STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA STATE EMPLOYEES' ASSOCIATION/SEIU LOCAL 1000,	)	
Charging Party,	)	Case No. LA-CE-278-H
v.	)	PERB Decision No. 890-H
CALIFORNIA STATE UNIVERSITY, SAN DIEGO,	)	June 19, 1991
Respondent.	)	

Appearances: Howard Schwartz, Attorney, for California State Employees' Association/SEIU Local 1000; William B. Haughton, Attorney, for California State University, San Diego.

Before Hesse, Chairperson; Shank and Carlyle, Members.

DECISION AND ORDER

CARLYLE, Member: This case is before the Public Employment Relations Board (Board) on appeal by the California State Employees' Association/SEIU Local 1000, of a Board agent's dismissal (attached hereto) of its charge that the California State University, San Diego violated section 3571(b) 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.

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

> It shall be unlawful for the higher education employer to do any of the following:
>
> (b) Deny to employee organizations rights guaranteed to them by this chapter.

The unfair practice charge in Case No. LA-CE-278-H is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Member Shank joins in this Decision.

Chairperson Hesse's concurrence begins on page 3.

Hesse, Chairperson, concurring: Consistent with my dissent in State of California (Department of Parks and Recreation) (1990) PERB Decision No. 810a-S, I find that the alleged conduct is covered by the collective bargaining agreement. Therefore, I would defer and dismiss the entire unfair practice charge to binding arbitration.

The unfair practice charge alleges that the California State University, San Diego (CSU) unlawfully discriminated against Christina A. Jackson (Jackson) in retaliation for her protected activity. Specifically, California State Employees' Association/SEIU Local 1000 (CSEA) alleges that Jackson was not chosen for a permanent appointment and was terminated after she had asked CSEA for assistance in an informal meeting with her supervisor. The unfair practice charge alleges that this conduct violated sections 3571 (a), (b) and (c) of the Higher Education Employer-Employee Relations Act (HEERA).

Although HEERA is governed by the deferral standards set forth in Dry Creek Joint Elementary School District (1980) PERB Order No. Ad-81a (Dry Creek),[1] some of the deferral principles enunciated in Lake Elsinore School District (1987) PERB Decision No. 646 (Lake Elsinore) are similar. The language of section 3541.5(a)(2) of the EERA expressly states that the Public Employment Relations Board (Board) shall not:

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[1]Although this case arose under the Educational Employment Relations Act (EERA), and was overruled on statutory grounds, the rationale is still applicable to cases under HEERA. (Regents of the University of California (1984) PERB Order No. Ad-139-H; California State University (1984) PERB Decision No. 392-H.)

> Issue a complaint against conduct also prohibited by the provisions of the agreement between the parties until the grievance machinery of the agreement, if it exists and covers the matter at issue, has been exhausted, either by settlement or binding arbitration.

Pursuant to Lake Elsinore, the Board is required to dismiss and defer an unfair practice charge if: (1) the grievance procedure of the parties' collective bargaining agreement culminates in binding arbitration, and (2) the conduct alleged in the unfair practice charge is prohibited by the parties' collective bargaining agreement. Under HEERA, deferral is appropriate where: (1) the dispute arises within a stable collective bargaining relationship where there is no enmity by the respondent toward the charging party; (2) the respondent is ready and willing to proceed to arbitration and must waive the contract-based procedural defenses; and (3) the contract and its meaning lie at the center of the dispute. (See Dry Creek and Collyer Insulated Wire (1971) 192 NLRB 837 [77 LRRM 1931].) Although the Board is not required to defer under the Dry Creek/Collyer standard, the Board has long followed the National Labor Relations Board's policy of prearbitral deferral when the Collyer standards are met. Generally, when a dispute arises over the application or interpretation of an existing collective bargaining agreement, the desireable method for settlement should be the parties' agreed-upon method of dispute resolution. (Lake Elsinore. p. 30 citing Collyer Insulated Wire, supra, 192 NLRB 837.)

