STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, COUNCIL 10, LOCALS 3235 AND 3238,	)	
Charging Parties,	)	Case No. LA-CE-243-H
v.	)	PERB Decision No. 763-H
REGENTS OF THE UNIVERSITY OF CALIFORNIA,	)	September 14, 1989
Respondent.	)	

Appearance: Cliff Fried, President Local 3238, for American Federation of State, County and Municipal Employees, Council 10, Locals 3235 and 3238.

Before Hesse, Chairperson; Porter, Craib, Shank and Camilli, Members.

DECISION AND ORDER

This case is before the Public Employment Relations Board (Board) on appeal by the charging parties of a Board agent's dismissal (attached hereto) of their charge that the respondent violated section 3571[1] of the Higher Education Employer-Employee Relations Act (Gov. Code sec. 3560 et seq.). We have reviewed the dismissal and, finding it free of prejudicial error, adopt it as the Decision of the Board itself.

[1]Although the Board agent's warning letter states that the unfair practice charge alleges violations of Government Code section 3571, subdivisions (a) and (b), the Board notes that the charge also included alleged violations of section 3571, subdivisions (c) and (d) which were fully addressed by the Board agent in the warning letter and subsequent dismissal.

The unfair practice charge in Case No. LA-CE-243-H is hereby DISMISSED WITHOUT LEAVE TO AMEND.

By the BOARD

PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
1031 18th Street, Room 102
Sacramento, CA 95814-4174
(916) 322-3198

May 31, 1989

Cliff Fried, President
AFSCME Local 3238
13833 Oxnard St., #16
Van Nuys, California 91401

Re: DISMISSAL OF CHARGE AND REFUSAL TO ISSUE COMPLAINT; Federico Martin, President, Local 3235 and Cliff Fried, President, Local 3238 (AFSCME Council 10) v. Regents of the University of California; Unfair Practice Charge No. LA-CE-243-H (First Amended Charge)

Dear Mr. Fried:

I indicated to you in my attached letter dated April 28, 1989, 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 May 12, 1989, the charge would be dismissed.

On May 10, 1989, you verbally requested, and were granted, an extension of time to file an amended charge not later than May 26, 1989. Your First Amended Charge was placed in the mail on May 26, 1989, and received in this office on May 30, 1989.

The amended charge includes one additional factual allegation not contained in the original charge, and offers an additional theory of the case. The balance of the statement appended to the amended charge constitutes reargument of points previously addressed. The one additional fact alleged is that the University indicated to an AFSCME representative (Ken Brown), after issuance of the March 15, 1988 letter[1] that a final decision would be made in June 1988 upon review of any additional deduction authorizations submitted by AFSCME. Such a statement is, however, consistent with the 90 days notice provided by the University by its March 15, 1988 letter, and in no way changes the applicability of the analysis set forth in my April 28, 1989 letter.

[1] The March 15 letter gave AFSCME Council 10 only 90 days to reach the minimum level of enrollments required to maintain a payroll deduction slot for benefit programs, or face termination of the deduction slot.

The new theory of the case offered by the amended charge is that the University violated Government Code sections 3565 and 3571 (a) and (b) by not providing notice to non-exclusively represented employees of a change in policy (namely, the March 15, 1988 letter) and providing employees an opportunity, through their chosen employee organization, to meet and confer over the issue, as required by Regents of the University of California v. Public Employment Relations Board (1985) 168 Cal.App.3d 937 [214 Cal.Rptr. 698]. This alleged violation also fails to state a prima facie case because the charge, as written, does not establish that the University enacted a change in policy with respect to the access of employee organizations to payroll deduction slots for benefit programs.

The statement submitted with the amended charge acknowledges that the HEERA does not provide for payroll deduction for benefits programs as a right of employees or employee organizations, that the contract language of the agreement between AFSCME and the University is clear and the accounting manual requirements discussed in the April 28, 1989 letter exist. The charge argues for a finding of a prima facie violation essentially on the basis that the University's decision to adhere to the accounting manual requirements had an impact on both employees and AFSCME and on the unsupported assertion that this impact (concerning a non-protected activity) interfered with AFSCME's organizing activities.

