by that time that UC took the position that he had already received all of the material to which he was entitled.

On September 2, 1982, Yeary wrote to Schoonover objecting to the selection of Gross and Gross¹ "denial" of Yeary's representative of choice. Woods responded to the letter, stating UC's readiness to proceed with the hearing on September 15. Woods' response was hand-delivered to Yeary on September 10. On September 13, Yeary wrote to Gross objecting

⁴Yeary's office was in the town of Parlier, near Fresno,

again to his appointment and to having to proceed without counsel. Yeary said that he had made a good-faith attempt to secure counsel, but that the prospective attorneys had told him that his inability to get documents made it "a waste of my time and money to proceed in a controlled environment" and that instead he should file suit. On September 13, Yeary also sent telegrams to some or all of the UC Regents asserting that he was being forced to go to a hearing without a critical witness, documents or counsel. On September 14, Yeary sent James Kendrick, vice-president of the UC division of which Extension is a part, a letter asking for a continuance of the hearing until his appeal for a change in the hearing officer could be decided and until he could obtain a lawyer. He also phoned Schoonover on the 14th and said he wished to have a court reporter at the hearing on the 15th.

A hearing was convened on September 15 in Berkeley. Neither Yeary nor Bradfield was present. In the hearing before PERB, Yeary testified that he was in Fresno that day; he tried to stay in his office "to see if [he] would hear from anyone" in Berkeley. He did not attend, he said, because he did not have an attorney, and because of "grave concerns" about the appointment and alleged "conflict of interest" of hearing officer Gross, concerns which "had never been addressed at all

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At the hearing, Gross noted his receipt of the September 13 letter from Yeary. Based on that letter, the record of the

May 27 hearing, and Yeary's absence, he found that Yeary's May 27 request for a continuance was "made in bad faith and for the purpose of delay." Woods moved that the case be dismissed with prejudice. On September 16 Gross issued a written decision reiterating the finding made at the hearing and recommending the dismissal with prejudice of Yeary's appeal. On September 27 Vice-President Kendrick issued a decision adopting Gross' recommendation and dismissing Yeary's appeal. Yeary was entitled to appeal Kendrick's decision to UC President David Saxon. Although Yeary knew of that right, he did not utilize it. With that, Yeary's first appeal came to an end.

Appeal No. 2

Yeary's appeal concerning McConnell's conduct was filed on April 5 1982. Schoonover asked McConnell's immediate supervisor to respond and sent the response to Yeary in June. The parties agreed to a delay in the proceeding for part of the summer. When Schoonover did not hear from Bradfield by October, he tried to contact Bradfield to discuss hearing dates. Bradfield, under medication and confined to bed for a back ailment, hung up on both Schoonover's secretary and UC Counsel Woods. Schoonover then notified Bradfield and Yeary by mail that he had appointed a three-member hearing committee, as Yeary had specified, and had set a hearing for November 15. The letter to Bradfield was returned, delivery refused.

Yeary objected to the November 15 date, on the ground that Bradfield was now out of state for treatment of his back

problem. Schoonover agreed to an alternate date, noting that it would have to be after the first of the next year due to Woods' schedule. Yearly initially told Schoonover's secretary that January 17 through February 10 were acceptable, but subject to Bradfield's schedule. When Schoonover then suggested specific dates within that period, however, Yearly replied that none of them were acceptable because Bradfield was scheduled to be out of the country.

Schoonover then wrote to Yearly, setting January 25, 26 and 27, 1983 for the hearing. He said that Yearly's program director had placed an "extremely high priority" on the hearing and had agreed "to adjusting [Yearly's] other work commitments to permit keeping this schedule." Vice-President Kendrick wrote Yearly in December, reaffirming the hearing dates and stating that "the hearing takes precedence over all other" work assignments.

Shortly before the January 25, 1983, hearing, Yearly retained a lawyer, Robert Bezemek,⁵ who wrote Kendrick and suggested referring certain procedural issues in the case to UC President Saxon. When Woods called Bezemek to confirm the hearing date, Bezemek said that he understood that Bradfield would represent Yearly in the hearing. Woods telephoned Bradfield, whose trip out of the country had been cancelled.

⁵Bezemek filed the present charge and appeared before PERB on Yearly's behalf.

Bradfield told Woods that Bezemek would represent Yeary and that he (Bradfield) was unavailable on the 25th. When told what Bezemek had said, Bradfield was uncooperative with Woods' offer to have Bradfield make a telephone call on the 25th to the site of the hearing and discuss the situation via speaker phone with the hearing committee. On January 24, Schoonover's secretary spoke with Yeary's secretary by telephone, and was told that Yeary's calendar indicated that he would be in San Luis Obispo on the 25th.

The hearing convened on January 25; neither Bradfield nor Yeary was present, and Bradfield did not telephone. The hearing committee received 50 exhibits into evidence, most of which were letters between the parties and other documents over the course of the second appeal, with most of these concerning attempts to schedule a hearing. The committee issued its decision on March 3, 1983. Finding that Yeary and Bradfield had been uncooperative in UC's attempts to schedule a hearing and in failing to appear, the committee recommended the dismissal of Yeary's appeal. On March 23, 1983 Vice-President Kendrick followed that recommendation. Yeary did not appeal Kendrick's decision to UC President Saxon.

Yeary filed an unfair practice charge in June 1982. For ten days between October 1983 and March 1984, an evidentiary hearing was held before a PERB ALJ. A proposed decision was issued in January 1985, and Yeary filed the present appeal.

DISCUSSION

Motion to Reopen the Record

The last testimony was taken on March 2, 1984; closing briefs were served on July 6, 1984. On September 6, 1984, Yeary filed a motion to reopen the record. He sought to introduce into evidence documents, proffered with the motion, that Yeary asserted would impeach the credibility of William Wood by contradicting his answer to one question asked at the PERB hearing. The motion stated that the documents were obtained by Bradfield and submitted to Yeary's attorney, and that they "were completely unknown until after" Wood testified at the hearing. Yeary argued that if Wood had testified in the first week of the hearing, as originally scheduled, rather than at the end, the information might have been discovered earlier. UC opposed the motion to reopen and the ALJ's proposed decision "dismisses" it. Yeary takes exception to that decision.

PERB Regulation 32320(a)(2) empowers the Board to reopen its proceedings for the taking of further evidence. The Board may reopen a completed record based on newly discovered evidence which was not previously available and could not have been discovered with the exercise of reasonable diligence. See San Mateo Community College District (1985) PERB Decision No. 543. "'Because of the possibility that the moving party may have been guilty of neglect, this ground is looked upon with "distrust and disfavor" and a strong showing of the

essential requirements must be made.'" San Joaquin Delta Community College District 1983 PERB Decision No. 261b, quoting Witkin, California Procedure 3d. vol. 8 at p. 432. The moving party must present a satisfactory explanation for the failure to produce the evidence at an earlier time. San Joaquin Delta, Id.

Measured by this standard, Yeary's motion must be denied. He fails to explain how the date or timing of Wood's testimony precluded or is otherwise relevant to whether the documents sought to be introduced would have been discovered earlier. He fails to suggest, for example, what questions would have been asked of Wood on cross-examination at an earlier opportunity, or what answers to those questions would have sparked a search for the documents that are now proffered. Nor does Yeary otherwise attempt to show the exercise of reasonable diligence in seeking the information, especially in view of the volume of his requests for information from UC.

In addition, we agree with the ALJ's conclusion that the proffered material would not necessarily impeach Wood's answer to the specific question that was asked. We therefore believe that it is only marginally relevant. Moreover, Wood's testimony was just one of several reasons given by the ALJ for finding that Wood did not actually make the alleged threats. Instead, the ALJ relied principally on documentary evidence in reaching his conclusion. Thus, even if the material were admitted, we would deem it insufficient to upset the ALJ's credibility determination.

For the reasons stated, the ALJ's denial of the motion to reopen the record is affirmed.

Motion to Disqualify ALJ

Yeary takes exception to the ALJ's failure to disqualify himself in response to Yeary's motion made on the ninth day of the hearing. The motion was based on allegations that the ALJ was prejudiced against both Yeary and his counsel. The ALJ addressed the allegations and denied the motion on the record.

We conclude that the motion was properly denied. PERB Regulation 32155 provides that a party may request that a Board agent such as an ALJ disqualify himself from a case where the agent's prejudice will prevent fair and impartial consideration of the case. The motion here, however, was neither in writing nor made before the taking of any evidence, as required by section 32155(c).

Discrimination

Yeary asserts that UC violated its own policies and practices and otherwise treated him arbitrarily and unfairly in the handling of his appeals, and that UC's motive for such treatment was Yeary's filing of the appeals, the filing of a complaint with the state DFEH, and his and Bradfield's union affiliation.

A party alleging unlawful discrimination has the burden of making a showing to support the inference that protected conduct was a motivating factor in the employer's decision to take adverse personnel action. State of California (Department of Development Services) (1982) PERB Decision No. 228-S.

Because direct proof of motivation is rarely possible, the required nexus between protected activity and the adverse action may be established by circumstantial evidence and inferred from the record as a whole. California State University (San Francisco). (1986) PERB Decision No. 559-H.

To justify such an inference, the charging party must first prove that the employer had actual or imputed knowledge of the employee's protected activity. Moreland Elementary School District (1982) PERB Decision No. 227. Once the employer's knowledge is shown, the charging party must produce evidence that creates the nexus between the employee's conduct and the employer's action. There are at least four factors that may supply such a nexus; the timing of the employer's conduct in relation to the employee's performance of protected activity, the employer's disparate treatment of the employee engaged in such activity, its departure from established procedures and standards when dealing with such employees, and the employer's inconsistent or contradictory justifications for its actions are factors which may support the inference of unlawful motive. If the required nexus is demonstrated, the employer has the burden of demonstrating that it would have taken the same action regardless of the employee's participation in protected activity.

The Board must first determine whether Yeary engaged in protected activity, and whether UC knew of it. As noted earlier, we disagree with the ALJ's findings regarding Yeary's

and Bradfield's CSEA affiliation. Yeary also argued, however, that the filing of both the UC appeal itself and the age discrimination complaint with the state were protected activities. UC did not dispute these contentions in its post-hearing brief. The ALJ found that the UC appeals and the state discrimination complaint were protected activities and that UC knew of these activities. UC does not except to these findings in its response to Yeary's appeal.

In a previous decision PERB suggested that the filing by an individual of a complaint with DFEH based on age, race, sex or other prohibited discrimination is not conduct protected by the statutes which PERB is charged with enforcing. See Los Angeles Unified School District (1985) PERB Decision No. 550 (summary affirmance of dismissal by regional attorney). We now expressly so hold. In reaching this conclusion, we note that reprisals for the filing of a discrimination complaint with DFEH are themselves prohibited by DFEH regulation and may be remedied by that agency.

On the other hand, two previous Board decisions concerning the present Respondent strongly imply that the filing of an internal appeal pursuant to UC's own personnel policies is a protected activity. Regents of the University of California (Berkeley) (1983) PERB Decision No. 308-H; Regents of the University of California (1983) PERB Decision No. 310-H. UC's failure in this case to except on appeal to the ALJ's finding of protected activity, and the consequent lack of briefing on

this significant issue, make us unwilling to reverse those findings sua sponte. Therefore, we will assume without deciding for purposes of this case that Yeary's filing of the UC appeal pursuant to a nonnegotiated grievance procedure was protected conduct under HEERA.

Yeary asserted that the alleged threats by William Wood constituted direct evidence of UC's improper motive. These incidents occurred in October and November 1981, more than six months before the original charge was filed with PERB on June 10, 1982, and thus, as the ALJ found, are time-barred under Section 3563.2(a) from being independent violations. Evidence of events occurring outside the statutory period, however, may be received as background in order to shed light on the true character of events occurring within the six-month period. Sacramento City Unified School District (1982) PERB Decision No. 214.

The ALJ properly admitted evidence concerning the alleged threats by Wood for that limited purpose, but he then specifically found that the threats were not made. We have reviewed the record concerning both the alleged threats and the evidentiary basis for the reasons given by the ALJ for that finding. We conclude that the ALJ's finding is supported by the record as a whole.

Without direct proof of an unlawful motive, the Board must determine whether there is evidence from which such a motive can be inferred. Yeary argues that nine separate indicia of

unlawful motive were proved. Several of these indicia depended on the credibility of principal witnesses in the case. The ALJ's major credibility findings concerned the testimony of these witnesses on the very subjects offered as indicia by Yeary. All of the findings were contrary to Yeary. The first finding concerned the alleged intimidation of Desmond Jolly into not testifying on Yeary's behalf. The second concerned Bradfield's participation in the strike-off process and whether he knew the rules before he engaged in that process. The third set of findings addressed Yeary's search for an attorney, his understanding of what was to occur on September 15, 1982, and his reasons or motives for not appearing on January 25, 1983. The ALJ's findings in these three areas are the focus of over a dozen of Yeary's exceptions to the proposed decision. After our review of the evidentiary basis for each of these findings, we reject the exceptions and affirm the ALJ's findings as being amply supported by the record and free from prejudicial error.