Applying the Dry Creek/Collyer standard here, the three prongs are satisfied. There is no evidence that the parties are not operating within a stable collective bargaining relationship, and CSU has indicated its willingness to proceed to arbitration and waive all procedural defenses. Finally, the Board must determine whether the conduct (matter at issue or dispute) is covered by the collective bargaining agreement. Here, the unfair practice charge involves the allegations that CSU unlawfully terminated Jackson in retaliation for her protected activity. This allegation directly involves an interpretation of Article V, Union Rights, section 5.14, of the collective bargaining agreement which provides "[a]n employee shall not suffer reprisals for participation in union activities." The collective bargaining agreement also provides for binding arbitration and defines the exclusive representative as a grievant when alleging a violation of its rights under the collective bargaining agreement.

As the conduct (CSU's denial of permanent appointment and termination) is covered by the parties' collective bargaining agreement, I conclude that the entire unfair practice charge should be dismissed and deferred to binding arbitration.

PUBLIC EMPLOYMENT RELATIONS BOARD

Los Angeles Regional Office
3530 Wilshire Boulevard, Suite 650
Los Angeles, CA 90010-2334
(213)736-3127

December 5, 1990

David N. Villarino
Labor Relations Representative
CA State Employees' Association/SEIU Local 1000
Post Office Box 62
Keene, California 93531

Re: California State Employees' Association/SEIU Local 1000
v. California State University, San Diego.
Unfair Practice Charge No. LA-CE-278-H
DISMISSAL OF CHARGE AND REFUSAL TO ISSUE COMPLAINT

Dear Mr. Villarino:

This case involves a charge that the California State University (CSU or University) unlawfully discriminated/coinmitted a reprisal against Ms. Cristina A. Jackson, in retaliation for her protected activity in violation of HEERA section 3571 (a)[1](b)[2]and (c). The charge was filed on July 31, 1990.

I indicated to you in my attached letter dated November 26, 1990 that the HEERA section 3571(a) allegation contained in the above-referenced charge was subject to deferral to arbitration. I also indicated to you that the allegations contained in the charge did not state a prima facie violation of HEERA section 3571(b) and (c). 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 accordingly. You were further advised that unless you amended these allegations or withdrew them prior to December 3, 1990. they would be dismissed.

On December 4, 1990 at approximately 12:15 p.m., I called you and asked if you intended to file an amended charge or a withdrawal. You stated, in relevant part, that you believed the University will argue at the arbitration hearing that it could dismiss Ms. Jackson for any reason at all, or, that it did not have to give a reason for her dismissal. Thus, you argued the arbitration is futile and any deferral to arbitration of the HEERA section 3571(a) allegation is inappropriate. You also indicated you would provide me with some case authority by

[1]Alleged in error as section 3572(a).

[2]Alleged in error as section 357(b).

3:30 p.m. on December 4, 1990. I have not heard from you or received any case authority since we spoke on December 4th. Also, as indicated in my letter dated November 26, 1990 and during our telephone conversation, no futility has been shown.

Therefore, since I have not received either a request for withdrawal or an amended charge, I am dismissing the above allegations which are subject to deferral to arbitration, and which fail to state a prima facie case based on this letter and the facts and reasons contained in my November 26, 1990 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 (California Code of Regulations, 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 Code of Regulations, 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 Code of Regulations, 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 Code of Regulations, 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 Code of Regulations, 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 _____
Marc S. Hurwitz
Regional Attorney

Attachment

cc: William B. Haughton, Esq.

PUBLIC EMPLOYMENT RELATIONS BOARD

Los Angeles Regional Office
3530 Wilshire Boulevard, Suite 650
Los Angeles, CA 90010-2334
(213)736-3127

November 26, 1990

David N. Villarino
Labor Relations Representative
CA State Employees' Association/SEIU Local 1000
Post Office Box 62
Keene, California 93531

Re: WARNING LETTER, California State Employees' Association/ SEIU Local 1000 v. California State University, San Diego, Unfair Practice Charge No. LA-CE-278-H

Dear Mr. Villarino:

This case involves a charge that the California State University (CSU or University) unlawfully discriminated/committed a reprisal against Ms. Cristina A. Jackson, in retaliation for her protected activity in violation of HEERA section 3571(a)[1] (b)[2]and (c). The charge was filed on July 31, 1990.