The only specific point in my April 28 letter which you dispute concerns the actual number of employees enrolled for benefits programs that AFSCME needed, under the accounting manual requirements cited, to maintain eligibility for the deduction slot. You argue that AFSCME should have had a year from January 1988 to reach a minimum of 500, because Council 10 was a "new sponsor" offering "new" benefit programs. Even assuming, for argument sake, this is true and that AFSCME Council 10 should have been treated as a "new" organization, AFSCME still did not meet the requirements of the accounting manual policy cited by the University in its March 15, 1988 letter. The accounting manual policy includes the requirement that, in order to begin payroll deduction, an employee organization have already enrolled 50 members or 25% of the employee organization membership (whichever is greater). which would calculate in this case to a

minimum of 1000,[2] given your estimate of AFSCME's membership as 4000. The charge as written alleges that AFSCME submitted some 200 to 250 enrollments, not 500, and certainly not 1000.

I am therefore dismissing the charge based on the facts and reasons contained in this letter and my April 28, 1989 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 (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

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[2]The anomaly of the minimum number required to begin deductions being higher than the required number to maintain deduction was already discussed in my April 28, 1989 letter, and I remain willing to accept your postulation that the number required would be only 500.

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,

CHRISTINE A. BOLOGNA
General Counsel

By
Les Chisholm
Regional Director

Attachment

cc: Federico Martin
Susan Benjamin

PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
1031 18th Street, Room 102
Sacramento, CA 95814-4174
(916) 322-3198

April 28, 1989

Cliff Fried, President
AFSCME Local 3238
13833 Oxnard St., #16
Van Nuys, CA 91401

Re: WARNING LETTER; Federico Martin, President, Local 3235 and Cliff Fried, President, Local 3238 (AFSCME Council 10) v. Regents of the University of California; Unfair Practice Charge No. LA-CE-243-H

Dear Mr. Fried:

The above-referenced charge, filed with PERB's Los Angeles regional office on November 1, 1988, alleges that the Regents of the University of California (Respondent or UC) violated Government Code section 3571 (a) and (b) by cancelling access for AFSCME and its members to a payroll deduction slot for benefits programs sponsored for members only by AFSCME. The Charging Parties in this case are both yourself and Federico Martin, and AFSCME Locals 3238 and 3235.

My investigation revealed the following information. AFSCME is the exclusive representative of three systemwide bargaining units of UC employees (Service, Patient Care Technical and Clerical & Allied Service) and the unit of UC Santa Cruz skilled crafts employees. In addition, AFSCME has members who are employed in positions included in non-exclusively represented bargaining units, including Systemwide Technical. AFSCME Local 3235 includes members who are employed in the Clerical & Allied Service bargaining unit on the UC Los Angeles campus. Local 3238 includes members who are employed in professional and technical positions, which are not a part of any represented unit, on the UC Los Angeles campus. Both locals are affiliated with AFSCME Council 10, which is the bargaining representative for all AFSCME locals in the UC system.

Since at least 1978, AFSCME affiliates (in various organizational structures) have submitted payroll deduction forms to UC, at all campuses, so that fees or premiums for AFSCME-sponsored insurance benefit programs would be deducted from members' pay warrants. UC provided, in its Accounting Manual, a procedure for this arrangement, with certain minimum qualifications established. Under these rules, employee organizations could provide for

membership participation in non-UC sponsored insurance benefit programs, provided that

a) deductions were available to members only;

b) within one year, the program had 500 or more participating UC employees and participation to that extent continues;

c) the program is not restricted to a geographic area of the State;

d) such program met legal requirements and all of the regulations established by the State's Insurance Commissioner;

e) to begin payroll deduction, insurance benefit programs have already enrolled 50 members or 25% of the employee organization membership (whichever is greater) for payroll deduction; and

f) participation will be reviewed annually to determine whether the 500-member minimum is being met.

The current collective bargaining agreements between AFSCME and UC include a provision citing AFSCME's access to the payroll deduction slot for insurance benefit programs, subject to the requirements set forth above from the Accounting Manual.

In January 1988, AFSCME Council 10 informed UC that Council 10 itself would be sponsoring the benefit programs and that a new package of insurance benefits was to be offered. A meeting was later held between representatives of Council 10 and UC, where certain concerns of UC were aired about an auto insurance policy being offered at UC San Diego.

By letter dated March 15, 1988, UC advised AFSCME Council 10 that the total number of AFSCME members enrolled in AFSCME-sponsored insurance benefit programs was only 36 and that, unless the enrollment was increased to the minimum of 500 members within 90 days (or by June 13, 1988), payroll deduction for AFSCME benefit programs would be cancelled. It is undisputed that no meetings were held between AFSCME and UC concerning the policy after the March 15 letter issued, and that no demand to bargain the issue was ever made by AFSCME. In early June 1988, some 200-250 additional deduction forms submitted by AFSCME were not accepted

by UC, and the existing deductions (for 36 members) were cancelled.

