

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



JAN SMITH,)	
)	
Charging Party,)	Case No. LA-CO-28-H
)	
v.)	PERB Decision No. 859-H
)	
AMERICAN FEDERATION OF STATE,)	December 17, 1990
COUNTY AND MUNICIPAL EMPLOYEES,)	
COUNCIL 10,)	
)	
Respondent.)	

Appearance: Jan Smith, on her own behalf.

Before Hesse, Chairperson; Shank and Camilli, Members.

DECISION AND ORDER

CAMILLI, Member: This case is before the Public Employment Relations Board (Board) on appeal by Jan Smith (Smith) of a Board agent's dismissal (attached hereto) of her charge that the American Federation of State, County and Municipal Employees, Council 10 (AFSCME) violated section 3571.1(b) of the Higher Education Employer-Employee Relations Act (HEERA)¹ when it refused to process her grievance to arbitration. Smith alleges

¹HEERA is codified at Government Code section 3560 et seq. Unless otherwise indicated, all statutory references are to the Government Code. Section 3571.1 states, in pertinent part:

It shall be unlawful for an employee organization to:

(b) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.

that AFSCME's refusal denied her the right of fair representation guaranteed by Government Code section 3578.² We have reviewed the dismissal and, finding it to be free of prejudicial error adopt it as the Decision of the Board itself.

The unfair practice charge in Case No. LA-CO-28-H is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chairperson Hesse and Member Shank joined in this Decision.

²Section 3578 states:

The employee organization recognized or certified as the exclusive representative shall represent all employees in the unit, fairly and impartially. A breach of this duty shall be deemed to have occurred if the employee organization's conduct in representation is arbitrary, discriminatory, or in bad faith.

PUBLIC EMPLOYMENT RELATIONS BOARD



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



August 15, 1990

Jan Smith

RE: WARNING LETTER, Unfair Practice Charge No. LA-CO-28-H, Jan Smith v. American Federation of State, County and Municipal Employees Council 10

In the above-referenced charge, you allege that the American Federation of State, County and Municipal Employees Council 10 (AFSCME) denied you the right to fair representation guaranteed by Government Code section 3578 of the Higher Education Employer-Employee Relations Act (HEERA) and thereby violated Government Code section 3571.1(b).

My investigation of this charge revealed the following facts.

You were employed by the University of California (University) as career employee in a unit for which AFSCME is the exclusive representative. Specifically, you were employed as a part-time (50%) Senior Clerk in the Department of Biology. On February 1, 1989, the Department informed you that you would be terminated effective July 1, 1989, but would have a right to recall and a preference for reemployment. On March 2, 1989, you filed a grievance challenging your termination and alleging violations of Articles 4, 8 and 13 of the collective bargaining agreement.

Article 4 of the agreement (as effective January 4, 1988, through June 30, 1989) prohibited discrimination because of race, color, religion, marital status, national origin, ancestry, sex, sexual orientation, handicap, veteran status, age, citizenship, or union (or non-union) affiliation. Neither the original grievance nor an amended grievance (filed on March 8, 1989) indicated what kind of discrimination was alleged to have occurred in violation of this article. It was apparently alleged later that there had been age discrimination, but it is not apparent what evidence supported this allegation.

Article 8 provided in part that the University could discharge or otherwise discipline a career employee for just cause, but that the employee was entitled to prior notice and an opportunity to respond, and that the employee could appeal the action through the contractual grievance procedure by alleging that the action

**Dismissal and Refusal to
Issue Complaint**
LA-CE-28-H
August 28, 1990
Page 2

Department if your therapist approved) on January 21, 1990, the day before the appeals panel decided not to take your case to arbitration. Even assuming that Skotnes (who was not on the panel and did not appear before it) could communicate your message to the panel, the panel would still not know whether you would actually accept reinstatement. Since reinstatement would be the normal remedy for an improper termination, the panel would still have a legitimate practical concern about the relative costs and benefits of taking your case to arbitration. The additional facts (cited in the amended charge) that the University Rehabilitation Counselor advised you not to go back to the Biology Department, and that University Labor Relations Officer Tony Giorgio said such a return was "not viable," would only increase the panel's legitimate practical concern.

It is still not apparent from the charge as amended that AFSCME's decision not to take your case to arbitration was without a rational basis or devoid of honest judgment. I am therefore dismissing the charge based on the facts and reasons contained in this letter and in my August 15 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)).

Dismissal and Refusal to
Issue Complaint
LA-CE-28-H
August 28, 1990
Page 3

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 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,

JOHN W. SPITTLER
General Counsel

By
Thomas J. Allen
Regional Attorney

Attachment

cc: Nadra Floyd

PUBLIC EMPLOYMENT RELATIONS BOARD



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



August 29, 1990

Jan Smith

RE: DISMISSAL AND REFUSAL TO ISSUE COMPLAINT, Unfair Practice
Charge No. LA-CE-28-H, Jan Smith v. American Federation of
State, County and Municipal Employees Council 10

Dear Ms. Smith:

I indicated to you in my attached letter dated August 15, 1990, 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 August 22, 1990, the charge would be dismissed.