My investigation and the charge revealed the following information. There is a collective bargaining agreement (Agreement) between CSEA/SEIU Local 1000 and CSU with effective dates of June 1, 1989 through May 31, 1992. Article VII, section 7.2 of the Agreement provides that "The term 'grievant' as used in this Article may refer to the union when alleging a violation of Union Rights as provided for in this Agreement." In Article V, Union Rights, section 5.14 provides "An employee shall not suffer reprisals for participation in union activities." Article VII, section 7.22 provides that the arbitrator's award shall be final and binding on both parties.

On March 7, 1990, Ms. Jackson met with David Villarino, CSEA's Labor Relations Representative and asked for assistance. He advised her to request an informal meeting between Ms. April StammerJohn, Supervisor of Accounts Payable, Mr. Villarino, and Ms. Jackson. Ms. Jackson made this request to Ms. StammerJohn, but Ms. Stammerjohn did not answer the question. CSEA has alleged that on November 23, 1989, Ms. Jackson interviewed for the position of Intermediate Account Clerk at San Diego State University along with other applicants including Mr. Fernando Castro. Ms. Jackson was led to believe that if she was selected

[1]Alleged in error as section 3572(a).

[2]Alleged in error as section 357(b).

for the position, she would become permanent after the duration of her temporary employment. On November 27, 1989, she was notified that she had been selected for the temporary position. Her employment in the Accounts Payable office commenced on November 28, 1989. Mr. Castro applied for a separate temporary 10-week appointment which became available on or about January 15, 1990. He was selected for that position.

On March 2, 1990, Ms. StammerJohn notified Ms. Jackson, that she was choosing Mr. Castro for the permanent appointment which Ms. Jackson believed she would get. Ms. Jackson questioned Ms. Stammerjohn about this, and Ms. StammerJohn indicated that she didn't think Ms. Jackson would fit in. She thought that Mr. Castro would fit better. Mr. Stammerjohn also indicated that Ms. Jackson could either leave at that time or stay until the end of May 1990. Jackson indicated her desire to stay until the end of May. On March 5, 1990, Ms. Jackson met with Ms. Stammerjohn to verify Ms. StammerJohn's remarks of March 2, 1990. The prior information was confirmed again on March 5, 1990. On or about March 7, 1990, Ms. Jackson gave Ms. Stammerjohn a memorandum to confirm their discussions of March 2 and 5, 1990. It was requested that Ms. Stammerjohn respond in writing if she disagreed with the memorandum. On March 9, 1990, Ms. Stammerjohn requested authority from the personnel office to fire Ms. Jackson. She requested that Ms. Jackson's temporary appointment expire on March 16, 1990. On March 15, 1990, Mr. Villarino came to the office and Ms. Jackson notified Ms. Stammerjohn that Mr. Villarino wished to speak with her. After a short meeting with Stammerjohn, Mr. Villarino advised Ms. Jackson that Ms. Stammerjohn wasn't willing to talk to him that day, but reluctantly agreed to set a date for an informal meeting. Ms. Stammerjohn needed to speak with someone at the personnel office before meeting with Mr. Villarino. On March 16, 1990, Mr. Grant Taunton, Manager of Classification and Employment, delivered a termination notice to Ms. Jackson.

On March 16, 1990, the termination date, Ms. Jackson asked why she was being terminated since she thought she could stay until the end of May. Ms. Stammerjohn replied that under the contract she did not have to give any reason. At an informal conference in April 1990, regarding the grievance filed on behalf of Ms. Jackson, Mr. Villarino asked Mr. Taunton for the reason Ms. Jackson was terminated. Mr. Taunton indicated that he did not have to give a reason. On May 16, 1990, Mr. Villarino met with Mr. Dan Gilbreath, the University Controller, regarding the grievance filed on behalf of Ms. Jackson. Mr. Gilbreath indicated that she was terminated due to budgetary constraints.

