

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



NING-PING CHAN,)
)
 Charging Party,) Case No. SF-CO-36-H
)
 v.) PERB Decision No. 1062-H
)
 UNIVERSITY COUNCIL - AMERICAN)
 FEDERATION OF TEACHERS,) October 13, 1994
)
 Respondent.)
 _____)

Appearances; Ning-Ping Chan, on her own behalf; Leonard, Carder, Nathan, Zuckerman, Ross, Chin and Remar by Margot A. Rosenberg, Attorney, for University Council - American Federation of Teacher\s.

Before Caffrey, Garcia and Johnson, Members.

DECISION

GARCIA, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Ning-Ping Chan (Chan) of a Board agent's dismissal (attached) of her unfair practice charge. Chan filed the unfair practice charge on April 7, 1994, alleging that the University Council - American Federation of Teachers (UC-AFT) violated its duty of fair representation in handling a grievance for Chan. This conduct was alleged to violate section 3571.1 of the Higher Education Employer-Employee Relations Act (HEERA).¹ After investigation,

¹HEERA is codified at Government Code section 3560 et seq. Unless otherwise indicated, all statutory references are to the Government Code. Section 3571.1 states, in pertinent part:

It shall be unlawful for an employee organization to:

the Board agent dismissed, the charge for failure to state a prima facie violation of HEERA.

The Board has reviewed the entire record, and we hereby affirm the Board agent's dismissal.

JURISDICTION

The Board has jurisdiction because: (1) Chan is an employee and UC-AFT is an employee organization as defined in HEERA, and (2) Chan's allegations were timely filed as unfair practice charges.

CHAN'S REQUEST FOR REVIEW OF DISMISSAL

On June 13, 1994, Chan filed a "request for review" of the dismissal. That letter refers to filing an "appeal" but fails to identify the "specific issues of procedure, fact, law or rationale to which the appeal is taken" as required by PERB Regulation 32635 (a).²

(e) Fail to represent fairly and impartially all the employees in the unit for which it is the exclusive representative.

²PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq. PERB Regulation 32635(a) reads, in pertinent part:

The appeal shall:

(1) State the specific issues of procedure, fact, law or rationale to which the appeal is taken;

(2) Identify the page or part of the dismissal to which each appeal is taken;

(3) State the grounds for each issue stated.

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DISCUSSION

The warning and dismissal letters demonstrate that the Board agent performed a thorough review of the pertinent details, and followed the relevant PERB precedent to correctly conclude that Chan failed to allege a prima facie case of a HEERA violation.

ORDER

The Board hereby AFFIRMS the Board agent's dismissal of the unfair practice charge in Case No. SF-CO-36-H.

Members Caffrey and Johnson joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD



San Francisco Regional Office
177 Poet Street, 9th Floor
San Francisco, CA 94108-4737
(415) 557-1350



May 27, 1994

Ning-Ping Chan

Re: **DISMISSAL OF UNFAIR PRACTICE CHARGE/REFUSAL TO ISSUE
COMPLAINT**

Ning-Ping Chan v. University Council - American Federation
of Teachers
Unfair Practice Charge No. SF-CO-36-H

Dear Ms. Chan:

The above-referenced unfair practice charge, filed on April 7, 1994, alleges, inter alia, that the University Council - American Federation of Teachers (UC-AFT) breached its duty of fair representation to Ning-Ping Chan regarding a grievance concerning her years of professional service at the University of California at Berkeley (University). This conduct is alleged to violate Government Code section 3571.1 of the Higher Education Employer-Employee Relations Act (HEERA).

I indicated to you, in my attached letter dated May 18, 1994, that the above-referenced charge did not state a prima facie case. You were advised that, if there were any factual inaccuracies or additional facts which would correct the deficiencies explained in that letter, you should amend the charge. You were further advised that, unless you amended the charge to state a prima facie case or withdrew it prior to May 26, 1994, the charge would be dismissed.

On May 24, 1994, you filed a letter pointing out the factual inaccuracies in my May 18, 1994 letter and raising arguments supporting the issuance of a complaint. Those matters which are pertinent to the case will be summarized below.

