

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



B. BENEDICT WATERS,)	
)	
Charging Party,)	Case No. LA-CO-13-H
)	
v.)	PERB Decision No. 697-H
)	
AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES,)	September 26, 1988
)	
Respondent.)	
)	

Appearance: B. Benedict Waters, on his own behalf.
Before Hesse, Chairperson; Porter, Craib and Shank, Members.

DECISION AND ORDER

This case is before the Public Employment Relations Board (Board) on appeal by Charging Party of a Board agent's dismissal, attached hereto, of his charge that the American Federation of State, County and Municipal Employees violated sections 3571.1(a) and (b) of the Higher Education Employer-Employee Relations Act (codified at Gov. Code sec. 3560 et seq.). We have reviewed the dismissal and, finding it free from prejudicial error, we adopt it as the Decision of the Board itself.

The unfair practice charge in Case No. LA-CO-13-H is hereby DISMISSED WITHOUT LEAVE TO AMEND.

By the Board



PUBLIC EMPLOYMENT RELATIONS BOARD



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



April 20, 1988

B. Benedict Waters
P.O. Box 191018
Los Angeles, California 90019

Re: LA-CO-13-H, B. Benedict Waters v. American Federation of State, County and Municipal Employees
PARTIAL DISMISSAL OF UNFAIR PRACTICE CHARGE

Dear Mr. Waters:

The above-referenced unfair practice charge, filed on September 22, 1987 and amended on April 4, 1988, alleges that the American Federation of State, County and Municipal Employees (AFSCME) concealed knowledge of benefits under the Memorandum of Understanding (MOU) negotiated with the employer, the Regents of the University of California (University), by failing to distribute copies of the MOU to employees in the bargaining unit, including Charging Party. This conduct is alleged to violate Government Code sections 3571.1(a) and (b) of the Higher Education Employer-Employee Relations Act (HEERA).

I indicated to you in my attached letter dated March 29, 1988 that certain allegations contained in the 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 accordingly. You were further advised that unless you amended these allegations to state a prima facie case, or withdrew them prior to April 5, 1988, they would be dismissed.

I received an amended charge on April 4, 1988. The amended charge contained several legal arguments as to why a complaint should issue. These arguments were considered but are found to be without merit. The reasoning stated in my March 29, 1988 letter is restated and incorporated herein by reference.

The only new facts alleged were that another bargaining unit member, Nancy A. Ridley, requested but was denied a copy of the MOU. This is insufficient to establish a prima facie violation as to other bargaining unit members. As noted in my letter of March 29, 1988, even if it were alleged that other members of the bargaining unit were denied copies upon their request, no prima facie violation would be alleged without other facts indicating such employees were also denied the opportunity to view copies in AFSCME's possession in order that they might ascertain their rights under the MOU.

Also, the amended charge alleges that AFSCME's lack of interest induced the University not to provide AFSCME with information necessary for it to ensure the distribution of the contract. The reasoning is circular. It is not probative of any causal connection with any conduct of the University that was detrimental to the rights of employees in the bargaining unit.

I am therefore dismissing those allegations which fail to state a prima facie case based on the facts and reasons contained in my March 19, 1988 and this 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 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. Code of Civil Procedure section 1013 shall apply. (See section 32135.) 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 (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 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 (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 SPITTLER
Acting General Counsel

By



DONN GINOZA
Regional Attorney

Attachment

PUBLIC EMPLOYMENT RELATIONS BOARD



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



March 29, 1988

B. Benedict Waters
P.O. Box 191018
Los Angeles, California 90019

Re: LA-CO-13-H, B. Benedict Waters v. Regents of the University of California

Dear Mr. Waters:

The above-referenced unfair practice charge, filed on September 22, 1987, alleges that the American Federation of State, County, and Municipal Employees (AFSCME) concealed knowledge of benefits under the Memorandum of Understanding (MOU) negotiated with the employer, the Regents of the University of California (University), by failing to distribute copies of the MOU to employees in the bargaining unit, including Charging Party. This conduct is alleged to violate Government Code sections 3571(a) and (b) of the Higher Education Employer-Employee Relations Act (HEERA).

My investigation revealed the following facts. Charging Party became employed at the University of California at Los Angeles (UCLA) on May 20, 1986 in a casual position. As a casual employee, Charging Party was covered by the MOU negotiated between AFSCME and the University, covering Unit 12 (Clerical and Allied Services).

