

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



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|---------------------------|---|-------------------------|
| CARMEN MICHELE COMSTOCK, |) | |
| |) | |
| Charging Party, |) | Case No. LA-CE-246-H |
| |) | |
| v. |) | PERB Decision No. 781-H |
| |) | |
| UNIVERSITY OF CALIFORNIA, |) | December 15, 1989 |
| SAN DIEGO, |) | |
| |) | |
| Respondent. |) | |

Appearances: Carmen Michele Comstock, on her own behalf; Susan Benjamin, University Counsel, for University of California, San Diego.

Before Hesse, Chairperson, Shank and Camilli, Members.

DECISION AND ORDER

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

The unfair practice charge in Case No. LA-CE-246-H is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chairperson Hesse and Member Camilli joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD



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



April 27, 1989

Carmen Michele Comstock

RE: DISMISSAL AND REFUSAL TO ISSUE COMPLAINT, Unfair Practice
Charge No. LA-CE-246-H, Carmen Michele Comstock v.
University of California, San Diego

Dear Ms. Comstock:

I indicated to you in my attached letter dated March 27, 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 April 5, 1989, the charge would be dismissed. I later gave you an extension of time to April 18, 1989.

I have not received either a request for withdrawal or an amended charge. In a telephone conversation on April 14, 1989, however, you raised a question concerning Government Code section 3567, which states in part as follows:

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. (Emphasis added.)

You questioned why, considering that your grievance never actually went to an arbitration hearing, you could not continue to deal with the University directly or through your attorney.

The answer to your question is that the right set forth in Government Code section 3567 has been held to be defeasible, that is, to be subject to limitation by agreement between the employer (in your case, the University) and the exclusive representative (AFSCME). Chaffey Joint Union High School District (1982), PERB

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Decision No. 202.¹ The University and AFSCME did in fact agree to a limitation on your right under Government Code section 3567 in Article 7, paragraph L, of the collective bargaining agreement, which gave AFSCME full authority over "a grievance appealed to arbitration" (emphasis added), regardless of whether the grievance actually went to hearing.

I am therefore dismissing the charge based on the facts and reasons contained in this letter and in my March 27 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

¹This decision actually interpreted Government Code section 3543. The decision is applicable to Government Code section 3567, however, because the relevant statutory language is virtually identical and the same policy considerations apply.

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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,

CHRISTINE A. BOLOGNA
General Counsel

By
Thomas J. ~~Allen~~
Regional Attorney

Attachment

cc: Susan Benjamin, Esq.

PUBLIC EMPLOYMENT RELATIONS BOARD



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



March 27, 1989

Carmen Michele Comstock

RE: WARNING LETTER, Unfair Practice Charge No. LA-CE-246-H,
Carmen Michele Comstock v. University of California, San
Diego

Dear Ms. Comstock:

In the above-referenced charge, you allege that the University of California at San Diego (University) interfered with your right to have a grievance processed under the collective bargaining agreement between the university and the American Federation of State, County and Municipal Employees (AFSCME). This conduct is alleged to violate Government Code section 3571 (a) of the Higher Education Employer-employee Relations Act (HEERA).

My investigation of this charge revealed the following information.

You were employed by the University in a unit for which AFSCME was the exclusive representative. The University dismissed you from employment on February 18, 1986. AFSCME declined to carry to arbitration three grievances leading up to your dismissal. AFSCME did carry to arbitration a grievance filed on March 7, 1986, challenging your dismissal itself.

In December 1986 an arbitration-hearing was scheduled for January 27, 1987. AFSCME Council Representative Teresa Pascual-Valladolid stated she would not represent you because you had inquired about obtaining your own attorney. In order to give your attorney time to prepare, Pascual-Valladolid said she would obtain a continuance of the hearing, and she later told your attorney and his secretary that she had taken the appropriate steps. Your attorney could not take those steps himself, because he had not been officially designated as representative by AFSCME, but he had orally informed University Labor Relations Officer Kerry Donnell that there was not enough time to prepare for the hearing.