Yeary also excepts to the ALJ's failure to consider incidents that are alleged to be indicia of UC's unlawful motive. We conclude that, although the factual basis of these incidents was proved, and while some of them are relevant in deciding whether an inference of unlawful motive may be drawn, we are unable to draw an inference that Yeary's protected conduct was a motivating factor in any of UC's actions during the course of the two appeals. To begin with, two of the incidents resulted in no harm to Yeary (indeed, one was to his

benefit) and thus cannot be the basis for an inference of unlawful motive. First, it is true that hearing officer Gross' withdrawal of recognition from Bradfield as Yeary's representative, shortly after the May 27, 1982 hearing, was contrary to the parties' understanding and stipulation that Bradfield would stay on until Yeary retained an attorney. The record fails, however, to reveal any harm to Yeary as the result of Gross' action. Bradfield continued to advise Yeary during the following months and the only action to be taken in that period was Yeary's search for an attorney. We also reject Yeary's contention that he was deprived of Bradfield's representation in the second appeal. We do not view Schoonover's suggestion to Yeary in November 1982 that CSEA might provide him with another representative as a threat or attempt to deprive Yeary of his representative of choice. Nor do we agree with Yeary's argument that the scheduling of the January 1983 hearing deprived him of Bradfield's representation in the second appeal.

Second, the strike-off process through which Gross was chosen had not been formally approved as required by UC policy. A departure from established procedure may be a factor from which an inference of unlawful motive can be drawn. Here, however, the process allowed Yeary a greater degree of participation in the process than he otherwise would have

had,⁶ and therefore we do not draw any inference of unlawful motive.

We also decline to draw an inference of unlawful motive from two other incidents cited by Yeary. We agree with Yeary's assertion that the reasons given for Schoonover's threats on three occasions to "automatically withdraw" Yeary's appeal if certain acts were not done or certain delays occurred were not specifically authorized as grounds for withdrawal by the Extension Handbook. Vice President Kendrick was authorized, however, to withdraw an appeal for a variety of reasons, and Kendrick had specifically delegated to Schoonover the process of handling Yeary's appeals. Schoonover's threats were made in order to move Yeary toward a hearing. While the threats to drop the appeal may not have been good practice, they carry little weight in demonstrating unlawful motive.

Finally, we agree that McConnell's conduct was objectionable. In obtaining a change in the hearing date through ex parte contact with the hearing officer, failing to inform Bradfield of the new date until March 30, moving to dismiss at the April 5 hearing when she knew neither Bradfield nor Yeary were available to attend, and in failing to ever

⁶Yeary makes the somewhat disingenuous argument that UC engaged in an elaborate scheme, including not informing Bradfield of all of the rules about the strike-off process, in order to obtain Gross as the hearing officer. The argument ignores the fact that had UC wanted Gross that badly, it could have simply struck Vetter's name when it had the last strike with just two names remaining.

inform them that the hearing had been held, her actions demonstrated poor judgment.

As stated, however, we decline to draw an inference from this or any other evidence that UC's actions during the course of the two appeals were based on an improper motive. We have carefully considered each of Yeary's exceptions to the ALJ's proposed decision, along with the pertinent portions of the record, and find them to be without merit. Yeary did not meet his burden of establishing a prima facie case of discrimination for his protected activity.

ORDER

The unfair practice charge and complaint in Case No. SF-CE-121-H is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chairperson Hesse and Member Porter joined in this Decision.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD



EDWARD A. YEARY,)
) Unfair Practice Charge
 Charging Party) Case No. SF-CE-121-H
)
 v.)
)
 REGENTS OF THE UNIVERSITY OF) PROPOSED DECISION
 CALIFORNIA,) (1/15/85)
)
 Respondent.)
)
 _____)

Appearances; Robert J. Bezemek (Bennett & Bezemek) Attorney for Edward A. Yeary; Glenn R. Woods (Office of the General Counsel, Regents of the University of California) and Michael J. Loeb (Crosby, Heafey, Roach and May) attorneys for the Regents of the University of California.

Before William P. Smith, Administrative Law Judge.

PROCEDURAL HISTORY

Edward A. Yeary (hereinafter Yeary or Charging Party) filed this unfair practice charge and the amendments thereto against the Regents of the University of California (hereinafter University or Respondent). Charging Party alleges that after he filed two grievances with the University (the first on October 9, 1981, and the second on April 5, 1982), the Respondent violated section 3571(a) of the Higher Education Employer-Employee Relations Act (hereafter HEERA or Act).¹

¹The HEERA is codified at Government Code section 3560. Unless otherwise stated all section references are to the Government Code.

This Board agent decision has been appealed to the Board itself and is not final. Only to the extent the Board itself adopts this decision and rationale may it be cited as precedent.

Charging Party alleges that between October 9, 1981, and the filing of the Third Amended Unfair Practice Charge herein on October 28, 1982, the University engaged in unfair practices involving appointment of hearing officers and hearing committees, changes in hearing officers, setting dates for hearings, actual hearings, contact of witnesses, and production of documents - all for the specific purpose of intentionally punishing Charging Party for use of the University's grievance process. (See Respondent's pre-trial statement of issues.)

Charging Party contends that as a result of the filing of the grievances the Respondent (1) denied him his right guaranteed in section 3567 of the Act to present grievances either individually or through a representative of his own choice, and (2) engaged in the specific conduct prohibited by section 3571(a) of the Act, to-wit: imposed reprisals, threatened to impose reprisals, discriminated against him, and interfered with, restrained, and coerced him and others because of Charging Party's filing of a grievance on October 9, 1981.

Charging Party also alleges that the failure of the University to provide the Charging Party as grievant with the University documents he requested, including his personnel file in order to prepare for the grievance hearing, constitutes a violation of section 3571(a) of the Act (see Charging Party's pre-hearing statements.)

Various specific facts are alleged in the charge and the several amendments thereto in support of the general allegations. These were refined in the pre-hearing statements of the parties. Neither the charges or the pre-hearing statement included the allegation that the University (through William Wood) threatened the Charging Party that, if he did not withdraw the charges of discrimination, adverse actions would be taken against him. Yeary first raised the specific issue when he offered testimony to this effect at the formal hearing. Over the Respondent's objection and motion to strike, the testimony was admitted. While the alleged threat was not in the alleged specific facts set forth in the charges or the pre-hearing statements, it was within the general allegations of threats, reprisals and intimidation set forth in the complaint. The Charging Party was allowed to amend the complaint in conformity with the testimony. Respondent was allowed such reasonable time as it might request for a continuance to avoid prejudice by surprise, to prepare witnesses in regard thereto, and to amend its answer should it deem it necessary. This was declined by Respondent as unnecessary.

Respondent's answer, while admitting certain facts relating to Yeary's employment and the University status under HEERA, dates of communications or events, denies generally the charge and specifically that any of its conduct in processing the two Yeary grievances was unlawful under the HEERA as charged. As

affirmative defenses, it raises the issues, (1) that the remedies sought by the Charging Party are not available or appropriate under the HEERA and (2) that the Charging Party has failed to file said charges within six months subsequent to the conduct alleged to constitute the unfair practice as required by section 32620(b)(5) of the Public Employment Relations Board (hereafter PERB), Rules and Regulations, title 8, part III, California Administrative Code. Therefore, in accord with section 3563.2(a) of the Act, the PERB is without jurisdiction to issue a complaint as to such matters.

The charge was filed on June 10, 1982. The charge was amended on June 29, 1982, October 13, 1982, and again on October 28, 1982. A complaint thereon was issued by the PERB on October 29, 1982. Respondent's answer was filed on December 13, 1982. The matter was set for informal conference on December 17, 1982, but the settlement efforts were unsuccessful. A request for hearing was filed on April 11, 1983. (Under the then applicable PERB procedure, after an informal conference, no further processing by the PERB would occur until a party or parties requested a formal hearing.) The hearing was set on May 16, 1983, and following days and a pre-hearing conference set for May 10, 1983. At the request of the Charging Party, the pre-hearing conference was reset for June 20, 1983, and the hearing continued to a date to be agreed upon at the pre-hearing conference, which date was thereafter

set for October 11, 1983, and thereafter as necessary through October 14, 1983. Prior thereto, pre-trial statements on behalf of each of the parties were submitted and various potential evidentiary documents exchanged pursuant to order at the pre-hearing conference. Because of disputes between the parties in regard thereto, a second pre-hearing conference was scheduled for September 29, 1983 at which time the issues presented by the charge and amended charges were agreed upon. The formal hearing commenced October 11, 1983, and continued through October 12, 1983, at which time it recessed to continue after the week of November 5, 1983, at dates mutually convenient to the parties. At the joint request of the parties the matter was continued for 20 days from October 31, 1983, for the parties to explore settlement possibilities with the understanding the parties provide acceptable mutually agreeable dates after November 21, or in December 1983. The parties responded on November 9, 1983, that the only acceptable dates were January 18, 19, and 20, 1984.

Based thereon, the hearing reconvened on January 18, 19, and 20, 1984, and continued through February 29, March 1 and 2 of 1984. Briefs were to be submitted 35 days after mailing of the transcript. The transcript was mailed on April 18, 1984. The parties jointly requested an extension to June 29, 1984. Because errors in the transcript were discovered, at the request of the parties, an additional seven days was granted to file briefs.

On July 6, 1984, briefs were filed and the matter submitted. However, on September 6, 1984, Charging Party filed a Motion to Reopen the Record and for a Protective Order. On September 11, 1984, Respondent filed its opposition thereto. For reasons stated hereafter the motion is denied.

SUMMARY AND FINDINGS OF FACT AS TO DISPOSITION OF GRIEVANCES

The University of California is a higher education employer under HEERA. The complainant in this case is Edward A. Yeary, an employee of the University in its cooperative extension system. He has been employed there since 1947 and has progressed through its several professional classification ranks to step V of the specialist/advisor series. There are seven steps (I through VII) in the series. The last two steps are reserved for "truly exceptional" performances.

Yeary sought and was denied promotion to step VI in 1977 and again in 1979. Yeary again sought a promotion to step VI in 1981. The normal procedure to be followed was for the assistant vice-president-director of cooperative extension to make the final determination after receiving the results of a review by the unit (program) director, ad hoc review committee and the personnel committee of the assembly council. This was done and while Yeary's performance was determined to be good, it was not rated outstanding and therefore insufficient to meet the criteria for advancement to step VI.

On October 9, 1981, Yeary filed a grievance under the Division of Agricultural Sciences appeals procedure for

academic non-senate employees, alleging that the denial of his promotion was because of his age and alleging that he had been denied certain information he had requested. After many delays, the parties engaged in a strike-off procedure that resulted in the matter being scheduled to be heard on May 27 and 28, 1982, before Hearing Officer Herbert Gross. On the day of the hearing, May 27, 1982, Mr. Yeary, through his representative Mr. Bradfield, requested a continuance of the hearing on various grounds including that since the University had substituted as its representative an attorney, Bradfield, a non-attorney, did not feel competent to continue to represent Mr. Yeary. Mr. Bradfield requested the continuance to enable Mr. Yeary to have time to hire a lawyer to represent him. This request was concurred in by the University's counsel and approved by Mr. Gross. The hearing was rescheduled for September 15, 1982, subject only to Mr. Yeary's new attorney's schedule.

Shortly before the hearing on September 15, 1982, Mr. Yeary again wrote to various individuals seeking a continuance on the basis that he did not have a lawyer. On September 15, 1982, the matter proceeded to hearing as scheduled. Mr. Yeary did not appear. After some discussion the hearing officer took the matter under submission and later issued his report finding that Mr. Yeary's earlier request for continuance was made in bad faith. The hearing officer recommended dismissal of the

grievance. This recommendation was accepted by Vice-President Kendrick on September 17, 1982. Mr. Yeary had the right to appeal Kendrick's decision to the president of the University. No appeal was filed.

Mr. Yeary filed his second grievance on April 5, 1982, which was amended on April 18 and April 29. It alleged that Employee Relations Specialist Judy McConnell had engaged in certain improper activities associated with the processing of the first grievance. After several delays the hearing was held on January 25, 1983. Neither Mr. Bradfield nor Mr. Yeary were present. The hearing committee received into evidence 50 exhibits, most of which were letters between the parties and documents outlining the attempts by Cooperative Extension to set a hearing date. Based upon these exhibits the University asked the Committee to dismiss the grievance on the basis that Mr. Yeary and Mr. Bradfield had intentionally obstructed the appeal process and were acting in bad faith. The hearing committee took the case under submission and issued its unanimous recommendation on March 3, 1983. It found that the University was lenient and reasonable in twice delaying the hearings to allow Mr. Yeary to coordinate his schedule with that of his representative Mr. Bradfield. The hearing committee also found that the evidence presented indicated that the failure of Mr. Yeary or his representative to appear at the January 25 hearing demonstrated a unique occasion of

uncooperativeness on the part of the grievant. The hearing committee recommended that the grievance as amended be dismissed and this was accepted by Vice-President Kendrick on March 17, 1983. Yeary did not appeal Kendrick*s decision to President Saxon.

CONTENTIONS OF PARTIES

It is the various circumstances surrounding the processing of these two grievances to conclusion that form the basis of the complaint. Complainant Yeary alleges that the grievance filed by him sparked the retaliation and discrimination complained of in the charge. Essentially Yeary complains that various alleged inconsistencies by the University in the selection of hearing officers, setting of hearing dates, continuances of hearing dates, refusal to continue hearing dates, motions to dismiss for Yeary's failure to appear, denial of Yeary's rights to representation of choice, failure to provide timely responses failure to provide information requested by Yeary and deviation from University policy are evidence of unlawful reprisal for Yeary's having filed the grievances as well as for his filing a complaint with the Department of Fair Employment and Housing.