The May 18, 1994 letter states that the University informed Chan in October 1992 that she would not be receiving a three-year appointment. Chan points out that the University did not inform her of this in October 1992. The one-year appointment which she accepted around that time was a position which the department urgently needed to fill. Chan accepted the position out of loyalty and did not question then the University's failure to grant her a longer term appointment. Chan assumed that the one-year position would be followed by a "long term position." She now asserts that the University attempted to manipulate Chan into accepting the one year position in order to aid its plan to deny her a three-year appointment. Chan also assumed that by granting

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the one-year appointment the University had "implicitly" performed the performance evaluation that the Memorandum of Understanding (MOU) requires as a condition precedent to receiving a three-year appointment.

In addition, Chan argues that the University withheld the basis for its calculation of her years of service until it responded at Step III of the grievance on October 14, 1993. On this basis, she alleges that UC-AFT was not faced with a timeliness problem -- the grounds on which UC-AFT declined Chan's request for arbitration. However, there is no evidence that UC-AFT ignored a meritorious argument for timeliness based on the October 14, 1993 date, or if it did, that it did so for arbitrary, discriminatory or bad faith reasons.

The May 18, 1994 letter states that the charge fails to indicate how UC-AFT representative Gross' decision to skip Steps I and II of the grievance procedure harmed the preparation of Chan's case. Chan argues that Gross' election to forego Steps I and II of the grievance procedure deprived her of the opportunity early on to confront and refute the University's reasons for denying her service credit in certain disputed classifications.

The May 18, 1994 letter states that the difference between Chan's and Gross' calculation of years of service did not appear to be crucial to the success of the grievance since Gross' incorrect calculation resulted in more than the necessary six years of service. Chan asserts that Gross presented Chan with her calculation of the service credit five minutes before the Step III meeting and included a 0.5 year of service in the title of "Acting Instructor" which should not have been included. Because this calculation was not supported by MOU language, the University refuted this amount of time and, as a consequence, Gross' calculation of 6.33 years, without the 0.5 year credit, fell below the minimum six-year requirement. Had Gross included service in those titles which Chan sought to include, the six-year requirement would have been met. Thus, the difference between Gross' calculation and Chan's calculation was material to the outcome of the hearing. Chan further asserts that the propriety of including the service comprising Chan's calculation "is not subject to differences of opinion." Chan insists that the MOU, to which Gross failed to refer in the Step III meeting, irrefutably establishes her eligibility. However, Chan does not include the language of the MOU proving this. She also does not explain how UC-AFT could have avoided the timeliness problem in arbitration based on an argument establishing an earlier date of accumulation of the six years (incorporating those periods of service which Chan believes Gross should have included), as explained by Ed Purcell in his December 6, 1993 letter, wherein

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UC-AFT declined Chan's request for arbitration. Purcell noted that an earlier date of accumulation would have put Chan on notice of the contract violation at yet an earlier date, causing an even greater lapse of time between the violation and the filing of the grievance.

The May 18, 1994 letter states that the charge fails to specify the grounds for concluding that UC-AFT breached its duty of fair representation with respect to a potential grievance alleging retaliation for Chan's union activities. Chan asserts that the University retaliated, and continues to retaliate, against her for union activity in violation of the MOU and that UC-AFT chose to ignore her meritorious grievance as to this matter. The University's retaliation was making a "fraudulent claim" that she had "accumulated 5.5 years of service by December 1991" and suggesting that "she should quietly leave." No date is given as to when the University made this fraudulent claim or when Chan requested, and UC-AFT refused, to process the grievance based on this conduct. Chan's letter appears to indicate that the University's fraud occurred following a break in service which ended on October 31, 1992, which would make any allegation of a breach of a duty of fair representation untimely. (Gov. Code, sec. 3563.2(b).) No additional information is provided to establish that UC-AFT refused to process a meritorious grievance based on retaliation for arbitrary, discriminatory or bad faith reasons.