DISCUSSION

As written, the charge argues for a finding that the Respondent was not entitled to enforce the provisions of the Accounting Manual cited above because UC had "sat on" its rights for up to ten years or, alternatively, because AFSCME Council 10 was a different sponsoring organization behind the benefits programs and payroll deduction slot, entitled under the policy to a full year to reach the 500 member minimum. In addition, you have argued that the Respondent's conduct constitutes interference with employee and AFSCME rights, reasoning that AFSCME utilized the insurance benefit programs as an organizing tool to encourage membership, that UC knew this and that UC acted to enforce the policy on minimum participation because of the organizing implications.

Where, as is the case here, the established policy is clear and unambiguous on its face, it is not possible to infer from past practice a finding which supersedes the language of the policy itself. Marysville Joint Unified School District (1983) PERB Decision No. 314. "The mere fact that an employer has not chosen to enforce its . . . rights in the past does not mean that, ipso facto, it is forever precluded from doing so." Ibid., at p. 10, citing Rio Hondo Community College District (1982) PERB Decision No. 279.

For the question of whether AFSCME Council 10 is a "new" organization to become relevant to a determination of whether a prima facie violation has been stated, it would first be necessary for the charge to allege that, if so, AFSCME Council 10 had submitted the required minimum number of payroll deduction forms to begin the process. You have alleged that AFSCME had, in addition to the original 36 enrolled members, some 200-250 deduction forms signed by members. Under the policy cited above, AFSCME Council 10 was required to have 50 members, or 25% of its members (whichever is greater), enrolled in order to begin having payroll deduction for benefits programs. You indicated to me, in our telephone conversation of April 27, 1989, that AFSCME Council 10's current membership is in excess of 4400; since 25% of 4400 is over 1000, it would appear the 500-minimum is in fact the minimum AFSCME would be required to reach, whether a "new" or

"old" sponsor, in order to become or remain eligible for the payroll deduction slot.[1]

In order to demonstrate a prima facie case for a finding of an interference violation, there must be a showing that Respondent's conduct tends to or does result in some harm to employee and/or employee organization rights. Carlsbad Unified School District (1979) PERB Decision No. 89, Novato Unified School District (1982) PERB Decision No. 210, Coast Community College District (1982) PERB Decision No. 251. Here, the rights shown to be harmed must be those protected under the Higher Education Employer-Employee Relations Act (HEERA). Government Code section 3565 sets forth the right of higher education employees to "form, join and participate in" employee organizations of their own choosing "for the purpose of representation on all matters of employer-employee relations and for the purpose of meeting and conferring." (Emphasis added.) Employees, of course, also have the right to not form, join and so forth.

HEERA also provides certain rights to employee organizations, including the right of access (section 3568), the right, if the exclusive representative of an appropriate unit, to represent employees on all matters within the scope of representation (section 3570), and the right, upon written authorization of an employee, to have deducted and remitted to it the "standard initiation fee, periodic dues, and any general assessments of such organization" (section 3585).

The "right to participate" may easily be construed to include the right of employees to participate in insurance programs offered by an employee organization, and the right of the employee organization to offer such programs for its members. Still missing, however and essential to the analysis, is any obligation on the part of the higher education employer to provide payroll deduction for this purpose. Section 3585 enumerates the types of deductions which are required, and insurance benefits programs are not listed. Charging Party's argument, essentially, is that

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[1]A literal reading of the policy would result in the anomaly of an employee organization, under these factual circumstances, being required to have more members enrolled to begin a program than to continue a program. A more liberal (and perhaps more rational) reading is that the minimum of 500 required to continue would become the minimum required to begin in such a case. As noted, AFSCME did not meet either test.

since payroll deduction facilitates enrollment by the employee organization of members in insurance programs (thus assisting the membership recruitment effort itself), it is "interference" for the employer to limit or cancel access to the deduction. Such a conclusion is unsupported by the language of HEERA and case law.

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 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 May 12, 1989, I shall dismiss your charge. If you have any questions, please call me at (916) 322-3198.

Sincerely,

Les Chisholm
Regional Director

cc: Federico Martin