

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



JACK EINHEBER,)
)
 Charging Party,) Case No. SF-CE-322-H
)
 v.) Request for Reconsideration
) PERB Decision No. 949-H
 REGENTS OF THE UNIVERSITY)
 OF CALIFORNIA,) PERB Decision No. 949a-H
)
 Respondent.) April 10, 1997
 _____)

Appearances: Jack Einheber, on his own behalf; Joyce Harlan, Labor Relations, for Regents of the University of California.

Before Caffrey, Chairman; Johnson and Dyer, Members.

DECISION

CAFFREY, Chairman: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Jack Einheber (Einheber) of the denial by a PERB administrative law judge of Einheber's request to reopen the hearing record in Regents of the University of California (Einheber) (1992) PERB Decision No. 949-H (Regents of UC). In that case, the Board dismissed Einheber's unfair practice charge and the complaint alleging that the University of California (University) violated section 3571(a) of the Higher Education Employer-Employee Relations Act (HEERA)¹ when it dismissed Einheber from his

¹HEERA is codified at Government Code section 3560 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code. Section 3571 states, in pertinent part:

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

position as a University police officer.

DISCUSSION

Einheber's request to reopen the hearing record is based on his assertion that he "relatively recently discovered abundant evidence" that his dismissal from his position as a University police officer resulted from retaliatory, disparate treatment of him by the University. The primary evidence Einheber offers involves several incidents involving other University officers who were allegedly subjected to discipline but were not dismissed. Einheber apparently argues that the conduct of the officers in those cases was at least as serious as the conduct for which he was dismissed. Therefore, Einheber argues the University's dismissal of Einheber constituted disparate treatment and supports his allegation of unlawful retaliation.

In San Mateo Community College District (1985) PERB Decision No. 543, the Board concluded that it is appropriate to consider a request to reopen a completed record based on new evidence by applying the standard for requests for reconsideration set forth in PERB regulations.²

The relevant part of PERB Regulation 32410 states:

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

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

(a) Any party to a decision of the Board itself may, because of extraordinary circumstances, file a request to reconsider the decision within 20 days following the date of service of the decision. . . . The grounds for requesting reconsideration are limited to claims that the decision of the Board itself contains prejudicial errors of fact, or newly discovered evidence or law which was not previously available and could not have been discovered with the exercise of reasonable diligence.

The Board recently considered requests to reopen two cases based on the argument that a ruling issued by another governmental agency supported the charging party's allegations that the employer violated the Ralph C. Dills Act. The charging party argued that the Board should reopen the cases over a year after it had dismissed the allegations, because the ruling of the other governmental agency only recently had become available. The Board treated the requests as requests for reconsideration and considered whether good cause existed to excuse the late filings. (State of California (Department of Youth Authority) (1996) PERB Order No. Ad-275-S; California State Employees Association. Local 1000 (Janowicz) (1996) PERB Order No. Ad-276-S.)

The Board concludes that it is appropriate to follow this approach in considering Einheber's request.

The Board's decision in Regents of UC was issued on August 13, 1992. Einheber's request, based on his assertion that there is new evidence to support his charge against the University, was filed on May 14, 1996, three years and nine

months later. Accordingly, the Board must address the issue of Einheber's extremely late filing of the request.

PERB Regulation 32136 provides, in part:

A late filing may be excused in the discretion of the Board for good cause only. A late filing which has been excused becomes a timely filing under these regulations.

In applying this regulation, the Board has found good cause to excuse late filings when a party has demonstrated a conscientious effort to timely file. (See, e.g., North Orange County Regional Occupational Program (1990) PERB Decision No. 807 (excusing late filing where exceptions inadvertently directed to wrong PERB office); Trustees of the California University (1989) PERB Order No. Ad-192-H (holding that good cause existed where postage meter set to incorrect date).)

As noted above, Einheber's request for reconsideration is based on his assertion that "relatively recently discovered" evidence demonstrates that the University terminated him in retaliation for his protected activity. Einheber cites a number of incidents in support of his request, most of which occurred prior to our 1992 decision in Regents of UC. The most recent incident apparently occurred on January 31, 1995. Einheber does not provide any explanation for his failure to file his request for reconsideration until May 14, 1996. Where a party fails to provide any explanation to excuse a late filing, the Board is precluded from finding that good cause exists. (California Faculty Association (Gregg) (1995) PERB Order No. Ad-271-H at p. 2, citing Sonoma County Office of Education (1992) PERB Order

No. Ad-230.) Accordingly, the Board finds that good cause does not exist to excuse Einheber's late filed request for reconsideration.

ORDER

Jack Einheber's request to accept his late filed request for reconsideration of the Board's decision in Regents of the University of California (Einheber) (1992) PERB Decision No. 949-H is hereby DENIED.

Members Johnson and Dyer joined in this Decision.