Article 2, section N.1. of the MOU, effective from July 1, 1986 through June 30, 1988, provides as follows:

The employer shall be responsible for reproducing a sufficient number of copies of this Agreement. The University shall determine the number of copies it needs in order to provide copies of this Agreement to its managerial, supervisory and confidential personnel. The University shall be responsible for the cost associated with the reproduction of the number of copies it needs. The Union shall be responsible for for the cost of the number of copies needed to provide a copy of this Agreement to each employee presently covered by the Agreement whether or not such employee is a member of the Union. The Union shall also be responsible for the cost of a sufficient number of copies to provide new employees with copies of the Agreement, whether or not such new employees are or become members of

the Union. Additionally, the Union shall be responsible for the costs of any copies that it needs for Union uses of the Agreement.

Article 2, section N.2. provides as follows:

Based upon a reasonable estimate of the number of copies the respective parties need to fulfill their respective obligations and needs for copies, the University shall inform the Union of that portion of the reproduction costs which is to be paid by the Union. Upon receipt of payment from the Union for its share of the reproduction costs, the University shall distribute one copy of this Agreement to each employee covered by the Agreement and shall commence distribution of one copy of the Agreement to each new employee covered by the Agreement as those employees are hired. Concurrent with the distribution to employees currently covered by the Agreement the University will provide the Union with the number of copies which are to be made available for Union purposes.

Charging Party has alleged in related unfair practice charges that he became the victim of employment discrimination beginning on or after February 2, 1987 and attempted on February 7, 1987 to file a grievance over the matter (LA-CE-217-H). Charging Party alleges that an agent of the University, Frank Martinez, Personnel Representative for UCLA's Facilities Division, Personnel and Payroll Department, falsely informed him that he was required to complete the informal resolution stage of the grievance process prior to filing a grievance, when in fact the MOU indicates that a grievant must file a grievance within thirty (30) days of the occurrence of the violation, regardless of the outcome of any attempts at informal resolution. When he did file the grievance in May 1987, the University initially rejected the grievance as being untimely. Charging Party states that not having a copy of the MOU prevented him from knowing about the timeliness requirements of the agreement.

Charging Party alleges that in early February 1987 he contacted Cliff Fried, a grievance representative for AFSCME, to discuss the filing of his grievance. He also states that he informed

Fried of Martinez's statements and that Fried failed to inform him of the 30-day time limit. As noted in the charge, he further asserts that the MOU requires that all employees be given a copy of the contract and argues that AFSCME does not obey or enforce this provision. When he raised this with Fried, Fried told him that copies were available at the AFSCME office on Wilshire, and that Fried could easily obtain a copy for him. Fried made repeated promises to provide him with a copy but never did provide him with one. Charging Party relied on these promises at least through March 2, 1987, or thirty days following the violation underlying the grievance. Charging Party also alleges that he is informed and believes that it is the custom and practice of AFSCME not to retain copies of the MOU at the Wilshire office in spite of Fried's claim to that effect.

Charging Party further indicated that he had heard from Andrea Ryan, an employee in Campus Architects and Engineers, that copies were not distributed to employees at the same time the managerial employees received their copies because AFSCME had failed to provide the University with the necessary funds for reproduction of the document.

Charging Party alleges in this unfair practice charge that AFSCME, acting in concert or collusion with the University, has deprived members of the bargaining unit of the information contained in the MOU by failing to ensure the distribution of copies by the University. As a result he claims he was personally injured when the University rejected his grievance as being untimely on May 6, 1987 and also claims that other employees are deprived of the information as well.

Charging Party submitted copies of an October 28, 1987 Public Records Act request to the University and the University's response thereto, dated November 9, 1987 from Sandra J. Rich, Assistant Labor Relations Manager. In this response the University indicated that (1) the Administrative Information System containing a list of all employees would have been used to calculate the number of employees initially entitled to receive copy of the contract, (2) records for job openings kept by the Employment Department provide a count of the number of new hires entitled to receive a copy of the agreement subsequent to the initial distribution, (3) the distribution procedure for casual employees would be through the Personnel Department, and (4) during the past several years new employees were informed that the contract is available from AFSCME. Charging Party asserts that this information request response demonstrates that there has been no distribution of contracts

to casual employees or recent hires for several years, although the University has the capability to distribute copies. Further, Charging Party has asserted that Antonia DeCuir, Coordinator of the UCLA Instant Personnel Service (manages all temporary hires including Charging Party), stated to him on October 22, 1987 that her department does not distribute a copy of the contract to new hires and has never been asked to assist in determining the number of future hires on which to base estimates of the number of contracts which must be printed. Frank Martinez is alleged to have also conceded that new hires are not provided copies of the contract during orientation.

On this basis, the Charging Party contends the University is in breach of its obligations under Article 2, section N.1. and section N.2. and, in turn, that AFSCME has failed to enforce these provisions of the contract.