Based on the facts stated above and PERB Regulation 32620(b)(5) (California Administrative Code, title 8, section 32650(b)(5)), **the HEERA** section 3571(a) allegation must be dismissed and **deferred to** arbitration under the Agreement.

PERB Regulation 32620(b)(5) requires the board agent processing **the** charge to:

> Dismiss the charge or any part thereof as provided in section 32630 if . . . it is determined that a complaint may not be issued **in** light of Government Code sections 3514.5, 3541.5 or 3563.2 or because a dispute arising **under HEERA** is subject to final and binding **arbitration.**

In Dry Creek Joint Elementary School District (1980) PERB **Order No. Ad-81a, the Board** explained that:

> [W]hile there is no statutory deferral **requirement** imposed on the National Labor **Relations Board (hereafter** NLRB), **that agency has voluntarily** adopted such a policy both **with regard to** post-arbitral and pre-arbitral **award** situations. (Footnote omitted.) EERA **section** 3541.5(a) essentially codifies the **policy** developed by the NLRB regarding **deferral** to arbitration proceedings and **awards.** It is appropriate, therefore, to **look** for guidance to the private sector. (Footnote to Fire Fighters Union v. City of Vallejo (1974) 12 Cal.3d 608.)

Although this case arose under the Educational Employment **Relations** Act (EERA), and was overruled on statutory grounds, the **rationale** is still applicable to cases under HEERA. Regents of **the** University of California (1983) PERB Order No. Ad-139-H; California State University (1984) PERB Decision No. 392-H.

In Collyer Insulated Wire 192 NLRB 837, 77 LRRM 1931 (1971) and **subsequent** cases, the NLRB articulated standards under which deferral is appropriate in prearbitral situations. These **requirements** are: (1) the dispute must arise within a stable **collective bargaining** relationship where there is no enmity by **the** respondent toward the charging party; (2) the respondent must **be ready and** willing to proceed to arbitration and must waive

contract-based procedural defenses; and (3) the contract and its meaning must lie at the center of the dispute.

These standards are met with respect to this case. First, no evidence has been produced to indicate that the parties are not operating within a stable collective bargaining relationship. Second, by the attached letter from its representative, William B. Haughton, Esq. dated August 6, 1990, the Respondent has indicated its willingness to proceed to arbitration and to waive all procedural defenses. Finally, the issue raised by this charge that CSU unlawfully discriminated /committed a reprisal against Ms. Jackson in retaliation for her protected activity, directly involves an interpretation of Article V, section 5.14 of the Agreement.

Accordingly, the HEERA section 3571(a) allegation must be deferred to arbitration and will be dismissed.[3] Such dismissal is without prejudice to the Charging Party's right, after arbitration, to seek a repugnancy review by PERB of the arbitrator's decision under the Dry Creek criteria. See PERB Regulation 32661 (California Administrative Code, title 8, section 32661; Los Angeles Unified School District (1982) PERB Decision No. 218; Dry Creek Joint Elementary School District, supra. You recently raised the issue that deferral to arbitration is inappropriate due to futility. Since Ms. Jackson held a temporary position, you indicated that according to the Education Code, the University could dismiss her without cause. This evidence does not demonstrate futility. First, futility is not mentioned in PERB Regulation 32620(b)(5). Second, assuming that the concept of futility is recognized under HEERA, it would operate to prevent deferral to arbitration where it would be futile for the charging party to attempt to arbitrate the matter. This is shown when, for example, the charging party is an individual and the exclusive representative refuses to take the person's case to arbitration. Here, the charging party's grievance is not impacted by the grievant's rights under the Education Code. McFarland Unified School District (1990) PERB Decision No. 786, rev. pending. Thus, no futility has been shown.

[3]Based on State of California, Department of Parks and Recreation (CAUSE) (1990) PERB Decision No. 810-S, and the language of the contract which only covers the "(a)" violation, I will not defer the allegation of a "(b)" violation.

