

**STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD**

JEFFREY ALAN SMITH,

Charging Party,

v.

REGENTS OF THE UNIVERSITY OF
CALIFORNIA,

Respondent.

Case No. LA-CE-650-H

PERB Decision No. 1478-H

March 12, 2002

Appearances: Jeffrey Alan Smith, on his own behalf; Office of the General Counsel by Edward M. Opton, Jr., University Counsel, for Regents of the University of California.

Before Baker, Whitehead and Neima, Members.

DECISION

BAKER, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Jeffrey Alan Smith (Smith) of a Board agent's dismissal (attached) of his unfair practice charge. The charge alleged that the Regents of the University of California (University) violated Higher Education Employer-Employee Relations Act (HEERA) section 3571(a)¹ by refusing to accept into evidence, in a contractual grievance proceeding, records obtained through settlement of a previous PERB unfair practice charge.

¹HEERA is codified at Government Code section 3560 et seq. Section 3571 provides, in pertinent part:

It shall be unlawful for the higher education employer to do any of the following:

- (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because

The Board has reviewed the entire record in this case, including the original and amended unfair practice charges and attachments, the warning and dismissal letters, Smith's appeal, and the University's response to the appeal. Smith's appeal reiterates arguments made before the Board agent. As the Board agent correctly noted, the settlement agreement in the first case concerned the University's obligation to provide necessary and relevant information. The agreement did not require the University to take into consideration Smith's evidence as part of the grievance process. Smith's remaining claim against the University may constitute a violation of the contractual grievance procedure, but for the reasons stated in the Board agent's dismissal letter, it does not constitute a prima facie violation of HEERA.

The Board finds the Board agent's dismissal letter to be free from prejudicial error and adopts it as the decision of the Board.

ORDER

The unfair practice charge in Case No. LA-CE-650-H is hereby **DISMISSED**
WITHOUT LEAVE TO AMEND.

Members Whitehead and Neima joined in this Decision.

of their exercise of rights guaranteed by this chapter. For purposes of this subdivision, "employee" includes an applicant for employment or reemployment.

Dismissal Letter

July 24, 2002

Jeffrey Alan Smith
8533 Cashio Street, #5
Los Angeles, CA 90035--3650

Re: Jeffrey Alan Smith v. Regents of the University of California
Unfair Practice Charge No. LA-CE-650-H
DISMISSAL LETTER

Dear Mr. Smith:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on September 21, 2001. Jeffrey Allen Smith alleges that the Regents of the University of California violated the Higher Education Employer-Employee Relations Act (HEERA)¹ by refusing to accept into evidence records obtained through a PERB complaint.

I indicated to you in my attached letter dated September 28, 2001, 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 October 5, 2001, the charge would be dismissed.

On October 5, 2001, Charging Party filed a first amended charge in the Los Angeles Regional Office. The amended charge reiterates the facts provided in the original charge and adds the following arguments.

Charging Party contends that when PERB issued a complaint against the University for failure to provide information to the union, the complaint also implicitly required the University to allow the Charging Party to present this information at a Step 3 hearing. The relevant facts are as follows.

Article 33 of the UC-AFT/University Agreement states the following regarding Step 3 grievance hearings:

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

1. If the grievance has not been resolved at Step 2, the grievant or the grievant's representative may request, in writing to the campus designated grievance officer, a Step 3 review. Such a request must be made within fifteen (15) calendar days from the date of the oral or written response at Step 2.
2. If either the grievant or the grievant's representative or the grievance officer requests a meeting to discuss the merits of the grievance, one shall be conducted within fifteen (15) calendar days of the request for the Step 3 review. If a meeting occurs, the grievant and/or the grievant's representative may be present. Also, the grievant or the grievant's representative shall be able to bring people to the meeting who have information to present about the grievance. . .
3. The grievant and/or the grievant's representative must present all known evidence and contentions relevant to the grievance at Step 3 review. Contentions not made known by the parties at this time are not subsequently admissible.
4. Notice to the grievant of the University's final decision will be as set forth below.
 - a. If no Step 3 meeting is requested, the University shall mail the written decision to the grievant and/or the grievant's representative within fifteen (15) calendar days following the date of receipt of the request for a Step 3 review. If a meeting is requested, the University shall mail the written decision to the grievant and/or the grievant's representative within fifteen (15) calendar days following the meeting. The University's decision shall become final within forty-five (45) calendar days following the mailing, unless within that time, the UC-AFT has appealed the decision to arbitration.

In 1998, the Charging Party filed a grievance with the University contending the University violated the reappointment procedures in the collective bargaining agreement by refusing to reappoint Charging Party for the following school year. In June 1998, UC-AFT filed an unfair practice charge against the University for refusing to provide the union with relevant information pertaining to Charging Party's grievance. On February 16, 1999, PERB issued a complaint against the District for failure to provide information. On December 12, 2000, the parties settled the charge and the University turned over the relevant information.