The University contends that after the two grievances were filed, Mr. Yeary and his representative, Mr. Bradfield, embarked on a campaign to obstruct the grievance process so as to avoid closure of the issues through a hearing on the

merits. They decided to cause as much trouble, and file as many additional actions and claims as possible, so as to force the University to cave in under the sheer burden of attempting to deal with the situation. The requests for information from Mr. Bradfield and Mr. Yeary were far-reaching and never-ending. Each University response drew another request.

Yeary also filed a complaint with the Department of Fair Employment and Housing, and when that case was closed based upon insufficient evidence he immediately filed another charge claiming retaliation. In addition to all of this, Mr. Yeary filed a multi-million dollar lawsuit arising out of the same issues seeking punitive damages against named individuals.

The University contends that throughout this onslaught it tried its best to bring the grievances to hearing. In each case, after many delays, the matters went forward without the presence of Mr. Yeary or Mr. Bradfield as a result of their own deliberate actions. It contends that the hearing officer and the hearing committee found that the University and its employees had followed the procedures and had been reasonable in their attempts to set the cases for hearing. Both grievances were dismissed upon recommendations from the hearing officer or hearing bodies after reviewing the appropriate facts involved in these delays and failures to appear before them.

FINDINGS OF FACT

On June 24, 1981, Yeary learned by written notice (dated June 22) from his program director, Gordon Rowe, that

Jerome Siebert, Director of Cooperative Extension, had denied Yeary's application for promotion to range VI. The notice set forth a summary of the reasons.

On July 1, Yeary wrote to Rowe requesting certain additional information regarding the promotion denial. He requested copies of his personnel evaluations since 1974, the make up of the ad hoc review committee and a "summary statement of the deliberations and recommendations of the ad hoc review committee." On July 21, 1981, not having received a response, Yeary met with Rowe and Rowe gave him a written statement which reads as follows:

Yeary, Edward

This action was denied two years ago because of a number of concerns. The primary concerns were related to the depth of his program, his professional standing, and his publications record. His work is primarily that of a service oriented program which makes him popular. However, he does not have the standing among his peer group which is important for advancement to Step VI. He has done a commendable job but not necessarily exceptional or outstanding in the sense of advancing the frontiers of knowledge. While he had taught at the Farm Management School in Oregon, why didn't he organize one in California given the great need for updating farm advisors' expertise in this area. His involvement in the Bankers Short Courses appears to be one of facilitator and organizer rather than providing subject matter expertise.

At the bottom was a notation in longhand, JBS, Comments, '81.

On July 23, 1981, Yeary wrote to Warren Schoonover, the Director of Administrative Services for the Agriculture and

University Services, that he wished to proceed with the appeal procedure from this decision which they had earlier discussed. This was an appeal policy procedure set forth in the Cooperative Extension Administrative Handbook. Schoonover as Director of Administrative Services is a member of the immediate staff of the Vice-President of the University's Agriculture and University Services. The Vice-President of Agriculture and University Services, under whose authority the Cooperative Extension service falls, at the time of the events in question, was J.B. Kendrick, Jr. Kendrick had delegated to Schoonover numerous staff and certain line responsibilities. Among Schoonover's express delegations was responsibility for coordinating and processing academic personnel appeals and grievances. It was in this capacity that Schoonover became involved in the various actions of which Yeary complains.

The grievance or appeal filed by Yeary was essentially against the action of Jerome Siebert as Director of Cooperative Extension of the University. The grievance or review process for Cooperative Extension is essentially as follows: A hearing officer is appointed by Vice-President Kendrick. The hearing officer, after a formal hearing process, issues a recommended decision. The hearing officer's recommended decision is forwarded to Kendrick to adopt or reject. Kendrick's final action is appealable to the University's systemwide president,

David Saxon. This is the last step of the University's internal review procedure.² -

Yeary's basic complaint was that the ad hoc review committee was not made up of his peers. He had had a running dispute with the University on this issue and believed that his salary classification in Cooperative Extension in the Specialist/Advisor series required that the committee be made up of advisors rather than specialists. The University considered that his duties were statewide rather than regional, as are most advisors, and that he therefore fell between the definition of specialist and advisor. The review committee was made up of specialists. Since Yeary testified that he later learned the committee recommended in favor of his promotion, this does not seem to have prejudiced his promotional review.

On July 31, 1981, Schoonover wrote to Yeary stating that appeals pertaining to title or salary matters must be submitted through administrative channels and are not subject to the grievance procedures "unless the actions alleged result from discrimination. . . ." Schoonover indicated that an appeal on the grounds of discrimination should be submitted through him and indicated that if Yeary's appeal was ". . . on the salary

²There is a hearing panel alternative to the single hearing officer procedure as well as external American Arbitration Association options but the final steps are the same.

matter . . . your letter . . . (through administrative channels) . . . giving full particulars should be addressed to Vice-President Kendrick." while Yeary's counsel complained this was evidence of attempts to dissuade or deny Yeary access to the grievance process, this request was reasonable for clarification and not an unreasonable interpretation of the scope of the grievance process. Schoonover also indicated he was informing Rowe and apparently Rowe's superior, the Associate Director for Programs, that attention should be given to providing Yeary documents "... and other appropriate information." On August 10, 1981, Yeary wrote Schoonover that he could not complete preparation to file the appropriate action under section 370 (of the grievance procedure) until he had received the information and would do so as quickly as he could receive and review his files.

Yeary, by letter of the same date to Nancy McLaughlin, who was Associate Director of Administration, requested information from his personnel files that considerably expanded the nature of the documents requested beyond that of items or information that would be in his personnel file.

There followed an additional letter from Schoonover to Yeary which indicated, in effect, that he was putting pressure on McLaughlin and Rowe to respond to Yeary's request. On August 25, McLaughlin sent Yeary "... the material contained in your personnel file" and indicated certain University policy

limitations on providing detailed recommendations of the several levels of review; and which provide instead for the furnishing of a summary. She indicated that the material from his files relating to salary review for the years 1972 through 1980 ". . . is being summarized and will be sent to you as soon as possible." She also apparently attempted to provide material he requested in regard to the grievance procedure and answered other questions.

Yeary, by letter to Schoonover (copy to Rowe), acknowledged receipt of the material as well as receiving a "brief" summary of the reasons (for denial of promotion) from Rowe, but indicated that he had not received other information he had requested of Rowe by letter of July 1_f 1981. Rowe responded on September 2 indicating that he believed that he had met his obligation to provide material and information when:

Recently on your visit to my office, we discussed my knowledge which included the Director's comments related to your being denied a promotion in addition to my own comments which summarized my recommendation as Program Director in transmitting materials to the personnel office.

I believe the summary of the information received from me suffices to meet the obligations of the Program Director related to such personnel actions. . . .

There followed in September letters from Yeary to McLaughlin and to Rowe (copies to Schoonover). The letter to McLaughlin complained about, among other things, the failure to

receive certain material he believed should have been in his files, additional information concerning the criteria for range VI, and a committee report on which he participated concerning promotional material. He also requested "... the position description, bio bibliographies and program review outlines of all of the individuals now in full title, step 6. . . ." which he indicated he understood to be approximately 20 people. In the letter to Rowe, Yeary indicated that he was not meeting his obligations to provide him with performance evaluations and ". . .to provide me for the first time with the reasons you relied upon to turn down my promotion. . . ." He indicated that the basis of his grievance was going to be against "... the arbitrary and discriminatory administrative action which you have taken." Rowe responded on September 24, essentially restating his earlier response.

Yeary then mailed to Schoonover (dated October 9, 1981 and postmarked October 15, 1981) what is essentially the formal grievance documents, indicating that efforts had been made, as required, to try to settle his complaint informally, and indicating, for the first time, that his was not a grievance over salary (and thus arguably not subject to the grievance appeal without more) but fits within the policy because "... it pertains to discrimination on the basis of age."

Just preceding this, on September 29, 1981, Yeary had also filed a charge of age discrimination with the California Department of Fair Employment and Housing.

Rowe was replaced as Yeary's program director by William Wood by the end of September 1981. Rowe received a call from Schoonover sometime in October. He informed Wood of Schoonover's complaint and he requested that Wood, as Yeary's new program director, contact Yeary and see if there was anyway Wood could bring about a reconciliation of the differences by arranging some kind of meeting of the parties, wood contacted Yeary by telephone on October 29, 1981. The substance of what was said by each is contradicted by the testimony of the other, but Yeary did reject the proposal.

Wood also received a call from Eugene Stevenson of the affirmative action office for the University, sometime in early November 1981, asking Wood to contact Yeary and to see if he was willing to consider any kind of meeting with any administrators of the University towards trying to bring about a resolution. Wood found an opportunity to meet briefly on the subject with Yeary at a conference they were both attending in Fresno on November 11, 1981. This much they agree upon. Yeary's answer was the same, that he thought such a meeting would not be productive and in essence reaffirmed that he would as soon not have Wood involved in it even as a mediator or intermediary. Once again, the substance of the words said by Wood are in dispute. Under Yeary's version Wood issued a threat. Wood claimed he offered to act as an intermediary or go-between.

Regardless of specific other content, the general nature of the conversations was one of Wood offering to serve as intermediary between Yeary and others in administration in an attempt to resolve the pending grievance informally.

Wood reported Yeary's rejection of the proposal to Schoonover and the rejection of a second similar proposal from Stevenson in brief conversations after each of these contacts with Yeary. On December 18, 1981, Schoonover tried to call Yeary and on December 21, 1981, Yeary returned the call. They discussed the appointment of a hearing officer. Schoonover indicated that since Yeary was an employee of the division of agriculture sciences, the hearing officer should be selected from within the division. Yeary protested that in at least two cases he was aware of this had not been the case, citing a grievance involving a farm advisor, Sterling Stevenson, whose hearing committee had included one member of agriculture science and also, the Helen Marquez grievance which was active at that time. Schoonover had called Pete Small of the Berkeley Campus Personnel Office as a matter of convenience and secured a list of some people who might serve as hearing officer because they had a large number of people. The list consisted of five people. One was from the extension service. Four, including Professor Buxbaum were from the school of law.

Schoonover received the list of potential hearing officers on December 17 and called Yeary December 18. Yeary managed to

get back to him December 21. Yearly indicated a preference for someone from the school of law. Schoonover told Yearly the steps he had taken to find a hearing officer. After talking to Yearly about the need to proceed with the process, he called those on the list to ascertain their availability. Only Mr. Buxbaum was available, and only after January 11, 1982. Schoonover's letter of January 15, 1982 to Yearly stated:

Dear Ed:

I have been trying to reach you by phone since the first of the year to discuss the selection of a Hearing Officer. Unfortunately I have not been able to identify a slate of individuals but have been able to identify one person who would indicate a willingness to serve as the Hearing Officer. He is Richard Buxbaum, Professor in the School of Law on the Berkeley campus. If you agree to his selection I will contact him again and confirm his appointment so that we may proceed. Please call me on this.

On January 18 Yearly called in response to the letter suggesting Buxbaum, and indicated he would give it consideration and would advise Schoonover by the end of the week. There was also conversation about all of the information (Yearly) had been requesting and a query from Schoonover as to its relation to an age discrimination case. Yearly assured him it did relate.

On January 22 and 26, Schoonover tried to reach Yearly without success. He reached him on January 28 and advised him

Buxbaum could not serve,³ and suggested Van Dusen Kennedy. There apparently was discussion about the selection and appointment procedure and Yeary was told it was the agriculture services division policy to have the vice president appoint a hearing officer, but they were extending the courtesy of suggesting a hearing officer to him first and that unless Yeary had apparent reason for concern, ". . .we wished to appoint Kennedy." He gave Yeary until the next day to get back with his response.⁴

On January 29, 1982, not having heard from Yeary, Schoonover wrote Yeary indicating as follows:

I am greatly concerned over our not moving forward on a timely basis to schedule your Hearing, as required by University Academic Personnel Policies.

When I wrote to you on January 15, and talked with you on the 18th, I indicated that only Professor Richard Buxbaum had indicated a willingness to serve as a Hearing Officer. You wished to give his appointment some thought, and indicated you would be in touch with me by the 22nd. Unfortunately, you did not get back to me on this matter, but I now have been advised by Professor Buxbaum that he is not able to

³At some point prior to the deadline of January 22, Schoonover heard that Buxbaum was unwilling to serve. On January 22, Peggy Barton had sent Schoonover a list of Berkeley campus hearing officers, together with its strikeoff procedure and the suggestion that Van Dusen Kennedy would be the most likely one available in the near future because he was retired.

⁴Vice President Kendrick officially, by letter, appointed Van Dusen Kennedy on February 1, 1982, as the hearing officer.

serve at this time. As we discussed when I called you on January 28, I have consulted with Van Dusen Kennedy, Professor Emeritus of Business Administration in Berkeley, and an experienced Hearing Officer, and he has agreed to serve. He is not acquainted with you, Gordon Rowe, or Jerry Siebert. As I have not heard from you as you indicated, we are now appointing Professor Kennedy as Hearing Officer to avoid any further delay. This appointment is in keeping with Section 270 of the Administrative Handbook.

Judy McConnell will be representing Cooperative Extension Administration, and she indicates the only available time in the immediate future when she would be available is the first week in March. I hope you will be available for a Hearing in Berkeley at that time. Please call me if this week is not possible, so that I may arrange with the parties concerned a mutually agreeable alternate time.

You have indicated that you will be represented at the Hearing. University Policy calls for the Administration to be represented by our General Counsel if you are being represented by a legally trained person. We assume that this is not to be the case and will proceed accordingly without General Counsel involvement unless we hear to the contrary. I hope that you will be able to advise me of your representative in the immediate future.