On August 20, 1990, you filed (by certified mail) a First Amended Charge. In this amended charge, you point out in part that AFSCME's letter to you dated March 1, 1990, did not address your claim of age discrimination. No evidence of age discrimination was cited, however, in the appeal of your grievance on June 29, 1989, in your letter to AFSCME on November 1, 1989, or in the statement you prepared to read to the AFSCME appeals panel on January 20, 1990. In your letter of November 1, 1989, the only discriminatory reason for your termination that you mentioned was that "[t]hey fired me, period, in a gross act of reprisal, for going to the Ombudsman" -- a kind of discrimination that the collective bargaining agreement apparently does not prohibit. Especially since it is still not apparent what evidence supported the claim of age discrimination, it does not seem unreasonable that AFSCME did not address this claim in its letter of March 1, 1990.

Moreover, the law does not require AFSCME to address in detail every argument in support of your grievance. As stated in my August 15 letter, the law requires you, as a charging party, to assert sufficient facts from which it becomes apparent how AFSCME's action or inaction was without a rational basis or devoid of honest judgment. The fact that AFSCME was apparently unpersuaded by arguments that you and AFSCME representative Peggy J. Skotnes apparently found persuasive is not sufficient.

In the amended charge, you make it clear that you called Skotnes (and left the message that you would go back to the Biology

Warning Letter
LA-CO-28-H
August 15, 1990
Page 2

was not based on just cause. Article 13 governed layoffs, which it defined (in section B.I.) to include "an involuntary separation from employment." This article provided (in section A.), "The University shall determine when temporary or indefinite layoffs . . . are necessary." Section C.I. of the article provided as follows:

If, in the judgment of the University, budgetary or operational considerations make it necessary to curtail operations, reorganize, reduce the hours of the workforce and/or reduce the workforce, staffing levels will be reduced in accordance with this Article. The selection of employees for layoff shall be at the sole discretion of the University. [Emphasis added.]

Sections E. and F. provided for recall and preferential rehire to "an active, vacant career position," with the following condition: "the employee must, as determined at the sole, non-grievable discretion of the University, be qualified to perform the duties of the position [emphasis added]."

Your amended grievance alleged that your termination, while disguised as a layoff, was disciplinary in nature and unwarranted under the circumstances. As a remedy, it requested reinstatement with no loss in wages and benefits.

In response to your grievance, the Department of Biology asserted that your termination was a layoff under Article 13, based on budgetary and operational needs and on plans to automate and reorganize. It asserted that funds saved by your layoff would fund other priorities, including another person in the Student Affairs Office. The Department denied that the termination was disciplinary or discriminatory. On appeal, the Vice Chancellor responded to the grievance in the same way, pointing out that Article 13 "states that the decision to layoff and the selection of the classification(s) for layoff are at the discretion of the University and are not grievable."

In a further appeal of your grievance, AFSCME representative Peggy J. Skotnes pointed out that you, a part-time (50%) Senior Clerk, were the only one laid-off, and that the person to be hired in the Student Affairs Office was a 50% Senior Typist Clerk. Skotnes continued as follows:

Warning Letter
LA-CO-28-H
August 15, 1990
Page 3

Jan Smith is eligible for recall into this position. She was offered this position in November 1988 and turned it down before she was ever informed she was to be laid off. This 50% Sr. Clerk Typist position was never posted and has since been filled. Aside from the evidence that the layoff was engineered to eliminate this particular individual, the Department knowingly deceived Ms. Smith regarding this other 50% position and clearly violated the recall section of the Layoff Article.

Additionally, we have also discovered that the proposed automation of the department has not been implemented at this time; further evidence that this was just a ruse used to get rid of this individual.

The Union requests as a remedy for the Department of Biology in conjunction with U.C. Riverside to find a 50% career variable time position for this employee and reinstatement of all benefits with no loss of seniority. The Department of Biology has refused to even give the employee a recommendation in order for her to take advantage of her preferential rehire rights. At minimum they should be required to do so.

The University's Office of Labor Relations nonetheless found no reason to change the earlier response to the grievance.

On October 25, 1989, AFSCME informed you by letter that it had "determined that this case lacks sufficient merit to justify processing to an arbitration hearing" and had therefore "decided not to take your case to arbitration." You were given an opportunity to appeal that decision, and you responded with a letter that stated in part as follows:

Please let me know just what would constitute sufficient merit to processing this case to arbitration. UC Riverside has done everything wrong in my case; even to the point of using my case in management training classes as what not to do, or they will be in a union grievance case. Also, at the time

Warning Letter
LA-CO-28-H
August 15, 1990
Page 4

they fired me they opened up a career position in the same department with a Sr. Clerk title, at 50%, variable time. This is the exact job classification, only with different duties, that I had before they started fooling around with my job, in October 1987. Even with my limited knowledge of the AFSCME contract, this does not seem right to me.

