STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, LOCAL 3212,	)	Case No. SF-CE-381-H
Charging Party,	)	PERB Decision No. 1023-H
v.	)	November 3, 1993
UNIVERSITY OF CALIFORNIA,	)	
Respondent.	)	

Appearance; Ernest Haberkern, Grievance Representative, for American Federation of State, County and Municipal Employees, Local 3212.

Before Blair, Chair; Caffrey and Garcia, Members.

DECISION

BLAIR, Chair: This case is before the Public Employment Relations Board (Board) on appeal by the American Federation of State, County and Municipal Employees, Local 3212 (AFSCME) of a Board agent's dismissal (attached) of its unfair practice charge. The charge alleged that Martin Lipow (Lipow), a projectionist for the University of California (UC) at Berkeley, was terminated in retaliation for filing an appeal of his reclassification as an independent contractor. The Board agent dismissed the charge as being untimely.

The Board has reviewed the entire record in this case and finds the Board agent's dismissal to be free of prejudicial error and adopts it as the decision of the Board itself consistent with the following discussion.

DISCUSSION

On appeal, AFSCME argues that the limitations period began to run on March 30, 1993, when the UC chancellor approved Lipow's reclassification, not when he received the termination letter on December 7, 1992.

Section 3541.5(a)(1) of the Higher Education Employer-Employee Relations Act (HEERA)[1] sets forth the six-month statutory limitation period for unfair practice charges. The statutory period begins to run once the charging party knows, or should have known, of the conduct underlying the charge. (Regents of the University of California (Alderson) (1993) PERB Decision No. 1002-H, citing Fairfield-Suisun Unified School District (1985) PERB Decision No. 547 and Healdsburg Union High School District (1984) PERB Decision No. 467.)

In unfair labor practice cases, PERB only has jurisdiction for the limited period of six months. If a charge is filed late, PERB completely lacks jurisdiction over the matter. (The Regents of the University of California (UC-AFT) (1990) PERB Decision No. 826-H.)

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[1]**HEERA** is codified at Government Code section 3560 et seq. HEERA section 3541.5 states, in pertinent part:

> (a) Any employee, employee organization, or employer shall have the right to file an unfair practice charge, except that the board shall not do . . . the following:
>
> (1) Issue a complaint in respect of any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge.

In the instant case, Lipow was clearly informed on December 7, 1992, that he was being terminated. The chancellor's subsequent approval of his reclassification does not serve to delay the beginning of the limitations period. Therefore, the charge, which was filed on June 11, 1993, was untimely filed.

ORDER

The unfair practice charge in Case No. SF-CE-381-H is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Caffrey and Garcia joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
177 Post Street, 9th Floor
San Francisco, CA 94108-4737
(415) 557-1350

August 12, 1993

Ernest Haberkern
American Federation of State, County and Municipal Employees
545-A Lexington Avenue
El Cerrito, California 94530

Re: **DISMISSAL OF UNFAIR PRACTICE CHARGE/REFUSAL TO ISSUE COMPLAINT**
American Federation of State, County and Municipal Employees v. Regents of the University of California
Unfair Practice Charge No. SF-CE-381-H

Dear Mr. Haberkern:

The above-referenced unfair practice charge, filed on June 11, 1993, alleges that the Regents of the University of California (University) terminated Martin Lipow in retaliation for his filing an appeal of his reclassification. This conduct is alleged to violate Government Code section 3571(a) of the Higher Education Employer-Employee Relations Act (HEERA).

I indicated to you, in my attached letter dated July 30, 1993, 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 August 9, 1993, the charge would be dismissed.

On August 9, 1993, an amended charge was filed. The amended charge contains the following new allegations. On October 9, 1992, Martin Lipow was informed by Laurie Kossof that he was being separated from University employment. Lipow had been separated "automatically by what he was led to believe was a computer error" on three previous occasions and when informed of this by Kossof had appealed her action to her superiors and prevailed in being reinstated on each occasion. Likewise, Lipow appealed the October 9 separation to Stephen Gong and then to the Chancellor's Office. On December 7, 1992, Lipow received the letter from Kossof, noted in the original charge, wherein she stated, ostensibly in reply to his grievance concerning reclassification, that he was no longer an employee of the University in any capacity. Lipow then filed a grievance on December 13, 1992 challenging Kossof's December 7, 1992 letter, which the original charge notes was rejected as untimely because,

in the University's opinion, Lipow's reclassification to an independent contractor in October 1992 severed his employment relationship and thus required him to file within a 30-day time limit. The amended charge alleges that University factfinder, Gail Ward, failed to explain in her March 8, 1993 decision how circumstances had differed from the previous three occasions when Lipow had prevailed in getting Kossof to rehire him.