Please call me to affirm these arrangements.⁵

Yeary got in touch with Robert Bradfield, who had been advising him, that same day or the next day as to the

⁵Prior to this time, Yeary had indicated he would elect to have representation in the hearing but had not indicated his choice.

desirability of Professor Kennedy as the hearing officer. On February 5 Yeary called Schoonover and indicated he accepted Kennedy. In this regard Yeary testified that while he hadn't gotten enough information on Kennedy by then, he had no choice.⁶

On February 5, 1982, Yeary also indicated to Schoonover that a hearing on March 1-5 would be acceptable.

By February 7, 1982, Yeary wrote Schoonover to indicate he could not proceed at the time because of heavy travel and other commitments "... until March 19th when a short break occurs. It will not be possible for me to proceed before that time." He indicated, "...we could go forward then if ... " and here he indicated, "... in the meantime we have received requested materials. ..." in reference to the fact of the many requests he had been making for various materials. This subject was by now becoming a running dispute between himself and the personnel office.

On February 16, 1982, Yeary dispatched a letter of appeal to Vice President Kendrick indicating that the first week of March, as suggested by Schoonover, was in conflict with his work schedule and indicating that after March 19 he had three

⁶Later, by letter dated April 14, Bradfield wrote Schoonover complaining of (among other things) Kennedy's non-employee status and thus ineligibility to serve as hearing officer.

weeks available. He requested the hearing be set for no earlier than March 22 and as soon thereafter as mutually agreeable.

On March 1, Yeary dispatched a letter to Schoonover requesting a vitae on Professor Kennedy. On the same date, Schoonover sent notice to Yeary after Vice President Kendrick had reviewed Yeary's request for a delay, saying we understand the hearing is now set for March 24, 1982.

On March 9, 1982, Yeary by letter to Schoonover, designated retired Professor Robert Bradfield to represent him. He described him as the Clinical Professor of Human Nutrition and also had been a nutrition specialist in Cooperative Extension until his retirement in 1977.⁷

This was Bradfield's first appearance by name in the process. In fact, he had been advising Yeary directly at least since September 18, 1981. On that date he had helped draft a

⁷Yeary did not mention that Bradfield was also a graduate with a doctor of jurisprudence degree from University of California, Boalt Hall Law School. As such, he could be reasonably construed as a legally trained person in regard to the U.C. policy described in Schoonover's letter to Yeary of January 29, 1982. However, Schoonover apparently recognized Bradfield's background as early as March 11, 1982 for on that date he advised Judy McConnell that U.C. would need to be represented by the general counsel.

However, by letter of March 17 (copy to Yeary), he advised her that the University had the option of not electing representation by the U.C. general counsel, and would proceed without it in this case.

letter from Yeary to Rowe requesting additional information regarding the basis of Rowe's actions concerning Yeary's failure of promotion. He thereafter advised Yeary in the procedural process that followed and became his representative of record for all purposes by notice to the University dated March 9, 1982. He was a California State Employee Association organization activist and representative at the University. He had previously been an employee of the extension service and had retired.

Bradfield had become involved in helping Yeary because Yeary had been referred to him by several other employees of the extension service who were interested in Yeary's cause and in the University grievance process in which he was involved. It is apparent that Bradfield was not liked by Siebert, the Director, a feeling that was reciprocal on the part of Bradfield.

Judy McConnell proceeded to represent the U.C. and on March 17, 1982, she dispatched a letter to Yeary, copy to Bradfield, suggesting a pre-hearing conference before Bradfield and herself, saying in relevant part:

This is to confirm that the hearing in the matter of your grievance is scheduled for March 24, beginning at 10:00 a.m. in Room 230 University Hall before hearing officer Van Dusen Kennedy. A court stenographer will be present.

Generally before a hearing both parties exchange names of witnesses they plan to

call and copies of documents they plan to introduce as evidence. This is necessary to avoid delays in the hearing while the parties review evidence which they may not have previously seen. I would appreciate a call from Mr. Bradfield, your representative, at his earliest convenience so that we can meet and exchange documents.

A conference was held between McConnell and Bradfield on March 22 to go over documents and lists of witnesses. Bradfield delivered to McConnell two documents which contained additional requests for information. Each was three pages long. One document contained 13 and the other 14 paragraphs of separate items, some of which were quite elaborate and would at best require extensive study and preparation in order to respond.

McConnell indicated there appeared to be a great amount of material requested and that she would have to go over the request. She testified that Bradfield stated they might have to meet with the hearing officer prior to the hearing set for March 22. Later, after reviewing the material, McConnell did not feel she could respond prior to the March 24 hearing date. McConnell proceeded to contact Kennedy directly, described the situation and requested the matter be put over. He agreed to do so. She testified she immediately called Bradfield and informed him of what she had done. He did not at that time protest either the continuance or the fact that she had unilaterally contacted Kennedy. He also did not indicate any witness problem the result of it.

In any event, the following letters exchanged between them. On March 23, 1982, McConnell sent Bradfield this letter:

RE: Yeary hearing

Pursuant to our discussion yesterday, I have called Dr. Kennedy and asked for a continuance for the Yeary hearing until such time as I am able to respond to your request for information as set forth in your letters of March 19 and March 22, 1982 (received on March 22). He has agreed to wait until I have replied to these memos and you have had a chance to review the material, at which point I will reschedule the hearing. I anticipate that we'll be able to move forward in April.

On March 24, she sent a letter to Bradfield as follows:

This is in response to your letter of March 19, 1982 which I received on March 22, 1982, wherein you requested the following information:

1. "all records related to the basis for the comments made in Mr. Rowe's memorandum of June 22, 1982"

Associate Director Nancy J. McLaughlin responded to Mr. Yeary on February 5, 1981 (page 2) wherein she stated "our opinion is that you did obtain an answer in Mr. Rowe's letter to you of September 24, 1981. . . ."

I have nothing further to provide in this regard.

2. "the dates of each and every performance evaluation of Mr. Yeary"

As I indicated to you on March 18 and in my letter of March 19, all performance evaluations are included in Mr. Yeary's file.

3. "the dates of each and every position description approved for Mr. Yearly over the 34-year period of employment."

As I indicated to you in my letter of March 19, 1982, the only position description for Mr. Yearly is included in his file, which has been provided to him.

4. "a copy of the President's Taskforce on Racial Discrimination in the Agricultural Extension Service"

This report is available for you at a cost of \$12.80 (128 pages).

5. "the first draft of the Kleingartner Report as it was sent to Vice President Kendrick and Assistant Vice President Siebert"

We have not been able to locate a draft of this report.

6. "the final Kleingartner report as issued to the Regents"

A copy of this report is available for you at a cost of \$16.00 (160 pages).

- 7a. "the bio bibliographies of Siebert, Rowe, Stevenson and McLaughlin"

On February 5, 1982, the Associate Director Nancy J. McLaughlin responded to your request for bio bibliographies of certain individuals by stating "we are unable to provide copies of the bio bibliographies . . . since we are obligated to protect their privacy." Therefore your request will be denied.

- 7b. "all records of material presented to the Board of Regents which in any way relate to the Cooperative Extension Service for the period January 1978 until the present"

8. "initial and subsequent (both) position descriptions released for hiring purposes for the position of County Director of Monterey County during 1981"

These documents are available at a cost of \$.20 (2 pages).

9. This is not a request for a document.
- 10a. "records which would describe the duties of unit coordinators for the period 1975 to the present"

We do not have records describing unit coordinator's duties from 1975. However, we will be able to locate a one page 1978 document regarding unit directors' positions which can be provided to you.

- 10b. "the amount of additional stipend which [Rowe] has received for these duties" and
- 10c. "the memo of instruction to him which outlined his duties as a unit coordinator" and
- 10d. "the memorandum relieving him of these duties"

These documents can be provided at a cost of \$.50 (5 pages).

11. All records of correspondence between the Cooperative Extension Service and Professor Richard Buxbaum during 1982, reference to serving as a hearing officer."

There is no correspondence between Cooperative Extension and Professor Buxbaum.

12. "position descriptions of Mr. James Reedy, Lola Williams, and all three job descriptions of Robert J. Reynolds during the last year and one-half"

We have copies of Mr. Reedy's position in Santa Clara (1 page), Ms. Williams' position description (4 pages) and Mr. Reynolds' position as County Director (3 pages). Mr. Yeary has already been provided with a copy of Mr. Reynolds' description as Urban Agricultural/Grants Specialist on March 15, 1982.

13. 'job application of Eugene Stevenson to the University of California'

Associate Director Nancy J. McLaughlin responded to this request on January 20, 1982.

14. "confidential portions of (Mr. Yeary's) file"

As I discussed with you on March 22, 1982, the University's policy on release of confidential information is set forth in the Academic Personnel Policy Manual (which you had the opportunity to review on March 18, 1982).

Section 160.20 b.(2) states:

" . . . upon written request, the Chancellor shall provide the individual with this summary (of all confidential documents) in writing. Such a statement shall not disclose the identities of persons who were the sources of confidential documents and shall not identify separately the evaluations and and recommendations in an academic personnel action by the chairperson of the department . . . , a campus and ad hoc review committee, or the Academic Personnel or equivalent committee."

This response is essentially the same as provided to you in my letter of March 19, 1982 and Nancy McLaughlin's letter to Edward Yeary of August 25, 1981.

As we are rescheduling the hearing for the first week in April, I suggest you indicate immediately which documents you wish photocopied.

On March 25, 1982, Bradfield sent the following letter to McConnell.

Mr. Yeary demands an immediate change in hearing officers for the reasons stated below.

(1) Mr. Kennedy does not meet the UC requirements for a hearing officer. Section 371.2 unequivocally requires that a hearing officers be UC employees. Mr. Kennedy is not an employee of the University and thus cannot be a hearing officer.

(2) Mr. Kennedy has been prejudiced by Vice President Kendrick's letter characterizing the grievance as salary and by Employee Relations staff sending of materials related to salary to Mr. Kennedy. No where in Mr. Yeary's complaint is a salary even mentioned. The grievance deals with abuse of administrative discretion and age discrimination. The characterization of the grievance as salary is prejudicial because salary is not grievable and it suggests that the matter is trivial.

(3) Mr. Kennedy conducted grievance business unilaterally with Employee Relations and improperly granted a continuance without participation and approval of opposing counsel. This has prejudiced the case because Mr. Yeary's chief witness leaves on out-of-state sabbatic leave for 3 months commencing April 1, 1982. This was known by the Cooperative Extension administration because they granted the leave.

P.S. I suggest that we return to Professor Buxbaum, the hearing officer both sides agreed upon before the unilateral substitution of Mr. Kennedy by your office.

I also suggest that calendars for both parties be cleared before going to the hearing officer to set a hearing date.

At this point, the first objection to Kennedy was raised and a return to Buxbaum was suggested.

On March 30, McConnell sent a notice to Bradfield as follows:

To confirm this afternoon's phone conversation, the Yeary hearing has been rescheduled for Monday, April 5, 1982. The hearing will be held in the Regents' Dining Room, 150 University Hall, beginning at 9:00 a.m.

On the same date, Bradfield wrote the following to McConnell:

A review of the records provided so far by UC reveals the necessity to call several additional witnesses. Mr. Yeary calls Mr. Siebert's supervisor, James B. Kendrick, Doris Smith, and Vice President for Personnel, Archibald Kleingartner as hostile witnesses and requests that when another hearing date is set that it is established only after calendars for the above witnesses have been cleared for their participation.

Bradfield disputes McConnell's description of what was said at the meeting of March 22, if anything, about the possibility of the need for a continuance. McConnell also stated while Marie Farree was mentioned as one of Yeary's witnesses, nothing was said about her availability, nor did Bradfield ask her to contact any witness in regard to their availability.

It is not clear who picked the date of April 5 for the hearing, Kennedy or McConnell. It was most likely McConnell.

This does not indicate to me that she tried to pick a date he would be unavailable. McConnell was aware that Yeary had previously indicated he would be willing to make the three weeks after March 23 available. She was aware there had been a previous delay and it is likely she felt under pressure from Schoonover to get the matter to a hearing.

In any event on March 25 and 26 Bradfield fired off a volley of objections, objecting to Kennedy as hearing officer and McConnell's further participation in the case. This was followed on April 5, 1982, by a second University grievance, this one against McConnell's conduct.

By this time the personal animosity between McConnell and Bradfield became clear. Bradfield indicated in his letter of March 26 to McConnell that:

In the event that you do not voluntarily disassociate yourself, Mr. Yeary will include these and other matters as a part of an unfair practice complaint which he is filing through his labor organization, and I will ask for a formal review prior to the hearing.

At this point it appears Yeary and Bradfield may have resolved to avoid a University hearing until after an unfair practice charge had been processed with the PERB if possible.

Although the grievance policy which applied to Yeary's case did not require input or approval of the grievant in regard to the appointment of the hearing officer, Mr. Schoonover testified that after Professor Kennedy was disqualified he

decided to allow Yeary to be involved in the selection of the hearing officers, but this time by the use of a strike-off procedure. In order to get a list of potential hearing officers he stated that he got a copy of the Berkeley campus hearing officer list, deleted those names where it was indicated that persons on the list could not hear a matter within 30 days and deleted Professor Kennedy's name because of Yeary's previous objections. Schoonover testified that he worked out the strike-off procedure with Mr. Bradfield on April 20, 1982, and wrote it up shortly thereafter. The hearing officer selection process was used on May 13, 1982, to select the hearing officer in Mr. Yeary's case.