The May 18, 1994 letter states that the charge lacks evidence that UC-AFT's refusal to arbitrate Chan's years-of-service grievance was "without a rational basis or devoid of honest judgment." Chan asserts that UC-AFT's decision to decline to take her case to arbitration was compelled by Gross' earlier "bad faith conduct" in representing her at Step III. She claims that it is improbable that Gross' conduct, involving a list of factors not repeated here, would suggest an honest or good faith handling of her grievance. She also contends that Gross' conduct implies that Gross engaged in complicity with the University to maintain its fraudulent calculation of her years of service.

The May 18, 1994 letter states that the charge lacks evidence concerning UC-AFT's improper withholding of evidence. Chan claims that the University's conduct, including its October 14, 1993 calculation of her years of service, its advertising of a vacancy to teach a course for which she was qualified to teach, and its failure to offer her a position, constitute a continuing violation of the provisions regarding post-six-year appointments. She claims that UC-AFT must know of a legal precedent that would avoid the timeliness problems with the years-of-service grievance, based on a continuing violation theory or on Chan's

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failure to discover the University's basis for calculating her service credit until its October 14, 1993 letter.

The undersigned has considered the foregoing facts and arguments and concludes that they fail to demonstrate that UC-AFT failed to pursue a meritorious grievance for arbitrary, discriminatory or bad faith reasons involving either a contract violation of Chan's right to a post-six year appointment or retaliation for union activities. The additional evidence does not establish that UC-AFT ignored, for arbitrary, discriminatory or bad faith reasons, a meritorious argument that Chan's years-of-service grievance was timely. Gross' alleged misconduct is not shown to have necessarily compelled Purcell's decision to reject the grievance nor demonstrate that UC-AFT breached its duty by forfeiting a meritorious grievance as a result of failing to make certain arguments at Steps I, II, and III of the grievance procedure.

Therefore, I am dismissing the charge based on the facts and reasons set forth above and in my May 18, 1994 letter.

Right to Appeal

Pursuant to Public Employment Relations Board regulations, you may obtain a review of this dismissal of the charge by filing an appeal to the Board itself within twenty (20) calendar days after service of this dismissal. (Cal. Code of Regs., tit. 8, sec. 32635(a).) To be timely filed, the original and five copies of such appeal must be actually received by the Board itself before the close of business (5 p.m.) or sent by telegraph, certified or Express United States mail postmarked no later than the last date set for filing. (Cal. Code of Regs., tit. 8, sec. 32135.) Code of Civil Procedure section 1013 shall apply. The Board's address is:

Public Employment Relations Board
1031 18th Street
Sacramento, CA 95814

If you file a timely appeal of the refusal to issue a complaint, any other party may file with the Board an original and five copies of a statement in opposition within twenty (20) calendar days following the date of service of the appeal. (Cal. Code of Regs., tit. 8, sec. 32635(b).)

Service

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding, and a "proof of service"

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must accompany each copy of a document served upon a party or filed with the Board itself. (See Cal. Code of Regs., tit. 8, sec. 32140 for the required contents and a sample form.) The document will be considered properly "served" when personally delivered or deposited in the first-class mail, postage paid and properly addressed.

Extension of Time

A request for an extension of time, in which to file a document with the Board itself, must be in writing and filed with the Board at the previously noted address. A request for an extension must be filed at least three (3) calendar days before the expiration of the time required for filing the document. The request must indicate good cause for and, if known, the position of each other party regarding the extension, and shall be accompanied by proof of service of the request upon each party. (Cal. Code of Regs., tit. 8, sec. 32132.)

Final Date

If no appeal is filed within the specified time limits, the dismissal will become final when the time limits have expired.

Sincerely,

ROBERT THOMPSON
Deputy General Counsel

By _____
DONN GINOZZI
Regional Attorney

Attachment

cc: Margot Rosenberg

PUBLIC EMPLOYMENT RELATIONS BOARD



San Francisco Regional Office
177 Post Street, 9th Floor
San Francisco, CA 94108-4737
(415) 557-1350



May 18, 1994

Ning-Ping Chan

Re: **WARNING LETTER**
Ning-Ping Chan v. University Council - American Federation
of Teachers
Unfair Practice Charge No. SF-CO-36-H

Dear Ms. Chan:

The above-referenced unfair practice charge, filed on April 7, 1994, alleges, inter alia, that the University Council - American Federation of Teachers (UC-AFT) breached its duty of fair representation to Ning-Ping Chan regarding a grievance concerning her years of professional service at the University of California at Berkeley (University). This conduct is alleged to violate Government Code section 3571.1 of the Higher Education Employer-Employee Relations Act (HEERA).

