STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

ORLANDO ERIC GRAVES, Charging Party, v. TRUSTEES OF THE CALIFORNIA STATE UNIVERSITY, Respondent.	Case No. SF-CE-726-H PERB Decision No. 1741-H January 26, 2005

Appearances: Orlando Eric Graves, on his own behalf; Donald A. Newman, University Counsel, for Trustees of the California State University.

Before Duncan, Chairman; Whitehead and Shek, Members.

DECISION

SHEK, Member: This case is before the Public Employment Relations Board (Board) on appeal by Orlando Eric Graves (Graves) of a Board agent's dismissal (attached) of his unfair practice charge. The unfair practice charge alleged that the Trustees of the California State University (CSU) violated Higher Education Employer-Employee Relations Act (HEERA)[1] by discriminating against him when he applied for employment with CSU.

The Board has reviewed the entire record in this matter, including the original and amended unfair practice charge, the warning and dismissal letters, Graves' appeal and CSU's response. The Board finds the warning and dismissal letters to be free of prejudicial error and adopts them as the decision of the Board itself.

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

ORDER

The unfair practice charge in Case No. SF-CE-726-H is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chairman Duncan and Member Whitehead joined in this Decision.

STATE OF CALIFORNIA ARNOLD SCHWARZENEGGER, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD

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

November 1, 2004

Orlando Eric Graves

Re: Orlando Eric Graves v. Trustees of the California State University
Unfair Practice Charge No. SF-CE-726-H
DISMISSAL LETTER

Dear Mr. Graves:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on September 20, 2004. Orlando Eric Graves alleges that the Trustees of the California State University violated the Higher Education Employer-Employee Relations Act (HEERA)[1] by changing the requirements to apply for a job with the University.

I indicated to you in my attached letter dated October 14, 2004, 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 25, 2004, the charge would be dismissed.

On October 26, 2004 I received an amended charge. In the amended charge you stated that you had "no idea why the decision of the Human Resources Service Group to not forward my application to the hiring department was determined." You also stated that the following were unfair practices: the Group's decision not to forward your application to the hiring department, Mrs. Gaspar's request that you complete an additional entire application package, and Mrs. Gaspar's request that you submit a letter of interest. Although the University's actions may seem out of the ordinary, that fact alone does not make them a violation of the HEERA. As explained in the warning letter, PERB's jurisdiction is limited to enforcement of the HEERA and does not include rectifying every problem that arises in the University workplace.

Therefore, I am dismissing the charge based on the facts and reasons contained in my October 14 letter.

---

[1]HEERA 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.

Right to Appeal

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

A document is considered "filed" when actually received before the close of business (5 p.m.) on the last day set for filing. (Regulations 32135(a) and 32130.) A document is also considered "filed" when received by facsimile transmission before the close of business on the last day for filing together with a Facsimile Transmission Cover Sheet which meets the requirements of Regulation 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Regulations 32135(b), (c) and (d); see also Regulations 32090 and 32130.)

The Board's address is:

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

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

Service

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

Extension of Time

A request for an extension of time, in which to file a document with the Board itself, must be in writing and filed with the Board at the previously noted address. A request for an extension

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

must be filed at least three (3) calendar days before the expiration of the time required for filing the document. The request must indicate good cause for and, if known, the position of each other party regarding the extension, and shall be accompanied by proof of service of the request upon each party. (Regulation 32132.)

Final Date

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

Sincerely,

Robert Thompson
General Counsel

Attachment

cc: Donald A. Newman

STATE OF CALIFORNIA ARNOLD SCHWARZENEGGER, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD

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

October 14, 2004

Orlando Eric Graves

Re: Orlando Eric Graves v. Trustees of the California State University
Unfair Practice Charge No. SF-CE-726-H
WARNING LETTER

Dear Mr. Graves:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on September 20, 2004. Orlando Eric Graves alleges that the Trustees of the California State University violated the Higher Education Employer-Employee Relations Act (HEERA)[1] by changing the requirements to apply for a job with the University.

On March 28, 2004, Mr. Graves mailed an application for employment to CSU San Jose for a position as a Fire Alarm Technician based on an advertisement in the San Jose Mercury newspaper. On April 9,[2] he received a job status notification form from the University stating they were unable to forward his application to the hiring department because he did not meet the experience requirements. After reviewing the pertinent documents, Mr. Graves came to the conclusion that the only disqualifying factor in his application was his race, African American.

On April 14, Mr. Graves spoke with Rosario Gaspar, Head of University Human Resources, who stated that his application did not demonstrate any programming experience. She told him to complete another application package and submit a letter of interest. He responded that this job position did not require a letter of interest. She disagreed and stated that he must also demonstrate renovation experience. When questioned, Ms. Gaspar admitted that the job requirements did not include renovation experience but that she was now requesting it. Mr. Graves protested that he was being treated unfairly and that legal action would follow.

Based on these allegations, this charge does not state a prima facie case for the following reasons.

Although the charge does not specify the type of violation being alleged, the facts in the charge most probably describe a discrimination case based on HEERA section 3571(a). To

---

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

[2] All dates are in 2004.

demonstrate a violation of HEERA section 3571(a), the charging party must show that: (1) the employee exercised rights under HEERA; (2) the employer had knowledge of the exercise of those rights; and (3) the employer imposed or threatened to impose reprisals, discriminated or threatened to discriminate, or otherwise interfered with, restrained or coerced the employees because of the exercise of those rights. (Novato Unified School District (1982) PERB Decision No. 210 (Novato); Carlsbad Unified School District (1979) PERB Decision No. 89.)

Although the timing of the employer's adverse action in close temporal proximity to the employee's protected conduct is an important factor (North Sacramento School District (1982) PERB Decision No. 264), it does not, without more, demonstrate the necessary connection or "nexus" between the adverse action and the protected conduct. (Moreland Elementary School District (1982) PERB Decision No. 227.) Facts establishing one or more of the following additional factors must also be present: (1) the employer's disparate treatment of the employee (State of California (Department of Transportation) (1984) PERB Decision No. 459-S); (2) the employer's departure from established procedures and standards when dealing with the employee (Santa Clara Unified School District (1979) PERB Decision No. 104.); (3) the employer's inconsistent or contradictory justifications for its actions (State of California (Department of Parks and Recreation) (1983) PERB Decision No. 328-S; (4) the employer's cursory investigation of the employee's misconduct; (5) the employer's failure to offer the employee justification at the time it took action or the offering of exaggerated, vague, or ambiguous reasons; (6) employer animosity towards union activists (Cupertino Union Elementary School District) (1986) PERB Decision No. 572.); or (7) any other facts which might demonstrate the employer's unlawful motive. (Novato; North Sacramento School District, supra, PERB Decision No. 264.)

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

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

Mr. Graves asserts that the change in job requirements described in this charge was motivated by the University's reaction to his race. Such allegations fall outside of PERB's jurisdiction. In California School Employees Association, Chapter 245 (Waymire) (2001) PERB Decision No. 1448, the Board held that PERB has no jurisdiction to enforce statues regarding discrimination based on sex, race, or religion. Allegations such as the ones made herein are more properly considered by the Department of Fair Employment and Housing. As PERB lacks jurisdiction over such allegations, this charge must be dismissed.

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 25, 2004, I shall dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Robert Thompson
General Counsel