Mr. Schoonover testified that the strike-off procedure was intended to be used only for Mr. Yeary's hearing and it was not intended for general use in Agriculture and University Services. Mr. Schoonover states that he specifically discussed the 30-day limitation period with Mr. Bradfield. He testified that he sent Bradfield the hearing officer list and some hearing officer resumes together with the hearing officer selection process which reads as follows:

Unless there is mutual agreement as to the selection of a hearing officer from the list, the selection will proceed as follows: The department representative or the employee (or his/her representative) shall flip a coin to determine who shall first proceed with a "cross off" from the list.

The parties shall then alternately cross off names until one is left.

That person will be the selected hearing officer. Administrative Services will contact the person to determine if he or she is able to hear the case within 30 days. If the selected person is not able to hear the case in 30 days, the person whose name was struck last shall be contacted, etc. The person who finally agrees to serve will be appointed as Hearing Officer by the Vice President.

Bradfield denies this portion was included in the packet he received. When Bradfield filed his amended Unfair Practice Charge herein he included the Hearing Officer Selection Process on exhibit as an attachment without raising any such issue. The cover letter from Schoonover expressly references the material sent to Bradfield and states that it enclosed the Hearing Officer Selection Process.

Although Bradfield, in his testimony, denies discussing the Hearing Officer Selection Process on April 20, 1982, this denial is not persuasive. It is not reasonable to conclude that he would not have raised the issue at the time of the strike-off process on May 13 and proceeded with the strikeoff without knowing the rules of the strikeoff or having read it. Bradfield's position is that he never bothered to find out or attempted to understand what the written selection process stated. Bradfield's testimony is not credible.

McConnell exercised the last strikeoff. As it happened that was Hearing Officer Gross, leaving Jan Vetter. Vetter was

not available to hear the case within the agreed time; so Schoonover, following the strike-off rules, went back to Gross.

On May 26, 1982, Mr. Woods and Mr. Bradfield met with Mr. Gross to discuss the upcoming hearing on May 27. There is a dispute between the parties as to just what was discussed and raised at that May 26 meeting. Bradfield claimed surprise that they ended up with Gross as the hearing officer rather than Vetter. He left town the same day of the strike off and made no arrangement for any special treatment for mail from Cooperative Extension. In fact, he alleges he did not bother to read his mail prior to the hearing.

The only other aspect of the dispute regarding what happened at the May 26 meeting which is noteworthy goes to Mr. Bradfield's credibility. In his testimony Mr. Bradfield stated that on May 26, 1982, he went to University Hall expecting to meet with Professor Vetter and Judy McConnell. He testified that up until the time he walked in the door and saw Mr. Woods and Mr. Gross he did not know that Mr. Vetter was not going to hear the matter and that Mr. Woods had replaced Judy McConnell as the University's representative. Mr. Bradfield testified that he did not get his copy of the letter of Gross' appointment until after the May 27 hearing because he left town on May 13 and did not get back until very early in the morning on May 25. He testified that he had all this mail waiting for him and that even though he was expecting

important mail from Cooperative Extension he did not take the time to go through the mail prior to the May 26 meeting. Bradfield's testimony here is different from the statements he made to Hearing Officer Gross on May 27, 1982. On that date he indicated to Mr. Gross that he had taken the time to go through his mail to separate out those letters from Cooperative Extension.

Bradfield's testimony was that he did not know until he walked into the room for a pre-hearing on May 26 that Herb Gross was to be the hearing officer; he immediately raised the question of a potential conflict of interest between Gross and Schoonover. Bradfield testified that he was concerned about this and asked Gross if he would consider stepping down. On cross-examination, Bradfield was asked how he could possibly know whether to ask about this potential conflict of interest between Schoonover and Gross since he did not have any knowledge that Gross was going to be the hearing officer and thus had no time to find out any information about Gross. Bradfield stated that either just prior to his walking into the meeting or at a break when he went out to get a cup of coffee, a person who Bradfield did not know walked up to him and stated "that man in there used to work with Schoonover." This testimony is simply unbelievable. It is in conflict with what he stated on May 27 when discussing this matter at the hearing. At that time he told Gross he had taken time to

separate from his mail the letters from Cooperative Extension. Mr. Bradfield's testimony is not credible that he learned of the Gross appointment only upon arrival at the pre-hearing on May 26.

During preparation of Yeary's age discrimination grievance, Bradfield and Yeary had contacted Desmond Jolly, one of the members of the ad hoc review committee. Yeary and Bradfield testified he originally offered to testify and otherwise help in furnishing material in support of Yeary's case. Bradfield testified Jolly later told him he had been told not to testify by Schoonover and Woods. Jolly's version is that he voluntarily sought advice from his program director because he felt there was a policy in regard to the confidentiality of the work of such promotional review committees. This was confirmed by Glenn Woods and since he felt he was being "used" by Bradfield, he chose not to testify or otherwise appear in the matter. Bradfield prepared an affidavit for his signature which he refused to sign.

At the commencement of the hearing on May 27, 1982, Bradfield raised the issue of a conflict of interest on the part of Gross to serve as hearing officer because of a very remote and indirect relationship with Schoonover, which to me does not warrant much discussion.

Mr. Schoonover was on the governing committee of the Continuing Education of the Bar. It was an advisory committee

composed of appointees of the State Bar and appointees of the University with regard to the operation of Continuing Education of the Bar (CEB). Mr. Schoonover had been on that committee since about 1970. He participated in some discussions regarding the pay scales for the attorneys, the assistant director and the director; he did not have discussions about individual salaries including Mr. Gross' individual salary. Schoonover testified that Mr. Bradfield and he discussed his relationship with CEB at the same time they discussed Bradfield's relationship with some of the law professors at Boalt and that this occurred prior to the strike off and Bradfield found no problem.

Mr. Gross testified that Mr. Schoonover did not have any supervisory responsibility over him in his work at CEB nor did Mr. Schoonover determine his individual salary. This testimony indicates there was no supervisory relationship or other impermissible connection between Gross and Schoonover or conflict of interest. In addition, the grievance concerned Rowe and Siebert, not Schoonover.

Yeary's grievances of April 5, 18 and 20, 1982, against McConnell, while filed with Gail Cieszkiewicz, Director of the University Systemwide Office of Personnel, ultimately reached Schoonover for processing and on May 25, 1982, Schoonover responded to Yeary to indicate by June 1, 1982, if he wished to proceed. Yeary responded on June 1, 1982, indicating that it

was being taken care of by Steve Salmon, systemwide personnel director. On June 10, 1982, Schoonover wrote Yeary that he took Yeary's reply as intention to proceed and he had directed McConnell's supervisor to respond no later than June 18, since he had received Yeary's letter on June 4. Schoonover followed with a letter of the same date to Booker McClain as McConnell's supervisor, directing the response as promised. Yeary and Bradfield received information copies. By letter of June 17, 1982, Nancy McLaughlin, on behalf of McClain responded to Yeary's grievances, essentially denying them for reasons stated and set forth the appeal procedure rights. Schoonover forwarded the response to Bradfield and Yeary on June 18. He asked if Yeary wished to pursue the case. On June 24, Bradfield responded, complaining that more than 60 days had already elapsed and that Schoonover's question as to Yeary's desire to pursue it was a violation of rules. Bradfield indicated he opted for a University hearing committee in lieu of a single hearing officer, or an outside arbiter. He indicated he wished to participate in its selection. He also indicated both he and Yeary would be unavailable until late August. On July 15, 1982, Schoonover's reply indicated that the delay in processing was approved and requested Bradfield to call him in August. Bradfield did not call. Schoonover's secretary, Linda Martinez, apparently made attempts to contact him.

She gave up and turned the problem over to Glenn Woods who was to be the University's representative. Woods testified that Martinez told him that when she did contact Bradfield, he hung up.

On September 13, 1982, Yeary wrote Hearing Officer Gross a lengthy letter setting forth all his complaints about the process to date indicating that he understood Woods intended to proceed with the hearing on September 15 and questioning Gross' authority to sit as hearing officer.

On September 14, 1982, Yeary telephoned Schoonover and indicated he wished to have a court reporter at the hearing scheduled for September 15, 1982. Also on September 14, 1982, Yeary wrote Vice President Kendrick stating:

This is an appeal for a continuance of my hearing until such time as my appeal for a change in hearing officer can be decided and until I am able to obtain legal counsel, because the University has changed from non-legal to legal representation against me.

The hearing convened on September 15, 1982. The hearing officer made the following findings of fact and recommendation:

FINDINGS

Based on the pattern of delaying behavior by Mr. Yeary demonstrated by the Exhibits to the transcript of the May 27, 1982 hearing, the quotes from the May 27, 1982 hearing transcript, the exhibits referred to above, and Mr. Yeary's failure to obtain a lawyer or appear at the September 15, 1982 hearing, the hearing officer finds that Mr. Yeary's May 27, 1982 request for a continuance was made in bad faith and for the purpose of

delay, and that Mr. Yeary, as appellant, failed in his duty to appear at the September 15, 1982 hearing, violating the spirit of Academic Personnel Appeals Manual 371.2H7.

Based on the motion of respondent, and the above findings, the appeal of Edward H. Yeary should be dismissed with prejudice.

On September 27, 1982, Vice President Kendrick wrote to Yeary informing him that he accepted the hearing officer's recommendation and that Yeary's appeal was dismissed.

On October 12, 1982, Kendrick appointed a panel of three to hear the Yeary/McConnell grievance.

On October 25, 1982, having failed to hear from Bradfield and having been unsuccessful in completing a conversation with him by phone, Schoonover sent Yeary and Bradfield certified return receipt letters. The letter informed them the matter was set for hearing on November 15, 1982. Bradfield's copy was returned refused. Yeary's apparently was received.

On October 27, 1982, Yeary wrote to Vice President Kendrick complaining about an alleged conflict of interest of one of the panel members and suggesting that the matter to the extent it was covered by this pending PERB unfair practice charge, be deferred to the PERB hearing. He also indicated Bradfield, his representative, was in poor health. He also complained that Schoonover had selected the panel without consultation with Bradfield, which indeed was the case. He also requested that the matter be transferred to another campus. This was followed

by a letter dated November 1, 1982, indicating that his representative, Bradfield, was ill and out of state receiving medical consultation and treatment and that his return date was uncertain.

On November 4, 1982, a letter from Kendrick's assistant, Lowell Lewis, on Kendrick's behalf, responded to Yeary in regard to the issues Yeary had raised, denying same based on stated reasons, indicating the hearing should proceed as scheduled. He emphasized, in conclusion, that his decision on the issues Yeary had raised would be appropriate to bring directly to the Chairman of the Committee (i.e., the hearing panel) for the hearing panel's consideration.

Schoonover attempted to communicate with Yeary by phone on November 8, 1982, as to a new date. While he did reach Yeary, no date was acceptable as Yeary indicated Bradfield was ill.

On November 10, Linda Martinez, Schoonover's secretary contacted Yeary by phone to indicate the hearing scheduled for November 15 would need to be rescheduled after the first of the year and requested acceptable dates from Yeary. On November 10 Yeary apparently reluctantly responded that January 17, 1983, or thereafter, would be acceptable, but this was followed the same day by a letter indicating in effect that no date was acceptable until Bradfield was consulted.

By letter of November 18 Yeary responded further to the November 10 phone call challenging the make up of the committee, the setting of a date immediately after January 1,

1983 and requesting that all future communications in the matter be in writing.

On November 22 Yeary wrote Martinez as follows:

I have received your telephone message dated November 18, 1982 concerning dates for my hearing. None of the indicated dates of January 25, 26, February 1, 2, 3 or 8, 9 and 10 are satisfactory. My schedule does not accommodate [sic] now to any date before the end of February, 1983.

My CSEA representative, Dr. Bradfield, has informed me that he anticipates being in South America between early January, 1983 and mid-February, 1983.

I request that you correspond directly with Dr. Bradfield concerning acceptable dates.

On November 22 Yeary fired off a letter to Lewis raising numerous familiar issues, i.e., conflict of interest (which now included Lewis) request for copies of all records used by Lewis in making the decision on the Yeary appeal, qualifications of the hearing officers on the panel, etc.

Three letters of the same date were sent to Kendrick. One indicated he wished numerous records for the reasons stated:

One of the areas we will be exploring in the coming hearing is that of arbitrary administrative actions and the possible dependency that you have upon Dr. Siebert for carrying out certain of these actions on your behalf.

This is a request made under the California Public Records Act and the Information Practice Act. It deals in part with a member of the Hearing Committee and questions of possible prejudice as it relates to the hearing. Generally it deals

with the single and sudden transaction of removing the entire set of administrators who had controlled Extension policy and planning for many years.

I request all records showing the time of service of:

a) The following demoted Assistant State Directors, Associate Director, and Director we had enjoyed in that capacity before demotion. Please include Stephen Carlson, Lee Benson, Win Lawson, George Alcorn, and any others who were so demoted.

b) The basis or reason in each instance for the action of removal (if the action was purely personal, do not include). My interest is only if there are records that these people were given specific work related charges and the opportunity to correct before administrative action was taken to remove them.

c) Correspondence between you and Siebert concerning each of these demotions (again if the reasons were purely person, [sic] do not include).

The second stated:

This is a request for records related to the selection of the Hearing Committee for my grievance of April 5, 1982. I make this request under the University's policy of disclosure of its administrative actions, the California Public Records Act and the Information Practice Act.