Investigation of the charge revealed the following. Ning-Ping Chan began teaching Chinese at the University of California at Berkeley in the fall of 1971. Over the next twelve or more years, she taught Chinese for at least 18 quarters in the East Asian Languages Department. This service qualified her for the benefits under the Memorandum of Understanding (MOU) for the bargaining unit of non-Senate instructors, represented by the UC-AFT. During a portion of this instructional time she was also pursuing an advanced degree.

On September 17, 1991, Chan filed a grievance under the UC-AFT MOU after she was notified that her medical benefits coverage had lapsed due to a break in service. The charge does not indicate how this grievance concluded.

Sometime in approximately October 1992, the University also informed Chan that she would not be receiving a three-year appointment because she had only 5.5 years of qualified service. This constituted a violation of the UC-AFT MOU and the rights of post-six-year appointees. The University also failed to conduct a performance evaluation prior to November 1992, as required by the MOU. By a letter dated October 26, 1992, Chan was offered a one-year appointment, which she accepted.

In July 1993, the University sent Chan a form requesting a forwarding address, which Chan completed and returned. The form was a Notice of Resignation Form, which the University apparently

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later asserted operated to deprive Chan of continuing employment.

Chan filed a grievance protesting these actions on May 18, 1993 and amended it on August 6, 1993. She was represented by Mary Ruth Gross of UC-AFT.

The charge alleges that Gross elected to move the grievance directly to Step III, eliminating additional time and a chance to discredit the University's defense. However, the charge does not indicate how the additional time would have aided Chan in the preparation of her case.

The charge alleges that Gross failed to represent Chan appropriately at the Step III meeting because Gross presented Chan with her calculation of Chan's years of service only five minutes prior to the meeting. Chan's figures were different but she claims she lacked sufficient time to challenge Gross' figures. In a letter attached to the charge dated September 29, 1993 from Gross to University Labor Relations Manager Debra Harrington, described as an addendum to the Step III meeting, Gross submitted arguments which Chan desired to be raised concerning specifically the inclusion of time taught in the title of Associate while Chan was a graduate student, in the title of an Acting Instructor, and during summer sessions. Gross indicated a desire for additional time to discuss certain issues with colleagues in UC-AFT and on that basis, according to Harrington's reply letter dated October 5, 1993, Harrington agreed to hold off her Step III response pending receipt of the additional information from Gross. Harrington provided the Step III response in an October 14, 1993 letter.

There continued to be a difference of opinion between Chan and Gross concerning the calculation of years of service. It is not clear that the difference was crucial however, since Gross' lowest calculation was 6.33 years through the end of the 1992-93 year, or more than enough to have qualified Chan for a three-year appointment at that time. In any event, when Chan requested that the grievance be taken to arbitration, UC-AFT, through Labor Consultant Edward Purcell, agreed to change its initial position and to believe that all of the service in the title of Associate, including summer session teaching, should count toward the six year threshold. However, Purcell, in his December 6, 1993 letter to Chan, communicated UC-AFT's decision not to take the grievance to arbitration because the grievance was not timely filed.

Based on the 5.5 years of service calculation, which Chan chose not to dispute in October 1992, she accepted the one-year appointment in reliance on the incorrect calculation. When that term was completed, the University failed to offer her a three-

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year appointment and as a consequence Chan filed her grievance. In her October 14, 1993 Step III response letter to Chan, Harrington contended that the grievance was not timely filed because it should have been filed within six months after Chan was notified of the 5.5 year calculation.

Purcell explained that if Chan's calculation of years were relied upon, her six year requirement would have been fulfilled in the fall of 1990, making the grievance several years late. If an argument were advanced placing her eligibility for a three-year appointment in 1992-93, UC-AFT believed that the October 26, 1992 appointment letter constituted the first notice of a contract violation.