The University provided correspondence from Gregory L. Kramp, Deputy Director, Office of Labor Relations (Office of the President, Berkeley Campus) to Nadra Floyd, Executive Director of AFSCME, dated July 24, 1986, in which Kramp confirms the parties' June 30, 1986 meeting during which Floyd indicated no interest in joining the University in the printing and distribution of the agreement to employees in Units 11 and 12, and on that basis the University denied any obligation to distribute copies.

Based on the facts as stated above, the allegations that AFSCME violated the HEERA by (1) failing to ensure that copies of the MOU were distributed to all employees in the bargaining unit and concealed knowledge of contractual benefits from all employees in the unit, and (2) causing or attempting to cause the University to violate Government Code section 3571 fail to state a prima facie violation of the HEERA for the reasons which follow.

Violation As to Other Bargaining Unit Members

Charging Party contends that by its "willful failure to ensure each employee is provided a copy of the Agreement," AFSCME has breached its duty of fair representation and that as a proximate result of AFSCME's failure to enforce Article 2, sections N.1. and N.2. of the MOU, employees in the unit are deprived of knowledge of their benefits under the MOU.

In order to state a prima facie violation on the theory of a breach of the duty of fair representation, Charging Party must allege facts demonstrating that the union engaged in conduct

toward its members that is arbitrary, discriminatory or in bad faith. Rocklin Teachers Professional Association (Romero) (1978) PERB Decision No. 124.

Standing alone, the fact that AFSCME failed to invoke the provisions of Article 2 to ensure that all employees received a copy of the MOU, fails to demonstrate arbitrary, discriminatory or bad faith conduct. The fact that the parties in this case have chosen to include in the MOU a provision enabling individual employees to receive copies of the MOU does not mean that providing such copies is required as a matter of statutory right. There is no authority under PERB construing the HEERA to require this. If the parties have negotiated the matter, there is nothing to prevent them from modifying the contract or waiving a provision under the contract. The fact that AFSCME may not have had the funds necessary for the printing of copies for its members or chose to spend its financial resources on other matters does not establish arbitrary, discriminatory or bad faith conduct. Moreover, PERB "shall not have the 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 not also constitute an unfair practice under this chapter." Government Code section 3563.2(b).

Charging Party alleges that AFSCME concealed knowledge of benefits under the MOU from all employees in the unit. This claim is supported by allegations that AFSCME failed to participate with the University in the distribution of copies of the MOU and that it is the custom and practice of AFSCME not to maintain copies of the MOU at the Wilshire office. Charging Party has also alleged facts indicating that new employees are not provided with copies upon their hire. However, no facts are alleged to demonstrate that other bargaining unit members requested but were denied copies of the MOU, or that even if copies are not available to individual employees upon their request, that such employees cannot make arrangements to view a copy in AFSCME's possession. Without such allegations, the charge fails to demonstrate any harm to the rights of these other employees (Carlsbad Unified School District (1978) PERB Decision No. 89) or that AFSCME has acted in an arbitrary, discriminatory or bad faith manner. As noted above, an employee organization does not violate the HEERA merely by failing to distribute the copies allegedly in violation of an express term of the MOU.

Violation of Government Code Section 3571.1(a)

Government Code section 3571.1(a) provides as follows:

It shall be unlawful for an employee organization to: (a) Cause or attempt to cause the higher education employer to violate Section 3571.

In order to state a violation of Government Code section 3571.1(a), it must be clear how and in what manner AFSCME caused or attempted to cause the employer to violate the HEERA. Tustin Unified School District (1987) PERB Decision No. 626. Charging Party has not alleged how any action on AFSCME's part caused the University to violate section 3571. The theory appears to be that AFSCME caused a violation by causing the University to violate Article 2, sections N.1. and N.2. However, as noted above, merely alleging that a party to the MOU has breached a provision of the MOU does not establish interference with employee rights. Therefore, if AFSCME only caused the University to violate the MOU, that fact is not sufficient to state a violation of section 3571.1(a).

For these reasons, the allegations that AFSCME violated the HEERA by (1) failing to ensure that copies of the MOU were distributed to all employees in the bargaining unit and concealed knowledge of contractual benefits from all employees in the unit, and (2) violating Government Code section 3571.1(a), as presently written, do not state a prima facie case. If you feel that there are any factual inaccuracies in this letter or any additional facts which 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 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 April 5, 1988, I shall dismiss the above-described allegation from your charge. If you have any questions on how to proceed, please call me at (213) 736-3127.

Sincerely,



DONN GINOZA
Regional Attorney