On March 23, 2001, the University and UC-AFT participated in a Step 3 meeting as explained in Article 33, above. During this meeting, chaired by UCLA Labor Relations Director Lynne

Thompson, the University "refused to examine the records or to receive them as evidence." On June 10, 2001, the University denied the grievance at Step 3. It is unclear whether the union has proceeded to binding arbitration.

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

Charging Party contends the University's actions in refusing to accept into evidence the documents provided "had the effect of nullifying PERB' previously issued complaint, preventing [Charging Party] from making use of records which PERB has already affirmed my right to use in presenting my grievance." Additionally, Charging Party asserts that PERB's previous complaint requires the University to examine those documents during Charging Party's grievance hearing.

It appears Charging Party misunderstands PERB's issuance of a complaint in the previous unfair practice charge. The exclusive representative is entitled to all information that is "necessary and relevant" to the discharge of its duty of representation. (Stockton Unified School District (1980) PERB Dec. No. 143). However, while the union is entitled to all relevant and necessary information, the duty to provide information does not require the University to accept the information as evidence. As such, the University's actions do not constitute a violation of the duty to provide information, nor do they nullify PERB's earlier ruling.

Charging Party seems to further allege that the University violated Article 33 by not taking into consideration the additional evidence Charging Party wished to produce. Although alleged as a contract violation, allegations of this type are usually reviewed as a unilateral change. However, individual employees do not have standing to allege unilateral change violations. (Oxnard School District (Gorcey/Tripp) (1988) PERB Decision No. 667.) As such, this allegation also fails to state a prima facie case.

Finally, Charging Party asserts the settlement agreement between the University and UC-AFT required the University to provide unredacted copies of the documents to Hearing Officer Lynne Thompson. However, an examination of the settlement agreement does not support Charging Party's contention. The settlement agreement states in relevant part:

1. The University will provide to the AFT copies of student evaluation forms for UCLA Writing Program and English Department lecturers who were reviewed for reappointment during the 1995-96, 1996-97, and 1997-98 academic years with the exceptions of: (1) forms which have previously been provided to the AFT, and (2) forms which do not contain handwritten comments by students. The University will also provide to the AFT copies of student letters concerning the evaluated lecturers, excepting those that have already been

provided. The copies provided to the AFT will be redacted in a manner similar to those previously provided.

5. The AFT, Jeff Smith, and Susan Griffin agree that they will keep the materials produced pursuant to this agreement, and materials previously produced to the AFT by the University in connections with PERB Case No. SF-CE-527-H, confidential among themselves, and that they will not reveal the contents thereof, or release said documents or copies of said documents to anyone other than themselves, Mr. Smith's grievance representative, the AFT's attorneys, and University administrators who are involved in the adjudication of the grievance concerning Mr. Smith's reappointment review.

Moreover, HEERA section 3563.2(b) states:

The board shall not have authority to enforce agreements between the parties, and shall not issue a complaint on any charge based on alleged violation of such an agreement that would not also constitute an unfair practice under this chapter.

As a violation of the settlement agreement constitutes a violation of a legal contract, and not an unfair practice under the HEERA, PERB lacks authority to adjudicate this issue. Thus, this allegation fails to state a prima facie case.

Right to Appeal

Pursuant to PERB Regulations,² you may obtain a review of this dismissal of the charge by filing an appeal to the Board itself within twenty (20) calendar days after service of this dismissal. (Regulation 32635(a).) Any document filed with the Board must contain the case name and number, and the original and five (5) copies of all documents must be provided to the Board.

A document is considered "filed" when actually received before the close of business (5 p.m.) on the last day set for filing or when mailed by certified or Express United States mail, as shown on the postal receipt or postmark, or delivered to a common carrier promising overnight delivery, as shown on the carrier's receipt, not later than the last day set for filing. (Regulations 32135(a) and 32130.)

A document is also considered "filed" when received by facsimile transmission before the close of business on the last day for filing together with a Facsimile Transmission Cover Sheet which meets the requirements of Regulation 32135(d), provided the filing party also places the

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

LA-CE-650-H
October 12, 2001
Page 5

original, together with the required number of copies and proof of service, in the U.S. mail. (Regulations 32135(b), (c) and (d); see also Regulations 32090 and 32130.)

The Board's address is:

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

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

Service

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding, and a "proof of service" must accompany each copy of a document served upon a party or filed with the Board itself. (See Regulation 32140 for the required contents and a sample form.) The document will be considered properly "served" when personally delivered or deposited in the first-class mail, postage paid and properly addressed. A document filed by facsimile transmission may be concurrently served via facsimile transmission on all parties to the proceeding. (Regulation 32135(c).)