Pascual-Valladolid failed to request a continuance, as your attorney learned when the arbitrator called him on the scheduled

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hearing date. Your attorney asked for a new date, but the arbitrator said that he would not be available until June and suggested that the parties might want to seek another arbitrator. Your attorney also spoke with Donnell on that day.

Two days later, on January 29, 1987, Donnell told your attorney for the first time that the University was taking the position that the grievance was no longer arbitrable, because the hearing could not be scheduled within 180 calendar days of the filing of the appeal. Article 7, paragraph P, of the collective bargaining agreement provides in part that "the scheduling of the hearing date for such arbitration must be accomplished no later than one hundred eighty (180) calendar days from the date the grievance was originally appealed to arbitration." Donnell stated the same position in a letter dated January 28, 1987. As a result, a new grievance was filed on February 25, 1987, regarding the arbitrability of the previous grievance.

Your attorney meanwhile attempted to negotiate a settlement, but none was reached that you could accept. AFSCME also attempted to negotiate a settlement. By a letter dated March 28, 1988, AFSCME presented to you a settlement agreement that it and the University had negotiated to resolve both grievances. The settlement had been changed from an earlier proposed settlement without your knowledge or consent, the University having withdrawn a demand that you not seek future employment at the University in exchange for AFSCME's withdrawal of its demand that certain documents be removed from your personnel file. AFSCME told you that it felt that this was a fair settlement and "the best settlement we can reach." It also told you that "we will not pursue your case to arbitration" but that you could appeal this decision to AFSCME's Executive Board.

You did appeal to the Executive Board, which finally decided not to proceed with arbitration* on April 24, 1988. By a letter to you dated May 6, 1988, AFSCME's Executive Director confirmed the decision and stated in part as follows:

The Executive Board informed you that Council 10 was not going forward with your arbitration and encouraged you to sign the agreement offered by the University. So therefore, it is your responsibility to contact the University regarding that agreement. Council 10 is no longer handling your case.

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By a letter dated June 8, 1988, you wrote to University Labor Relations Officer Donnell indicating you had an attorney who would contact him. By a letter dated June 16, 1988, Donnell responded that, notwithstanding AFSCME's failure to sign a written agreement, the University's position was that AFSCME and the University had reached an agreement settling the grievances. Donnell made reference to Article 7, paragraph L, of the collective bargaining agreement, which states in part as follows:

With regard to a grievance appealed to arbitration, AFSCME shall have full authority to settle, withdraw, or otherwise dispose of any grievance brought on behalf of the Union and/or on the behalf of employees. An agreement to settle, withdraw, or otherwise dispose of a grievance appealed to arbitration reached by and between the University and AFSCME shall be binding upon employees represented by AFSCME.

Donnell stated that he would recognize AFSCME as your exclusive representative and that neither you nor your attorney had authority to contact him.

Based on the facts stated above, the charge fails to state a prima facie case, for the reasons that follow.

Under Government Code section 3563.2 (a), the Public Employment Relations Board "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." Because your charge was filed on October 24, 1988, only allegations of unfair practices occurring on or after April 24, 1988, are timely. April 24, 1988, was the day AFSCME finally decided not to proceed with arbitration. *

You have alleged that the University violated HEERA section 3571 (a) by interfering with your right to have your grievance processed. In order to state a prima facie case of interference, an employee must show that the employer's conduct caused harm or potential harm to the employee's statutory rights. Carlsbad Unified School District (1979) PERB Decision No 89; Regents of the University of California (Berkeley) (1983) PERB Decision No. 308-H.

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An employee's individual statutory rights to grievance processing are set forth in HEERA section 3567, which states in part as follows:

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. (Emphasis added.)

As the highlighted proviso 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. Consistent with this proviso, the collective bargaining agreement between the University and AFSCME gave AFSCME full authority to dispose of any grievance appealed to arbitration, and the University did not interfere with any statutory right you had by refusing to deal directly with you or your attorney, or with anyone other than AFSCME, with regard to the grievance.

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 April 5, 1989, I shall dismiss your charge. If you have any questions, please call me at (213) 736-3127.

Sincerely,

Thomas J. Allen^{4/}
Regional Attorney