Also, just to let you know, mine was not a layoff, it was a definite termination. They fired me, period, in a gross act of reprisal, for going to the Ombudsman to seek help with the harassment and other things they had been putting me through for over a year and a half. The word "termination" was used as opposed to "layoff" as further harassment and degradation. Please find the enclosed termination [notice] that you requested.

On January 20, 1990, you appeared in person before an AFSCME appeals panel to tell your story. You also told the panel that your therapist had told you not to go back to the Biology Department. On March 1, 1990, AFSCME Executive Director Nadra Floyd sent you a letter stating in full as follows:

The AFSCME Council 10 Southern Appeals Panel, met on January 22, 1990 and arrived at the following decision in your arbitration case.

The Panel voted to uphold the decision not to got [sic] forward on your case. The panel after reviewing all the evidence, decided the following:

- a. The University does have the right to reorganize work in a department.
- b. You did not possess the qualifications necessary for the Senior Clerk Typist position which was subsequently created.

When you received this letter, you called AFSCME representative Skotnes and left a message¹ to the effect that if the arbitrator ruled that you had to go back to the Biology Department you would do so, if your therapist approved.

AFSCME Executive Director Nadra Floyd has told me that the **appeals panel's** decision was influenced by the collective bargaining agreement's grant of discretion to the University in layoff decisions; by what the panel saw as insufficient evidence that your termination was disciplinary; and by your apparent reluctance, based on your therapist's advice, to accept reinstatement to the Biology Department, which was the remedy that the grievance requested. She told me that the panel decided you did not possess the qualifications necessary for the Senior Clerk Typist position because it understood that you do not type. You have also told me that you are "not a typist."

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

You have alleged that AFSCME, as the exclusive representative, denied you the right to fair representation. The duty of fair representation imposed on the exclusive representative extends to grievance handling. Fremont Teachers Association (King) (1980) PERB Decision No. 125; United Teachers of Los Angeles (Collins) (1983) PERB Decision No. 258. In order to state a prima facie violation of this section of the EERA, a charging party must show that the exclusive representative's conduct was arbitrary, discriminatory, or in bad faith. In United Teachers of Los Angeles (Collins). id., the Public Employment Relations Board (PERB) stated:

Absent bad faith, discrimination, or arbitrary conduct, mere negligence or poor judgment in handling a grievance does not constitute a breach of the union's duty.

.

A union may exercise its discretion to determine how far to pursue a grievance on the employee's behalf as long as it does not arbitrarily ignore a meritorious grievance or process a grievance in a perfunctory fashion. A union is also not required to process an employee's grievance if the chances for success are minimal.

In order to state a prima facie case of arbitrary conduct violating the duty of fair representation, a charging party:

Warning Letter
LA-CO-28-H
August 15, 1990
Page 6

. . . must, at a minimum, include an assertion of sufficient facts from which it becomes apparent how or in what manner the exclusive representative's action or inaction was without a rational basis or devoid of honest judgment. Reed District Teachers Association, CTA/NEA (Reyes) (1983) PERB Decision No. 332, citing Rocklin Teachers Professional Association (Romero) (1980) PERB Decision No. 124.

It is not apparent that AFSCME's decision not to take your case to arbitration was without a rational basis or devoid of honest judgment. Article 13 of the collective bargaining agreement allows the University, in its judgment, to determine when layoffs and reorganizations are necessary and, in its "sole discretion," to select employees for layoff. Presumably the University's discretion is limited by Article 4, which prohibits various kinds of discrimination; Article 4 does not, however, appear to prohibit discrimination because an employee went to the University Ombudsman. AFSCME could therefore conclude, with some rational basis and honest judgment, that it would not be likely to succeed in arbitration in challenging your termination, which the University had portrayed as a layoff due to reorganization. Whether or not AFSCME found you actually possessed the qualifications necessary for the Senior Clerk Typist position may not have been significant, since Article 13 also allowed the University, in its "sole, non-grievable discretion," to determine whether or not a laid-off employee is "fully qualified" for a vacant position, and AFSCME could reasonably have concluded that an arbitrator would therefore feel bound by the University's determination on this issue. Furthermore, considering the effort and expense of arbitration, it was not unreasonable for AFSCME to be concerned that you might ultimately decline, on your therapist's advice, the remedy of reinstatement that you originally sought.

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,

Warning Letter
LA-CO-28-H
August 15, 1990
Page 7

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 August 22, 1990, I shall dismiss your charge. If you have any questions, please call me at (213) 736-3127.

Sincerely,

Thomas J. Allen
Regional Attorney