Extension of Time

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

LA-CE-650-H
October 12, 2001
Page 6

Final Date

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

Sincerely,

ROBERT THOMPSON
Deputy General Counsel

By _____
Kristin L. Rosi
Regional Attorney

Attachment

cc: Edward M. Opton, Jr.

KLR

Warning Letter

July 24, 2002

Jeffrey Alan Smith
8533 Cashio Street, #5
Los Angeles, CA 90035--365

Re: Jeffrey Alan Smith v. Regents of the University of California
Unfair Practice Charge No. LA-CE-650-H
WARNING LETTER

Dear Mr. Smith:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on September 21, 2001. Jeffrey Allen Smith alleges that the Regents of the University of California violated the Higher Education Employer-Employee Relations Act (HEERA)¹ by refusing to accept into evidence records obtained through a PERB complaint.

Investigation of the charge revealed the following. Charging Party was employed by the University as a Lecturer. As such, Charging Party was exclusively represented by the University Council-American Federation of Teachers (UC-AFT). The University and UC-AFT are parties to a collective bargaining agreement which states, in Article 33, the following regarding Step 3 grievance hearings:

1. If the grievance has not been resolved at Step 2, the grievant or the grievant's representative may request, in writing to the campus designated grievance officer, a Step 3 review. Such a request must be made within fifteen (15) calendar days from the date of the oral or written response at Step 2.
2. If either the grievant or the grievant's representative or the grievance officer requests a meeting to discuss the merits of the grievance, one shall be conducted within fifteen (15) calendar days of the request for the Step 3 review. If a meeting occurs, the grievant and/or the grievant's representative may be present. Also, the grievant or the grievant's representative shall be able to

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bring people to the meeting who have information to present about the grievance. . .

3. The grievant and/or the grievant's representative must present all known evidence and contentions relevant to the grievance at Step 3 review. Contentions not made known by the parties at this time are not subsequently admissible.

4. Notice to the grievant of the University's final decision will be as set forth below.

a. If no Step 3 meeting is requested, the University shall mail the written decision to the grievant and/or the grievant's representative within fifteen (15) calendar days following the date of receipt of the request for a Step 3 review. If a meeting is requested, the University shall mail the written decision to the grievant and/or the grievant's representative within fifteen (15) calendar days following the meeting. The University's decision shall become final within forty-five (45) calendar days following the mailing, unless within that time, the UC-AFT has appealed the decision to arbitration.

In 1998, the Charging Party filed a grievance with the University contending the University violated the reappointment procedures in the collective bargaining agreement by refusing to reappoint Charging Party for the following school year. In June 1998, UC-AFT filed an unfair practice charge against the University for refusing to provide the union with relevant information pertaining to Charging Party's grievance. On February 16, 1999, PERB issued a complaint against the District for failure to provide information. On December 12, 2000, the parties settled the charge and the University turned over the relevant information.

On March 23, 2001, the University and UC-AFT participated in a Step 3 meeting as explained in Article 33, above. During this meeting, chaired by UCLA Labor Relations Director Lynne Thompson, the University "refused to examine the records or to receive them as evidence." On June 10, 2001, the University denied the grievance at Step 3. It is unclear whether the union has proceeded to binding arbitration.

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

Charging Party contends the University's actions in refusing to accept into evidence the documents provided "had the effect of nullifying PERB' previously issued complaint, preventing [Charging Party] from making use of records which PERB has already affirmed my right to use in presenting my grievance."

LA-CE-650-H
September 28, 2001
Page 3

It appears Charging Party misunderstands PERB's issuance of a complaint in the previous unfair practice charge. The exclusive representative is entitled to all information that is "necessary and relevant" to the discharge of its duty of representation. (Stockton Unified School District (1980) PERB Dec. No. 143). However, while the union is entitled to all relevant and necessary information, the duty to provide information does not require the University to accept the information as evidence. As such, the University's actions do not constitute a violation of the duty to provide information, nor do they nullify PERB's earlier ruling.

For these reasons the charge, as presently written, does not state a prima facie case. If there are any factual inaccuracies in this letter or additional facts that would correct the deficiencies explained above, please amend the charge. The amended charge should be prepared on a standard PERB unfair practice charge form, clearly labeled First Amended Charge, contain all the facts and allegations you wish to make, and be signed under penalty of perjury by the charging party. The amended charge must have the case number written on the top right hand corner of the charge form. The amended charge must be served on the respondent's representative and the original proof of service must be filed with PERB. If I do not receive an amended charge or withdrawal from you before October 5, 2001, I shall dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Kristin L. Rosi
Regional Attorney

KLR