STATE OP CALIFORNIA
DECISION OP THE
PUBLIC EMPLOYMENT RELATIONS BOARD

DAVID W. IRVIN, Charging Party,	)	Case No. LA-CE-267-H
v.	)	PERB Decision No. 849-H
REGENTS OF THE UNIVERSITY OF CALIFORNIA, Respondent.	)	October 30, 1990

Appearances: Daniel Dillon for David Irvin; Sandra J. Rich, Assistant Labor Relations Manager, for the Regents of the University of California.

Before Hesse, Chairperson; Shank, Camilli and Cunningham, Members.

DECISION AND ORDER

This case is before the Public Employment Relations Board (Board) on appeal by David W. Irvin of a Board agent's dismissal (attached hereto) of his charge that the Regents of the University of California violated section 3571(a), (b), (c) and (d) of the Higher Education Employer-Employee Relations Act (HEERA).[1] We have reviewed the dismissal and, finding it to be free of prejudicial error, adopt it as the Decision of the Board itself.[2]

---

[1]HEERA is codified at Government Code section 3560 et seq. Unless otherwise indicated, all statutory references are to the Government Code.

[2]We note that the first full sentence on page 2 of the Board agent's July 18, 1990 dismissal letter currently reads, "In addition, it states that '[f]ailure to invoke the process described in this section within one hundred and eighty (180) calendar days will render the agreements ineligible for arbitration.' " (Emphasis

The unfair practice charge in Case No. LA-CE-267-H is hereby DISMISSED WITHOUT LEAVE TO AMEND.

By the Board[3]

---

added). The word "agreements" was incorrectly typed; the correct word should have been "grievance."

[3]Member Craib did not participate in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD

Headquarters Office
1031 18* Street
Sacramento, CA 95814-4174
(916) 322-3088

Office of the General Counsel
916/323-8015

July 18, 1990

Daniel Dillon

Re: David W. Irvin v. Regents of the University of California
Unfair Practice Charge No. LA-CE-267-H, 1st Amended Charge
DISMISSAL of Charge and Refusal to Issue Complaint

Dear Mr. Dillon:

The above-referenced charge alleges that the University of California at Los Angeles (University) unilaterally interpreted the Memorandum of Understanding (MOU) between the University and the International Union of Operating Engineers, Local 501, AFL-CIO (IUOE) to exclude Mr. Irvin's right to a third party arbitration of his grievance. This conduct is alleged to violate sections 3571(a), (b), (c) and (d) of the Higher Education Employer-Employee Relations Act (HEERA).

I indicated to you in my attached letter dated May 24, 1990, 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 that would correct the deficiencies explained in that letter, you should amend the charge accordingly. You were further advised that unless you amended the charge to state a prima facie case, or withdrew it prior to June 18, 1990, the charge would be dismissed.

Charging Party requested and was granted an extension of time to file an amended charge. The amended charge was filed on June 28, 1990, and states that the union requested arbitration in Mr. Irvin's case on December 8, 1989, but an arbitration has yet to be scheduled or held. Although the amended charge claims that the University refused to allow the grievance to proceed to arbitration, there are no specific facts indicating what steps the University has taken to prevent such a hearing from being held. Rather, it appears that after the IUOE filed its request for arbitration it took no further action on this case. The MOU in effect at the time the request for arbitration was made requires in section (b) of Article 26 that "[w]ithin fourteen (14) calendar days of a request for arbitration, the parties shall meet and attempt to reach an agreement on an

arbitrator. . . . " In addition, it states that "[f]ailure to invoke the process described in this section within one hundred and eighty (180) calendar days will render the agreements ineligible for arbitration." The University asserts and Charging Party does not dispute that typically the IUOE has been responsible for initiating the meeting to select the arbitrator. In this case, the IUOE failed to request such a meeting. Based on these facts, there is no demonstration of a prima facie case against the University.

Charging Party also asserts that the University has violated the HEERA by firing Mr. Irvin under the wrong contract. Namely, that Mr. Irvin would have become a permanent employee by operation of the MOU dated July 17, 1989 through June 30, 1992 (Article 6), as opposed to Article 6 of the prior contract dated July 17, 1986 through April 30, 1989. This is really a dispute over whether Article 6 of the new contract has been violated by Mr. Irvin's termination and/or the process by which the University terminated him. HEERA section 3563.2(b) states that:

> 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 no also constitute an unfair practice under this chapter.

Because there has been no demonstration of any other unfair practice, PERB does not have the authority to remedy the alleged violation of this contract.

Charging Party also asserts that the University has refused to allow Mr. Irvin to process his grievance to arbitration in violation of HEERA section 3567. This section states:

> Any employee or group of employees may at any time, either individually or through a representative of their own choosing, present grievances to the employer and have such grievances adjusted, without the intervention of the exclusive representative; provided, the adjustment is reached prior to arbitration pursuant to section 3589, and the adjustment is not inconsistent with the terms of a written memorandum then in effect. . . .