Please supply all records which are in any [sic] related to:

a) The method of selection of the members of the Hearing Committee (the criteria, the process).

b) The experience in dispute resolution of the three members chosen for the Hearing Committee (a listing of previous cases

decided by each of the committee together with specific training or experience in dispute resolution).

c) Any prior relationships of Hearing Committee members with Mr. Schoonover, Dr. Siebert, or yourself.

d) The selection of the date of November 15 and 16, 1982 for the hearing and subsequent notification.

e) The decision not to allow me or my CSEA representative to participate either in the selection of the committee or the date of the hearing.

The third letter dealt with the problem of the scheduled dates and changes in dates for the hearing. The relevant portion of Yeary's letter follows:

I wrote on October 27th and November 1st to appeal the selection of the hearing committee, the conflict of interest of your Deputy Schoonover, the conflict of interest of a hearing committee member, and the selection of a hearing date without my knowledge. On November 4, 1982 Mr. Lewis wrote to me denying the appeal and stating that the hearing would go forward on November 15, 1982. I therefore thoroughly prepared to represent myself because my CSEA representative was out of state.

On November 8, 1982 I received a telephone call from your Deputy Schoonover ordering me to select a date immediately and to drop my representative, Professor Bradfield and find another. I preferred to represent myself rather than start all over with a new representative. No provisions were made to adapt to the schedules of my witnesses. No guarantees were made that hostile administrative witnesses would be available.

On November 10th I received a telephone call from Ms. Linda Martinez. She advised me that the hearing had been postponed until

next year. I asked her why and she told me that the November 15th date was not convenient for UC Attorney Glen Woods and he was busy and unavailable until next year.

This is additional evidence of the one-sided manner in which the Cooperative Extension Service handles grievances. I made two formal written appeals. One was denied by Lewis on your behalf. The other was never acted upon. I was told that the hearing would proceed November 15. I prepared to the best of my ability and was ready to proceed. Now, the Cooperative Extension Service, for reasons of their own convenience, unilaterally changed the hearing date. If I have to appeal, then Extension should have to appeal in the exact same manner. Nobody has had the courtesy to ask if such a delay by CES inconveniences me. It does.

On November 23 Schoonover sent a letter to Yeary addressing, from Schoonover's point of view, the complaints raised to date by Yeary. A selected portion follows by way of example:

To correct some misstatements in your November 10 letter, I did not assure you that CSEA would provide you with another representative, but I did suggest that you might inquire as to whether they would. Further, I did request that we move forward in setting Hearing date since, with so many people involved, it is difficult to set mutually acceptable dates. You agreed to call my Secretary upon the return to your office the morning of November 9 to discuss possible dates. This you failed to do and only on November 10 was she able to contact you and advise you that Administration's representative, Glenn Woods, was not available until after the first of the year. At that time you advised her that the period between January 17, 1983 and February 10, was good for you although you had no knowledge of Mr. Bradfield's availability. Further you advised her you

would call back the following week after you had time to contact Mr. Bradfield. This you have failed to do and we have been unable to reach you.

Ed, your representative, Mr. Bradfield, has refused to communicate with us by not accepting any mail and by hanging up on us when we phone. You have an extremely busy work schedule calling for you to be out of the office a great deal and making it difficult for us to reach you by phone. You have asked us to contact you only by mail, but this does not allow for a meeting of minds and takes too much time. I suggest you keep your office advised of where we may contact you by phone so when we need to, we may do so with the further understanding that we also confirm these communications in writing.

We have experienced great difficulty in setting Hearing dates with you. At this time, we are setting the dates of January 25, and 26, 1983, as the dates for the Hearing to be held in Room 350, University Hall, Berkeley, commencing at 10:00 a.m. on the 25th. This is two months from now and provides ample notice so that this long delayed Hearing can go forward. (Underlining added for emphasis.)

Note that a new date for hearing of January 25 and 26, 1983, was now set.

On December 9, 1982, Yearly wrote to Vice President Kendrick complaining among many other things about the January 25 date set for the hearing. He requested a continuance to some time to be agreed upon in the future, and in any event not until Kleingartner had first ruled on his appeal to transfer the case to some campus that was without a College of Agriculture and

until sometime when Bradfield should inform Kendrick he was able to work again.

As if in anticipation of Yeary's next letter, on December 9 Schoonover also dispatched a letter saying among other things:

The hearing is set for January 25 and 26, 1983, as specified in my letter of November 23. The administration will be there and ready to proceed. You will need to be there also, represented by Mr. Bradfield, another representative, or yourself. Your Program Director has assured me that he has placed an extremely high priority on this and has agreed to your adjusting other work commitments to permit keeping this schedule. (Underlining added for emphasis.)

You have requested us to correspond with your representative, Mr. Bradfield, regarding dates and other matters; however, he has hung up on us by phone, and has refused to accept letters. Until he is ready to openly communicate with us, we must deal directly with you. As you have sent the Hearing Committee members copies of your letter of November 22, I am likewise sending them copies of this correspondence.

On December 20, Kendrick responded in no uncertain terms to Yeary's letter of December 9 as follows:

I have received your letter of December 9, 1982, concerning the hearing on your complaint against Judy McConnell, and have discussed it with members of my staff. I find that your letter contains a number of questionable statements to which I will not attempt to respond. Your appeal process has been delayed too long already, and I am not prepared to delay it any further. You and your representative have refused, through your unavailability, to participate in the difficult task of finding dates when all parties involved can attend the hearing.

Accordingly, I am letting stand January 25 and 26, 1983, as the dates for the hearing. As far as your work assignment is concerned, the hearing takes precedence over all others, and, thus, you should plan to cancel, reschedule, or designate someone else to assist the San Luis Obispo Bankers' Short Course which you indicate is scheduled for the same date. In addition, you may need to adjust your schedule prior to that date to have time to prepare for the hearing. (Underlining added for emphasis.)

The sequence of letters set forth are by no means the entire number of exchanges that occurred, nor the entire contents of the letters in each case. They are set forth to the degree and in the fashion they are herein to try to capture the essence of the difficulties that had developed between the individuals acting for the University and Yeary and Bradfield.

On November 1, 1982, the Department of Fair Employment and Housing notified Yeary that their investigation of his complaint was complete and they found insufficient evidence to justify further pursuit of the matter and the case would be closed.

Shortly before the hearing Mr. Yeary retained a lawyer, Mr. Bezemek. Mr. Woods called Mr. Bezemek to ask whether he would be representing Yeary in the grievance scheduled for January 25, 1983, and Mr. Bezemek stated that he was only representing Yeary in his Unfair Practice Charges and stated that Woods should contact Mr. Bradfield. The day before the hearing, January 24, Mr. Woods did reach Mr. Bradfield by

telephone at his home to confirm the hearing for the next day. Bradfield stated that he was not representing Yeary and that Mr. Woods should contact Mr. Bezemek. When Mr. Woods informed Mr. Bradfield that Bezemek had informed him to the contrary, Bradfield said that it didn't matter anyway because the University knew that he couldn't be there. Mr. Woods suggested that when the hearing convened on January 25 that the University would attempt to get a speaker phone hook-up and place a call to Mr. Bradfield so the matter could be straightened out. However, Bradfield refused to give out the telephone number where he would be. Mr. Woods then suggested that Bradfield call the University at the Cooperative Extension offices at 10:15 a.m. and Bradfield said he would attempt to do so.

The hearing took place on January 25, 1983, and on March 3, 1983, the Hearing Committee issued its recommendations. The Hearing Committee found as follows:

Substantial evidence was presented that the University was lenient and reasonable in twice delaying the hearings to allow Mr. Yeary to coordinate his schedule with that of his representative, Mr. Bradfield. It was the committee's belief that after numerous delays related to the illness or absence of Mr. Yeary's representative, that it was not unreasonable to expect the grievant to select an alternative representative, and allow the hearings to proceed. Because of the frequent lack of response to phone calls, messages, and letters on the part of Mr. Yeary and

Mr. Bradfield, it was also reasonable for Mr. Schoonover to attempt to convene the hearing by establishing a firm hearing date.

The evidence presented also indicated that there was a basic uncooperativeness on the part of Mr. Yeary and Mr. Bradfield in their not responding in a timely manner to University attempts to contact them and to jointly establish a hearing date.

On Nov 23, Schoonover, in his liaison role, sent a letter to Mr. Yeary establishing the hearing date as Jan 25 and 26. Vice-President Kendrick, in his Dec 20 letter stated that "... the hearing takes precedence over all others (work assignments)," and in his Jan 20 letter that he expected the hearing to proceed on Jan 25 and 26. The failure of the grievant or his representative to appear at the Jan 25 hearing demonstrates a unique occasion of uncooperativeness on the part of the grievant.

The Hearing Committee unanimously recommended dismissal of Mr. Yeary's second grievance. That recommendation was accepted in March 1983 by Vice President Kendrick.

Yeary's justification for not being available for the hearing on January 25 and 26 was because he had prior commitments which could not be changed. These were the Bankers Short Course on January 25, 1983. This date was not firmly set until sometime after January 1, 1983. The meeting to be held with Mr. Bendixen on January 26, 27 and 28 could have been postponed. There was no compelling reason for it given Yeary's orders from Kendrick to adjust his work to provide for attendance at the hearing.

DISCUSSION

I. Introduction

Section 3571(a) of the Act prohibits discriminatory action against an employee for engaging in conduct protected by the HEERA. In Novato Unified School District (4/30/82) PERB Decision No. 210, the Board set forth the standard by which charges alleging discriminatory conduct under section 3571(a) are to be decided. The Board summarized its test in a decision under HEERA issued the same day as Novato;

. . . a party alleging a violation . . . has the burden of making a showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision to engage in the conduct of which the employee complains. Once this is established, the burden shifts to the employer to demonstrate that it would have taken the same action even in the absence of protected conduct. As noted in Novato, this shift in the burden of producing evidence must operate consistently with the charging party's obligation to establish an unfair practice by the preponderance of the evidence. (California State University, Sacramento (4/30/82) PERB Decision No. 211-H at pp. 13-14.)

The test adopted by the Board is consistent with precedent in California and under the National Labor Relations Act (NLRA) requiring the trier of fact to weigh both direct and circumstantial evidence in order to determine whether an action would not have been taken against an employee but for the exercise of protected rights. See, e.g., Martori Brothers Distributors v. Agricultural Labor Relations Bd. (1981)

29 Cal.3d 721, 729-730; Wright Line, Inc. (1980) 251 NLRB 15005 LRRM1167] enf., inpar
[108 LRRM 2513].⁸

Hence, assuming a prima facie case is presented, an employer carries the burden of producing evidence that the action "would have occurred in any event." Martori Brothers Distributors v. Agricultural Labor Relations Bd., supra, 29 Cal.3d at 730. Once employer misconduct is demonstrated, the employer's action,

. . . should not be deemed an unfair labor practice unless the Board determines that the employee would have been retained "but for" his union membership or his performance of other protected activities. (Ibid.)

It is under this test that the University's conduct will be analyzed.

Section 3565 of HEERA states in relevant part:

Higher education employees shall have the right to form, join and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations and for the purpose of meeting and conferring.

⁸The construction of similar or identical provisions of the NLRA, as amended, 29 U.S.C. 151 et seq., may be used to guide interpretation of the EERA. See, e.g., San Diego Teachers Assn. v. Superior Court (1979) 12 Cal.3d 1, 12-13; Fire Fighters Union v. City of Vallejo (1974) 12 Cal.3d 608, 616. Compare section 3571(a) of the Act with section 8(a)(3) of the NLRA, also prohibiting discrimination for the exercise of protected rights.

To find any of Yeary's actions protected under this section, it must be found that he actively participated in an employee organization, and that the organization existed for the purpose of representation regarding matters of employer-employee relations. See Monsoor v. State of California, Department of Developmental Services (7/28/82) PERB Decision No. 228-S (hereafter Monsoor). Under the Act an employee organization is defined in section 3562(g) as,

. . . any organization of any kind in which higher education employees participate and which exists for the purpose, in whole or in part, of dealing with higher education employers concerning grievances, labor disputes, wages, hours, and other terms and conditions of employment of employees. . .

Taking guidance from the private sector, the Board has interpreted similar language under the State Employer-Employee Relations Act to mean that a given aggregation of employees, to be considered an employee organization, need not be formally constituted, have formal membership requirements, hold regular meetings, have constitutions or by-laws, or in any other manner conform to the common definition of an "organization." Rather, the Board placed the central focus on whether the group has, as a key purpose, the representation of employees on employment-related matters. Monsoor, supra, p. 7. Under this test, the Board observed that even two employees who act in concert to present grievances about cuts in overtime and loss of jobs may be viewed to have constituted themselves an employee

organization because they had joined together to represent employees concerning working conditions. It follows that interfering with even two employees who engage in such activity has the effect of discouraging employees in general from continuing to act in concert through an employee organization. Ohio Oil Company (1951) 92 NLRB 1597 [27 LRRM 1288] cited with approval in Monsoor, supra.

Under this approach, we need not consider the full range of Yeary's activities prior to Bradfield's involvement in the grievance in order to determine that he engaged in the requisite protected activity to satisfy the first step under the Novato test. Yeary's actions with respect to the claim of age discrimination were protected.

The central premise of the HEERA, in accord with the PERB's interpretation of comparable legislation, is that individual action with or on behalf of others is deemed concerted action and therefore entitled to protection, but that conduct less than that, divorced from collective concerns, is protected not by the HEERA, but, if at all, by other legal redress. See, e.g, Baldwin Park Unified School District (4/4/70) PERB Decision No. 92; Grossmont Community College District (3/19/80) PERB Decision No. 117.