The charge alleges that UC-AFT withheld information regarding a "union affiliation definition until 12-6-93." Purcell's December 6, 1993 letter notifies Chan that it is willing to offer her a \$1,000 reimbursement of attorney's fees if she desires to institute a court action on her own. He then indicates that if he receives proof of attorney service billings, he will submit her case to state and national affiliates with a request to provide additional matching funds.

The charge alleges that UC-AFT refused to commence a "legal action" against the University on her behalf.

The charge alleges that UC-AFT failed to file a complaint on her behalf alleging that she had been denied a teaching load in retaliation for union activities. The charge does not explain the basis for this claim.

The charge alleges that UC-AFT failed to inform Chan of the existence of the Public Employment Relations Board (PERB).

Based on the facts state above, the charge as presently written fails to state a prima facie violation of the HEERA for the reasons that follow.

PERB has held that a breach of the duty of fair representation occurs when a union's conduct toward a member of the bargaining unit is arbitrary, discriminatory, or in bad faith. (Rocklin Teachers Professional Association (1980) PERB Dec. No. 124.) In the context of grievance handling, PERB has defined the scope of the duty as follow:

. . . Absent bad faith, discrimination, or arbitrary conduct, mere negligence or poor judgment in handling a grievance does not

constitute a breach of the union's duty.
[Citations omitted.]

A union may exercise its discretion to determine how far to pursue a grievance in the employee's behalf as long as it does not arbitrarily ignore a meritorious grievance or process a grievance in a perfunctory fashion. A union is also not required to process an employee's grievance if the chances for success are minimal. [Citations omitted.]
(United Teachers - Los Angeles (Collins)
(1982) PERB Dec. No. 258.)

In addition, in order to show a prima facie violation involving a breach of the duty of fair representation, the charging party must present facts which would justify a finding that the union acted without a rational basis or in a way that is devoid of honest judgment. (Reed District Teachers Association, CTA/NEA
.(Reyes) (1983) PERB Dec. No. 332.)

The charge fails to provide specific facts indicating that UC-AFT failed to pursue a meritorious grievance for arbitrary, discriminatory, or bad faith reasons. HEERA does not place an absolute duty on UC-AFT to elevate a grievance to arbitration. In its December 6, 1993 letter, UC-AFT articulated its reasons for declining to take the case to arbitration. There is no showing that these reasons were without a rational basis or devoid of honest judgment. The disputes which Chan had with Gross concerning the processing of her grievance do not appear to have adversely impacted UC-AFT's representation of Chan. Nor does the conduct on Gross' part appear to have been arbitrary, discriminatory, or in bad faith.

UC-AFT owes no duty of fair representation in regard to the avenues of relief other than the grievance procedure.
(California Faculty Association (Pomerantsev) (1988) PERB Dec.
No. 698-H.) Therefore, UC-AFT's failure to institute a legal action on Chan's behalf and to notify Chan of the existence of PERB fail to state a violation.

The allegations that UC-AFT failed to represent Chan regarding alleged retaliation for union activities and withheld information contain insufficient evidence from which to conclude that a violation occurred. There is no showing that UC-AFT forfeited a meritorious grievance for arbitrary, discriminatory, or bad faith reasons.

Warning Letter

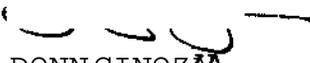
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For these reasons the charge, as presently written, does not state a prima facie case. If there are any factual inaccuracies in this letter or additional facts which would correct the deficiencies explained above, please amend the charge. The amended charge should be prepared on a standard PERB unfair practice charge form, clearly labeled First Amended Charge, contain all the facts and allegations you wish to make, and be signed under penalty of perjury by the charging party. The amended charge must be served on the respondent and the original proof of service must be filed with PERB. If I do not receive an amended charge or withdrawal from you before May 26, 1994, I shall dismiss your charge. If you have any questions, please call me at (415) 557-1350.

Sincerely,



DONNGINOZA

Regional Attorney