It is concluded that these facts are insufficient to state a prima facie violation of retaliation because they do not serve to establish a different and later date for calculating the running of the six-month statute of limitations. Assuming, arguendo, that the circumstances of the previous three "computer error" situations were similar to the circumstances of Kossof's December 7, 1992 action to terminate Lipow -- and it is doubtful that such facts have been alleged,[1] -'- Lipow became aware of the alleged retaliatory act of Kossof's on December 7, 1992. According to the amended charge, in the previous cases it was not Kossof who rescinded her decision, rather it was her superiors as a result of the appeal process. Therefore, Kossof's act of retaliation on December 7, 1992 was unequivocally communicated to Lipow at that time. There is no legal authority for the proposition that the date on which an employee's appeals of an adverse action are exhausted -- even assuming he believes he will prevail -- establishes the date for the running of the statute of limitations. Since the charge was not filed within six months of December 7, 1992, the charge is untimely.

Based on the foregoing facts and reasons as well as those contained in my July 30, 1993 letter, I am dismissing the charge.

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. (Cal. Code of Regs., tit. 8, sec. 32635(a).) To be timely filed, the original and five copies of such appeal must be actually received by the Board itself

[1] For example, the amended charge alleges that Kossof informed on October 9, 1992 that he had been "automatically separated." However, the letter of December 7, 1992 from Kossof, "ostensibly in reply to his grievance concerning his reclassification," is not alleged to have been "automatic" in nature or to have suggested any "computer error. "

before the close of business (5 p.m.) or sent by telegraph, certified or Express United States mail postmarked no later than the last date set for filing. (Cal. Code of Regs., tit. 8, sec. 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 (20) calendar days following the date of service of the appeal. (Cal. Code of Regs., tit. 8, sec. 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 Cal. Code of Regs., tit. 8, sec. 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 (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. (Cal. Code of Regs., tit. 8, sec. 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
Deputy General Counsel

By _____
DONN GINOZA
Regional Attorney

Attachment

cc: Dennis Marino
Leslie Van Houten

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
177 Post Street, 9th Floor
San Francisco, CA 94108-4737
(415) 557-1350

July 30, 1993

Ernest Haberkern
American Federation of State, County and Municipal Employees
545-A Lexington Avenue
El Cerrito, California 94530

Re: **WARNING LETTER**
American Federation of State, County and Municipal Employees v. Regents of the University of California
Unfair Practice Charge No. SF-CE-381-H

Dear Mr. Haberkern:

The above-referenced unfair practice charge, filed on June 11, 1993, alleges that the Regents of the University of California (University) terminated Martin Lipow in retaliation for his filing an appeal of his reclassification. This conduct is alleged to violate Government Code section 3571(a) of the Higher Education Employer-Employee Relations Act (HEERA).

Investigation of the charge revealed the following. Martin Lipow has been employed as a projectionist for over twenty years by the Pacific Film Archive, a department within the University's Berkeley campus. Prior to the enactment of the HEERA, Lipow had been designated as a casual employee under the terms of a collective bargaining agreement between the International Alliance of Theatrical and Stage Employees and Moving Picture Machine Operators, Local 169. Following the passage of the HEERA, the Public Employment Relations Board (PERB) established a bargaining unit which included Lipow's classification. Elections were held and the employees voted for no representation.

In October 1992, Lipow was informed by his supervisor, Stephen Gong, that he would no longer be employed as a casual employee, but rather as an independent contractor. Lipow filed an appeal of this action on November 16, 1992. On December 7, 1992, Lipow received a letter from Laurie Kossof, Personnel Analyst at the University Art Museum, informing him that he was no longer an employee of the University in any capacity.

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

The charge is untimely. Government Code section 3563.2(a) states that PERB "shall not . . . issue a complaint in respect of any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge." PERB has held

that the six month period commences to run when the charging party knew or should have known of the conduct giving rise to the alleged unfair practice. (Regents of the University of California (1983) PERB Dec. No. 359-H.) The charge was filed on June 11, 1993. The charge alleges that Lipow received the letter terminating his employment relationship with the University on December 7, 1992. Therefore, the charge was not filed within six months of the date Lipow knew or should have known of the unfair practice. (See U. S. Postal Service (1984) 271 NLRB 61 [116 LRRM 1417] [employee is in position to file unfair practice charge when notice of adverse employment decision is communicated to him] .)

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 which 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 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 August 9, 1993, I shall dismiss your charge. If you have any questions, please call me at (415) 557-1350.

Sincerely,

DONN GINOZA
Regional Attorney