Thus, as a general rule, an individual complaint of a personal nature, regardless of justification on the merits,

does not trigger the protections of the HEERA.⁹

Once Bradfield at the urging of other employees entered the picture, however, the question arises of whether Yeary's status under the HEERA changed. At that juncture he was joining with others to pursue the goal of collective representation. Even though CSEA was not an exclusive representative, and thus not certified to engage in collective bargaining, CSEA was free to provide grievance representation in conjunction with Yeary's right to "form, join and participate" in an employee organization efforts.

Unlike his initial activity which is best described as a pursuit of a reversal of his denial of a promotion and wage increase to the benefit of himself only, the ultimate basis of

⁹In contrast, the NLRB has repeatedly ruled that individual activities involving attempts to enforce the provisions of an existing collective bargaining agreement is concerted activity (Interboro Contractors, Inc. (1966), 157 NLRB 1295 [61 LRRM 1537] enf. (CA 2 1967) 388 F.2d 495 [67 LRRM 2083]; B & M Excavating, Inc. (1965) 155 NLRB 1152 [60 LRRM 1466]; Bunney Bros. Constr. Co. (1962) 139 NLRB 1516 [51 LRRM 1532]).

In Alleluia Cushion Co., Inc. (1975) 221 NLRB 999 [91 LRRM 1131], the Interboro rule was extended for the first time to cover situations where there was no collective bargaining agreement in effect and where the employee making the protest was not represented by a collective bargaining agent. In Alleluia, a non-union employer had discharged an employee for writing a letter to the California Occupational Safety & Health Administration complaining about certain alleged safety problems.

his formal University grievance alleged existence became age discrimination as well as his complaint to the California Department of Fair Employment and Housing. This was a concern to fellow employees as well as himself. Thus, Bradfield's involvement in Yeary's grievance as an employee organization (CSEA) representative and activist as well as the collective purpose of the basis of the grievance, insure that the pursuit of the grievance was protected activity, as was his complaint to the Department of Fair Employment and Housing.

That Yeary's resort to the grievance machinery of the University as well as the filing of a complaint with the Fair Employment and Housing Department of the State of California was a protected activity is not a contested legal issue by the Respondent. That the employer, as Respondent, knew of these actions is also not a disputed issue.

Even if Yeary's activity prior to the date of filing the grievance was protected activity as urged by Yeary's attorney, the record in relation to Schoonover's processing of the first steps gives no support to Yeary's claim of interference or reprisal for resort to grievance machinery or denial of access to the process. In short, it would fail to support a prima facie case. The evidence shows Schoonover did nothing other than attempt to aid Yeary in seeking a solution at the lowest level and clarifying the nature and basis of the appeal. He also used persuasive power as his staff position availed him to

get people in line positions to respond as required, including appropriate responses from the personnel department staff to Yeary's request for information from Yeary's file.

From this point on, there appears to have occurred a comedy of procedural process. The University on its part became determined to bring the grievance to a hearing and Yeary and his representative seemed clearly determined to avoid a hearing on the merits. If this also provoked the University to procedural error, so much the better. That the Charging Party's representatives consider the University's internal appeal/grievance process and the University's administration thereof incapable of providing a true due process similar to a bilaterally negotiated and independently administered process is quite apparent. It may also be true. However, that is what it is and no more. Given the gigantic and bifurcated nature of the University structure, given its propensity to indulge in apparent autonomy of its many segments and the classic bureaucratic administrative structure that almost of necessity results, the administration of the internal appeal system seems to almost fall of its own weight. Certainly, faced with a skilled and determined adversary, it almost strangled in this case.

The PERB's responsibility in examining its operation in the light of the basis of this unfair practice complaint is not to attempt to make the process better than it is. It is to

determine whether there was retaliation or intimidation or reprisals against an employee who invokes the process. It is not to review procedural errors or the result.

Specifically relative to this case, the Board's responsibility is to protect the employee's right, protected by the Act, to resort to the procedure. It protects the right to have representation of the employee's choice in the process. As a necessary collaring thereof, it protects the right of fellow employees to testify without fear of reprisal or discrimination.

On January 18, 1984, Yeary testified to the effect that:

"On October 29, 1981 Yeary's immediate supervisor Bill Wood telephoned him. Yeary said Wood told Yeary that the "administration was mad as hell that [he] had filed a complaint with a state agency . . ." and that if Yeary "didn't withdraw the complaint, that it was unlikely that [he] would get any hearing of any kind at all since [the] administration had been so upset over filing a grievance with the state agency" and that it was in Yeary's "best interest to withdraw it."

He further testified that on November 11, 1981, at a conference they both attended in Fresno that the following took place:

"Mr. Wood said that administration was still mad as hell that I had filed the State complaint. He said that he had talked to administrators and had seen correspondence related to this matter, that he felt that speaking for administration I should withdraw the complaint to avoid adverse action against me. He said that if I would withdraw the complaint, administration would then consider some sort of informal

administrative hearing relative to my University of California grievance, but that if I did not withdraw it, it was unlikely there would be any hearing of any kind at all. He said he would not testify against me at a meeting, that he had in the past written some favorable letters that were supportive of me. I told him that I had learned from my experience to date that I could not trust some of the administrators. Mr. Wood suggested that if I reached any accommodation with administration relative to the promotion matter that I should be sure and get it in writing. And I assured that I would only exchange a withdrawal of grievances and complaints for a written promise of favorable action relative to my promotion."

If this was an accurate description of what was said, it may constitute a violation of the Act as a threat.

Even if we credit Yeary's version of the words said by Wood to Yeary on either or both occasions, i.e. October 29 and November 11, 1981, more than six months passed before the filing of the first unfair practice charge herein on June 10, 1982.

The Act expressly provides that no complaint by the PERB shall issue on a charge filed more than six months subsequent to the conduct alleged to constitute the unfair practice.¹⁰ **10**

¹⁰See in relevant part section 3563.2(a):

Any employee, employee organization, or employer shall have the right to file an unfair practice charge, except that the board shall not issue a complaint in respect of any charge based upon an alleged unfair

In this case, the Respondent has properly raised the defense of this statute of limitations contained in the Act in its answer and on the record in the hearing. No exceptions that would appropriately toll the statute would appear to apply nor are any urged by the Charging Party. Acts before December 10, 1981, are not properly a part of the charge and complaint.

The fact that the substance of what Yeary testified to in re the nature of statements made by Wood on October 29, 1981, and November 11, 1981, did not appear in any of the several charges filed by Yeary through October 29, 1982, is further cause for concern in relation to the statute of limitations. These pleadings together with Respondent's answer thereto establish the factual issues to be dealt with at the formal hearing and the legal and factual issues to be disposed of herein. The threatening nature of the alleged statement by

practice occurring more than six months prior to the filing of the charge; . . .

See also in relevant part California Administrative Code, title 8, part III, section 32620(b)(5):

(b) The powers and duties of such Board agent shall be to:

.

(5) Dismiss the charge or any part thereof as provided in Section 32630 . . . if it is determined that a complaint may not be issued in light of Government Code sections . . . 3563.2.

. . .

Wood also did not appear in the pretrial statement of the Charging Party; indeed Wood was not even proposed as a witness by either party. Thus while the complaint was allowed (over objection of Respondent) to be amended at the hearing on January 18, 1984, to conform with the testimony of Yeary, this did not mean that the statute of limitations defense was disposed of by the ruling. Indeed, the fact that an alleged threatening characterization of the Woods/Yeary conversations on October 29, 1981, and November 11, 1981 was first made known to the Respondent on January 18, 1984, during the course of the hearing, makes the statute of limitations defense, if anything, even more relevant and would make my failure to find it a bar even more prejudicial to the statutory due process rights of Respondent.¹¹

The third amendment to the charge filed on October 29, 1982, cuts off the acts alleged to be unlawful as of that point in time. Conduct occurring thereafter was admitted and will be considered in so far as it goes to support the Charging Party's point of view that what followed is further proof of Respondent's overall unlawful motive and intent and/or to the Respondent's view that it illustrates and confirms the Charging Party's intended dalliance and avoidance of a hearing on the merits that caused the alleged unlawful acts.

¹¹ See Regents of the University of California (UCLA) (12/21/82) PERB Decision No. 267-H and Monrovia Unified School District (12/13/84) PERB Decision No. 460.

Of more interest is what light, if any, the testimony and other evidence shed on the motives, as lawful or unlawful, of the University participants in these contacts with Yeary as they relate to subsequent events which occurred within the six-months statutory period.

For this purpose, it is useful to determine the facts as best we can of what occurred on October 29 and November 11, 1981. This requires credibility findings of the testimony of Yeary and Bradfield.

In dealing with the credibility of Yeary, cf: Wood as to events of October 29, 1981 and November 11, 1981, I go first to the written evidence and pleadings. They were perpetuated in written form at a time much closer to the events in question. The first document in point of time is a portion of the Yeary letter of November 2, 1981, to Schoonover which characterized the phone conversation with Wood of October 29, 1981, as follows:

In a recent telephone conversation with Program Leader Bill Wood, it was suggested that I should have a go-between or intermediary. It is my belief that administration held this point of view. Bill very kindly offered to serve as that person. However, my feeling is that I do not want yet another Cooperative Extension employee to be involved and I will seek out someone outside of Cooperative Extension to serve in this role. That person can deal with the remedy and other matters.

Yeary filed his first discrimination complaint with the State Department of Fair Housing and Employment on September 29,

1981, before the events in question. However he filed two subsequent complaints, both dated January 7, 1983, in which he claimed retaliation for filing the grievances in question herein and an amendment thereto claiming discrimination for filing a complaint with the Department of Fair Employment and Housing. Neither sets forth the alleged facts as testified to by Yeary or indeed refers to the events of October 29 or November 11 at all. This strongly supports the conclusion that if the two conversations occurred as claimed by Yeary they would have been referenced in the later documents.

Next in time would be the charge and several amended charges filed herein as the basis for this unfair practice complaint. Yeary's charges make no mention of an October and November 1981 conversation with Wood. In his amended unfair practice charge filed June 29, 1982 Mr. Yeary alleges:

During March of 1982, complainant's then direct supervisor, Mr. William Wood, asked him to withdraw his complaint to the state government concerning discrimination, to withdraw his request for a hearing under University rules, and submit the matter administratively, meaning that he should simply write a letter to Vice President

. . .

In his second amended unfair practice charge filed October 23, 1982, Yeary alleges that:

During the spring of 1982 complainant's supervisor Bill Wood commented to the complainant that he would be better off to drop the discrimination charges and proceed administratively by letter. . . .

These statements bear no resemblance to the threat that Yeary testified to on January 18, 1984. Yeary, however, insists that the statements in the unfair practice charges refer to the same conversation he had with Wood in October and November 1981. What is the reason for the difference in characterization? Yeary states that Mr. Bradfield prepared the unfair practice charges and evidently got the date wrong. More important, they did not mention a threat or contain any description that could be construed as one. Yeary also admits that the statements in the unfair practice charge do not mention a "threat". They do fit the conversations as described by Wood.

The explanations of Bradfield are even less credible. Essentially, he faults the word processing equipment used in preparation of the charge for the accidental failure of the alleged facts to appear. Indeed, they do him little service in other areas of his testimony as well where credibility is important to establish Yeary's case. This is especially so since so many of the continuances, delays, claimed lack of notice, lack of agreement and alleged inability to appear that are critical to each parties position depend on whether you credit the witnesses for the University or Bradfield and Yeary.

Both Yeary and Bradfield failed to appear at the scheduled hearing before Kennedy on April 5 on the age discrimination appeal. Yeary and Bradfield knew the hearing was scheduled for

that date prior thereto. They apparently elected to object to any adverse results that might occur after the fact. Bradfield had already filed his objections to Kennedy's authority to act prior thereto. The hearing opened and McConnell moved to dismiss for Yeary or Bradfield's failure to appear. McConnell in response to Kennedy's questions gave Kennedy the background of the procedural steps to date and of the steps taken by both McConnell and Schoonover to notice Yeary and Bradfield of the hearing date. Hearing Officer Kennedy questioned his authority under all the circumstances to dismiss and suggested instead that first the question of the appropriateness of his continuing in the matter as hearing officer be resolved by Kleingartner since it had been raised by Bradfield that he did not meet the criteria of employee status with the University.

Charging Party objects to the fact that McConnell moved to have the grievance dismissed at this point. Since the motion was unsuccessful and since the Charging Party was not prejudiced thereby, it was clear before the date as she had warned Bradfield she would seek such a remedy if he failed to appear. They had obviously reached a point where each was testing the other over the disputed hearing date. Bradfield had been able to avoid each one, relying instead on procedural objections and appeals founded on actual or perceived procedural errors.

This process was to be repeated on at least two more occasions in the first Yeary grievance and later in the second Yeary grievance.

The testimony does not indicate, as Yeary alleges, that later in the process, before Hearing Officer Gross he was forced to fire the counsel of his choice. As I read the testimony, when Bradfield appeared before the hearing officer on May 27, 1982, he claimed surprise that the University had elected to change their representative from McConnell to Glenn Woods. Bradfield said he was not an attorney.¹²

He claimed he would be at an extreme disadvantage with the University having an attorney and stated, "so therefore we are asking for a continuance so that he (Yeary) may obtain legal representation and be on an equal footing."

Mr. Bradfield, in response to Glenn Woods direct question, conceded he did not feel competent to represent Yeary as against Woods' representation of the University.