However, the refusal of the University to allow Mr. Irvin to represent himself in an arbitration proceeding does not violate this section. As this section indicates, when a grievance

reaches arbitration, an employee's individual statutory right to present grievances and have them adjusted without the intervention of the exclusive representative comes to an end. An almost identical claim was dismissed by the Board in University of California. San Diego (1989) PERB Decision No. 781-H. Accordingly, this charge does not state a prima facie violation of the HEERA.

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 (California Administrative Code, title 8, section 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 (5:00 p.m.) or sent by telegraph, certified or Express United States mail postmarked no later than the last date set for filing (California Administrative Code, title 8, section 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 calendar days following the date of service of the appeal (California Administrative Code, title 8, section 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 California Administrative Code, title 8, section 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 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 (California Administrative Code, title 8, section 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,

JOHN W. SPITTLER
General Counsel

By Robert Thompson
Robert Thompson
Deputy General Counsel

Attachment

cc: Claudia Cate

STATE Of CALIFORNIA GEORGE DEUKMEJIAN, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD

Headquarters Office
1031 18th Street
Sacramento. CA 95814-4174
(916) 322-3088

Office of the General Counsel
916/323-8015

VIA U.S. EXPRESS MAIL

May 24, 1990

Daniel Dillon

Re: David W. Irvin v. Regents of the University of California
Unfair Practice Charge No. LA-CE-267-H
WARNING LETTER

Dear Mr. Dillon:

The above-referenced charge alleges that the University of California at Los Angeles (University) unilaterally interpreted the Memorandum of Understanding (MOU) between the University and the International Union of Operating Engineers, Local 501, AFL-CIO (IUOE) to exclude Mr. Irvin's right to a third party arbitration of his grievance. This conduct is alleged to violate Sections 3571(a), (b), (c) and (d) of the Higher Education Employer-Employee Relations Act (HEERA).

My investigation revealed the following information. Mr. Irvin was employed by the University as a casual employee (plumber) on September 6, 1988. On March 6, 1989, he became a probationary career employee. On August 18, 1989, Mr. Irvin was released from employment in accordance with Article 6 of the MOU by David Hendry, superintendent of physical plant for the University. On August 23, 1989, IUOE Representative David Hamilton wrote to University Representative Gayle Cowling, indicating that Mr. Irvin had requested a meeting to air a complaint pursuant to Article 28 of the MOU. On September 14, a meeting was convened to discuss the basis of Mr. Irvin's complaint. At that time Mr. Irvin indicated that he believed he was being released do to his national origin (Scottland). On September 18, 1989, Mr. Irvin also filed a grievance against the University. The University objected to Mr. Irvin filing both a grievance and complaint over the same dismissal. In a letter dated September 26, 1989, Mr. Irvin indicated to the University that he was going to drop the complaint and that he wished to have his problem heard as a grievance.

There then followed a series of letters between Mr. Irvin, IUOE representatives, and University representatives concerning

whether Mr. Irvin's grievance would be arbitrated. The most recent correspondence dated January 3, 1990, from University Assistant Labor Relations Manager Sandra Rich to Mr. Hamilton indicated that the University would not deny IUOE's request that Mr. Irvin's grievance be arbitrated. The letter went on to explain, however, that several factors indicated a weakness in Mr. Irvin's case and that if the dispute were to proceed to arbitration, the parties should be initially concerned with the procedural and arbitrability questions rather than the substance of the dispute. In my final discussion with Mr. Irvin, on April 10, 1990, he indicated that he was meeting with the IUOE that evening concerning his grievance and would inform me of the outcome of that discussion. I have not heard from him since.

Based on the facts described above, this charge does not state a prima facie violation of the HEERA for the reasons which follow. The thrust of Mr. Irvin's charge is that the University unilaterally reinterpreted a section of the memorandum of understanding to limit or defeat his ability to proceed to arbitration on his grievance. Such a unilateral change of an employer's policy is considered a refusal to bargain in good faith. The Public Employment Relations Board (PERB) determined in Oxnard School District (Gorsey/Tripp) (1988) PERB Decision No. 667 that an individual employee does not have the standing to file a charge alleging a violation of the employer's duty to bargain in good faith.[1]

Even if Mr. Irvin had standing to file this charge, it does not appear that the University is preventing Mr. Irvin or his exclusive representative IUOE from pursuing his grievance to arbitration. (See Ms. Rich's letter of January 3, 1990.) Thus, there appears to be no factual basis for the allegations contained in this charge.

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 any additional facts that would correct the deficiencies explained above, please amend the charge accordingly. The amended charge should be prepared on a standard PERB unfair practice charge form clearly labeled First Amended

[1]Although Oxnard School District was decided under the Educational Employment Relations Act (EERA), the reasoning of this case is applicable to similar situations arising under the HEERA because the policy of the two acts is similar, and the language of 3571(c) is identical to that of EERA section 3543.5(c).

Charge. contain all the facts and allegations you wish to make, and must 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 June 18 . 1990. I shall dismiss your charge. If you have any questions, please call me at (916) 322-3198.

Sincerely,

Robert Thompson
Deputy General Counsel