The allegations also fail to state a prima facie violation of HEERA section 3571(b) for the following reasons. Section 3571(b) provides that it is unlawful to deny to employee organizations rights guaranteed to them in HEERA. However, under HEERA, employee organizations have not been granted a general and independent statutory right to represent unit members in their employment relations with their employer.[4] This significant limitation on the rights of employee organizations under HEERA **has** been found to be intentional. In Regents of the University of California v. Public Employment Relations Board (1985) 168 **Cal.App.**3d 937, 945, 214 Cal. Rptr. 698 the Court of Appeal **stated:**

> We read the legislative omission as merely shifting emphasis. The non-exclusive employee organization may continue to represent its members in many ways, but the initiative for representation must come from the employee. The employee has a right to be represented, but the organization does not have an independent right to represent.

The Court's analysis applies with equal force to an exclusive **representative** or a non-exclusive representative; HEERA grants to **the** exclusive representative only an independent right of **representation** to meet and confer with the employer pursuant to **HEERA** section 3570.[5].

Finally, the charge alleges insufficient facts to state a prima **facie violation** of HEERA section 3571(c). The thrust of this case clearly involves allegations of reprisal for protected activity. It does not allege any facts which would give rise to a violate of the employer's duty to bargain.

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[4]The Legislature omitted enacting a provision in HEERA similar to section 3515.5 of the Dills Act or section 3543.1(a) of EERA which provided the employee organization the right to represent their members in their employment relations with the employer.

[5]As will be stated hereafter, insufficient facts have been alleged to support an independent, prima facie violation of section 3571(c), refusal or failure of CSU to meet and confer with the union.

If you feel that there are any factual inaccuracies in this letter or any additional facts which would require a different conclusion than the one explained above, please amend the charge accordingly. This 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 December 3, 1990, I shall dismiss your charge without leave to amend. If you have any questions on how to proceed, please call me or Tom Allen at (213) 736-3127.

Sincerely,

Marc S. Hurwitz
Regional Attorney

Attachment

THE CALIFORNIA STATE UNIVERSITY

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SAN MARCOS • SONOMA • STANISLAUS

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8-63M040

August 6, 1990

Marc S. Hurwitz
Regional Attorney
Public Employment Relations Board
3530 Wilshire Blvd., Suite 650
Los Angeles, California 90010-2334

Re: Unfair Practice Charge No. LA-CE-278-H - CSEA/SEIU Local 1000 v. California State University - Alleged Retaliation for Union Activity (Cristina Jackson) - San Diego State University; Our File No. L90-603

Dear Marc:

Enclosed herewith is a copy of the grievance which has been filed in this matter, as admitted in paragraphs 5a and 5b of the unfair practice charge.

The grievance alleges a violation of Article 5.14 of the current CSEA-CSU collective bargaining agreement, a copy of which is on file with PERB. This article provides:

> "An employee shall not suffer reprisals for participation in union activities."

An affidavit of the employee, Cristina A. Jackson, dated March 23, 1990, is attached in support of the grievance. This is the identical affidavit attached as Attachment "A" to the unfair practice charge to support the allegation of reprisals for participation in union activities.

There can be no question in this case because of the identical affidavit that the interpretation and meaning of Article 5.14 as well as Article 11.5 of the contract lies at the core of this dispute. The contract contains a grievance procedure which can culminate in binding arbitration (Article 7). The parties have a stabile collective bargaining relationship and CSU will waive all procedural defenses it has to arbitrating

the dispute, including timeliness, if PERB dismisses this charge based on deferral.

All of the Collyer elements supporting deferral to arbitration are present in this case. Moreover, as a matter of policy, CSU should not be required to litigate the same issue in multiple forums.

Based on the foregoing, this charge should be dismissed by PERB and deferred to arbitration.

Sincerely,

BRUCE M. RICHARDSON
Acting General Counsel

William B. Haughton
Senior Labor Relations Counsel

WBH:mks:0146E
Enclosure