Mr. Woods was obviously concerned as to what position to take in relation to opposing or agreeing to the continuance requested. He was concerned with getting this case finally to hearing. Now one more objection had been raised in support of a request for a continuance. Mr. Bradfield was in fact a graduate of Boalt Hall. Was this just a pretext to justify

¹²While he had a law degree from U.C.'s Boalt Hall Law School, he had not been admitted to the Bar or practiced law.

more delay? Mr. Bradfield was reluctant to say he could no longer represent Yeary. Yeary was present but Bradfield said Yeary would have to make that decision. He consulted with Yeary. The Hearing Officer was also concerned and questioned Bradfield on the record. Mr. Woods took the position that he would agree to the continuance on condition that Yeary would in fact go out and obtain a lawyer to represent him. Bradfield and Yeary both knew the condition that would be required if the University's attorney was to agree to the continuance and not oppose it. Yeary obviously knew the situation. Bradfield's answer to the Hearing Officer was in essence an acceptance of the terms. They could have accepted the condition or rejected it. In response to the hearing officer's question, "Is that what you propose Mr. Bradfield," Bradfield's answer was:

Mr. Yeary and I have discussed this as you had asked us to do, and I have advised Mr. Yeary that based on the combination of the fact that we do not have the records that I feel that we need and the question also of legal training, that my advice to him would be to do essentially what Glenn just stated, and that is, that he should consider two things; that if he wants a continuance, that it should be on the basis that he will be represented by a member of the Bar of the State of California, and that he should start looking as promptly as he can, and that when he obtains that counsel, that I will step down, provide my records to his new counsel, and that under no circumstances would I represent him in the continuation of this grievance, and Mr. Yeary has agreed to that. (Underlining added for emphasis.)

Bradfield obviously avoided as long as he could stating that he wanted a continuance so Yeary could obtain an attorney. He tried to hedge instead and say only that he wanted a continuance so Yeary could have time to consider whether he should obtain an attorney. Yeary, on his part, never did obtain an attorney once the continuance was granted. While he testified he made efforts to do so, his testimony in this regard is not at all persuasive. He could not give the names of any attorneys he contacted. He gave as his reason for not being able to obtain an attorney that all of those he contacted indicated they felt he should first obtain all the information he had requested from the University before he came in to further discuss the case. This to me is not credible. If there was a question about the need for additional records, it is far more likely that at least one or more of the attorneys he contacted would have considered the obtaining of it through available legal processes from a reluctant defendant, a natural and common part of their representation of the client. It is much more believable and likely that Yeary himself imposed that condition on his proceeding further in seeking legal representation and so stated in conversations he had with attorneys. This would have been consistent with Bradfield and Yeary's position throughout the University's frustrated attempts to bring the case to hearing or otherwise dispose of it.

It is even plausible that Yeary had no intention or made no effort to seek legal representation, preferring instead that the University proceed without his presence on the date to which the matter had been continued as support for his position that he was denied a hearing. What other explanation better explains his failure to appear at the time and place previously set? If he was sincere, why would he not have appeared and stated his position and make his case of inability to obtain representation to the hearing officer on the record to rule upon? His explanation that he considered the date as simply tentative is not credible. It is more reasonable that he, or at least Bradfield (who was still advising him), understood that the use of the term tentative related to the hearing officer's recognition that upon his obtaining counsel, the attorney selected not having been present when the date was set might have calendar conflicts which would have to be considered. This is the commonly accepted use and meaning of the term when used in such proceedings.

Woods' concern was that the request for a continuance, in so far as it was based on Bradfield's alleged concern as to his competence was a sham, but faced with Bradfield's statement that he did not feel qualified, Woods was between the proverbial rock and a hard place. If Woods insisted on the Hearing Officer going forward, Yeary could have proceeded and, given past objections, would have likely claimed he was prejudiced. He elected not to oppose the request for

continuance but did so only conditionally. It was one which would test how serious they were about the stated basis of the request. The proposed condition was agreed to voluntarily by Bradfield and Yeary. The hearing officer granted the continuance and included the condition. This does not indicate to me that Yeary was deprived of his representative of choice. On the contrary, he elected to seek other representation as the condition of the hearing officer granting yet another continuance in a grievance matter that had already run too long. It was a case in which to date no scheduled hearing had been able to deal with other than procedural issues. The case to that date had run well beyond the normal processing time lines. The hearing officer was justifiably concerned about further delay.

The University's conduct was reasonable in regard to its position given the preceding events and doesn't support a prima facie case of a violation of Yeary's rights.

Dr. Jolly had one contact with Yeary and two contacts with Bradfield prior to scheduled hearings on Yeary's first grievance. Dr. Jolly testified as to these discussions. The essence of these discussions was his willingness to testify as to the deliberations and recommendations of the Ad Hoc Committee in reviewing Yeary's application for promotion. It was clear from the first conversation with Yeary that if he did testify he would be a reluctant witness at best. The basis of his reluctance to appear to me is more typical of a person who

would prefer not to get involved in a potentially awkward and embarrassing personnel matter than one who felt threatened or intimidated should he appear. He was concerned in his own mind about the appropriateness of testifying in regard to the review committee deliberations. It was Dr. Jolly who elected to call Schoonover and ask if there was a policy in regard thereto. He was referred to Glenn Wood, an attorney on the General Counsel's staff assigned to this case. Glenn Wood told him the University's policy was that such deliberations were confidential. There is no question that this was the University's policy. Whether it was binding or enforceable as against Jolly or other academics is not the question, but rather the question is did the University exercise such a claim in this case to unlawfully interfere with Yeary's employee or organization rights guaranteed by the Act. There is no evidence that this was the case. Nor is there evidence that the policy was applied discriminatorily dependent upon the nature of, or University's stake in the particular case.

Dr. Jolly sought advice, was given the advice and elected not to make himself available. The ultimate reason he chose not to testify was a feeling he best described as that Bradfield was attempting "to manipulate him." Given his demeanor on the witness stand, his straightforward and apparent frankness, I credit his testimony as to the conversations with Bradfield and Yeary where they conflict.

While it is true that an unlawful motive may be inferred from the outright failure or refusal to process grievances, that is not what happened here. The University did not fail or refuse to process Yeary's grievances. It simply took positions different from those taken by Yeary and Bradfield. These included issues involving appointment of hearing officers, qualifications of hearing officers, supplying of information, the confidential nature of certain committee actions, setting and continuing hearing dates and urging grounds for dismissal. In response to these differences Yeary elected to take appeals through established and non-established procedures to higher levels in the systemwide hierarchy. The grievances were eventually disposed of by a hearing officer or hearing panels in the light of Yeary and Bradfield's failure to appear or proceed in a timely fashion.

The ultimate dismissal of both grievances was not, in my view, due to or evidence of unlawful motive or an attempt to retaliate against the grievant for exercise of protected conduct. Nor does the evidence show a denial of Yeary's access to the process.

Based on the foregoing, I am unable to infer an unlawful motive from the manner in which the University responded to the grievances filed by Yeary. Although there were many issues raised by Yeary and Bradfield, in almost all instances the University's responses were at least arguable. In many other

instances, the University's positions were clearly correct. There were only a few examples, as have been noted where the University took questionable positions. Given the totality of the University's responses, it would be patently unreasonable to infer an unlawful motive because on a few occasions its position may have been erroneous. Similarly, Yeary was not denied recourse to the appeal hearing process. He elected not to participate unless all the information requested by him was received prior to a hearing. He was unwilling to seek the position and/or order of the hearing officer on the matter. He was unwilling to appear at a hearing where evidence on the merits could have been considered and both he and his representative made themselves unavailable to attend the hearings. Indeed they frustrated the University's attempts to give them notice and in several situations waited to the last possible moment to give the University notice of their objections to the grievance and hearing procedure to that date.

The disposition of dismissal that occurred in both cases was the result of a deliberate and intentional course of action by Yeary and Bradfield designed to frustrate the setting and/or holding of hearings on the merits.

Under the Novato test it is clear that thereafter Yeary's access to the grievance procedure and the filing of an age discrimination complaint was protected activity.

Assuming that various alleged procedural deficiencies in the processing of the grievance were harmful of the grievant's exercise of protected activity, the Charging Party must show a nexus between the protected activity and the employer's action against the employee. Nexus essentially is motivation. Was the processing and ultimate dismissal of Yeary's two grievances the result of unlawful motivation on the part of those acting on behalf of the University (*i.e.*, discrimination against him because of his having engaged in protected activity)? There is no credible evidence to support such a conclusion. Failure to establish this, Yeary's case fails to state a prima facie case.

Or was the ultimate dismissal of Yeary's grievances the result of his own conduct?¹³

¹³See ¹³Cerritos Community College (10/14/80 PERB Decision No. 141. In this case a part-time instructor and employee organization activist (whose activity was known to the employer) job performance was evaluated. The evaluators determined the instructor had problems in getting along with other personnel including his department chairperson. The division chairperson assigned to evaluate him found that the instructor avoided him, and when he finally managed to contact him, determined that he exhibited a hostile and aggressive attitude. The evaluator expressed concerns about the instructor's inability to get along. The instructor was not rehired. In upholding the hearing officer's dismissal of the charge, the Board wrote:

Here the Charging Party failed to establish the requisite nexus between (the instructors) non-retention and his organizational activities. Therefore we affirm the hearing officer's dismissal of the unfair practice charge in this case.

Yeary failed to appear at the hearing of January 25, 1983, on the McConnell grievance, claiming program conflicts.

It seems to me that when the Vice President of the University having overall responsibility for the extension service program makes a decision that the hearing on a grievance should take priority over other program responsibilities of Yeary, including his participation in the Bankers Short Course, it is clear where the priorities of the employee should be. Whether Yeary's own actions created the conflict or not is not the question, though it certainly would bear on Yeary's motives. There certainly is some evidence that he encourages the key participants to express their concern as to the conflict in dates.

Yeary chose not to attend the scheduled hearing on January 25 and the hearing committee recommended dismissal. This action was then adopted by Kendrick.

CONCLUSIONS

In both the Siebert/Rowe grievance and the McConnell grievance, Yeary chose to avoid a hearing on the merits by failure to appear except on his own terms. He chose not to place the issue of failure to receive requested information before the hearing officer who could have made an order for its production, if appropriate. He elected over and over again to put procedural obstacles in the path of moving the cases forward. If they were ultimately dismissed it was the result of his own tactics.

By analogy, under different rules but similar concepts of procedure, the PERB sustained an administrative law judge's dismissal because of a charging party's failure to appear using words particularly appropriate to the fact situation present in this case. See Gust Siamis v. Los Angeles Unified School District (12/18/84) PERB Decision No. 464 where the Board said in relevant part:

Moreover, once a case is set for hearing, neither party can unilaterally determine that the date is inappropriate or that he doesn't like certain procedural rulings and therefore fail to appear. By his unjustified failure to appear on two days of scheduled hearing, Mr. Siamis prevented the presentation of his case in addition to inconveniencing his own witnesses and the District. In exercising the discretion vested in the Administrative Law Judge, in order to regulate the conduct of the hearing, it is determined that dismissal is the appropriate result.¹⁴

¹⁴By analogy in support of the same principal in the present case, see also:

. . . a court could exercise its discretion and dismiss the action pursuant to either subsection 3 or 4. (See generally, O'Day v. Superior Court (1941) 18 Cal.2d 540; Campbell v. Security Pacific National Bank (1976) 62 Cal.App.3d 379; Souza v. Capital Co. (1963) 220 Cal.App.2d 744.) Moreover, in Souza and in Union Bond and Trust Company v. M and M Wood Working Company (1960) 179 Cal.App. 2d 673, the Courts of Appeal noted that the power of a trial court to dismiss actions for failure to prosecute is not contingent upon statute but derives from the court's inherent power of control over its proceedings. (Cited with approval by PERB in Siamis (supra) in comparing a similar quasi-judicial proceeding before the PERB.)

As further evidence of Charging Party's desire to delay the process and frustrate the proceedings is the Motion to Reopen the Record filed on September 6, 1984. The Motion if granted would open the record to receive evidence on a collateral matter that allegedly would serve to impeach a witness. The Motion is not only totally unconvincing but the connection between the question and answer quoted and the proffered letters is tenuous and far fetched. Charging Party's Motion to Reopen the Record and for a Protecting Order is therefore dismissed as is the entire charge and complaint.¹⁵

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in the case, it is hereby ordered that the unfair practice charge and companion complaint against the Regents of the University of California are hereby DISMISSED.

Pursuant to California Administrative Code, title 8, part III, section 32305, this Proposed Decision and Order shall become final on February 4, 1985, unless a party files a timely statement of exceptions. In accordance with the rules, the statement of exceptions should identify by page citation or exhibit number the portions of the record relied upon for such

¹⁵The material offered in support of the motion will therefore not be accepted into the record of the case, but will be maintained in a separate sealed envelope should the material become relevant at some time in a review hereof.

exceptions. See California Administrative Code title 8, part III, section 32300. Such statement of exceptions and supporting brief must be actually received by the Public Employment Relations Board at its headquarters office in Sacramento before the close of business (5:00 p.m.) on February 4, 1985, or sent by telegraph or certified United States mail, postmarked not later than the last day for filing in order to be timely filed. See California Administrative Code, title 8, part III, section 32135. Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall be filed with the Board itself. See California Administrative Code, title 8, part III, sections 32300 and 32305.

Dated: January 15, 1985

WILLIAM P." SMITH
Administrative Law Judge