STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

WERNER FRANZ WITKE, Charging Party, v. UNIVERSITY PROFESSIONAL AND TECHNICAL EMPLOYEES, CWA LOCAL 9119, Respondent.	Case No. LA-CO-69-H PERB Decision No. 1446-H June 21, 2001

Appearances: Werner Franz Witke, on his own behalf; Zwerdling, Paul, Leibig, Kahn, Thompson & Wolly by Carla M. Siegel, Attorney, and Schwartz, Steinsapir, Dohrmann, Sommers by Michael Feinberg, Attorney, for University Professional and Technical Employees, CWA Local 9119.

Before Amador, Baker and Whitehead, Members.

DECISION

WHITEHEAD, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Werner Franz Witke (Witke) from a Board agent's dismissal (attached) of his unfair practice charge. In his charge Witke alleged that the University Professional and Technical Employees, CWA Local 9119 (CWA) improperly assessed its fair share agency fee, contrary to PERB Regulation 32994(a),[1] and that the arbitrator's award on

[1]PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq. PERB Regulation 32994 states, in pertinent part:

> (a) If an agency fee payer disagrees with the exclusive representative's determination of the agency fee amount, that employee (hereinafter known as an "agency fee objector") may file an agency fee objection. . . . An agency fee objector may file an unfair practice charge that challenges the amount of the agency fee; however, no complaint shall issue until the agency fee objector has first exhausted the exclusive representative's Agency Fee Appeal Procedure.

the fair share question was issued in an untimely fashion, in violation of PERB Regulation 32994(b)(8).[2] Witke alleged these acts constituted unfair practices under the Higher Education Employer-Employee Relations Act (HEERA)[3] and PERB Regulation 32997.[4]

The Board has reviewed the entire record in this case, including the original and amended unfair practice charges and their attachments, the warning and dismissal letters, Witke's appeal, and CWA's statement in opposition to the appeal. The Board finds the Board agent's dismissal to be free from prejudicial error and adopts it as the decision of the Board itself.

ORDER

The unfair practice charge in Case No. LA-CO-69-H is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Amador and Baker joined in this Decision.

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[2]PERB Regulation 32994(b)(8) states:

> All decisions of the agency fee impartial decisionmaker shall be in writing, and shall be rendered no later than 30 days after the close of the hearing.

[3]HEERA is codified at Government Code section 3560 et seq.

[4]PERB Regulation 32997 states:

> It shall be an unfair practice for an exclusive representative to collect agency fees in violation of these regulations.

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
1515 Clay Street, Suite 2201
Oakland, CA 94612
(510) 622-1016

January 30, 2001

Werner Franz Witke

Re: Werner Franz Witke v. University Professional and Technical Employees, CWA Local 9119
Unfair Practice Charge No. LA-CO-69-H
Dismissal and Refusal to Issue a Complaint

Dear Mr. Witke:

In the above-referenced charge, filed on September 27, 2000, Werner Franz Witke alleges the University Professional and Technical Employees, CWA (UPTE or CWA) violated the Higher Education Employer-Employee Relations Act (HEERA or Act). The charge alleges: (1) the arbitrator's award did not issue within 30 days of the close of the hearing; and (2) UPTE failed to provide a reasonable basis by which chargeable and nonchargeable agency fee expenses could be calculated.

On December 15, 2000, I issued a warning letter indicating the charge failed to state a prima facie violation. The warning letter explained:

> When the agency fee arbitration has already concluded, PERB will defer to an arbitrator's award and refuse to issue a complaint in which: (1) the arbitration proceedings were fair and regular; and (2) the arbitrator's award is not clearly repugnant to the purposes of the Act. (ABC Federation of Teachers (1998) PERB Decision No. 1295.)

The warning letter concluded that the timing of the arbitrator's award did not demonstrate that proceedings were unfair or irregular. The original charge did not include other facts indicating that the proceedings were unfair and irregular. Nor did the original charge present facts indicating that the arbitrator's award is clearly repugnant to the purposes of the Act.

The first amended charge alleges the proceedings were unfair and irregular for the following reasons: (1) the arbitrator reopened the proceedings without providing the Charging Party with notice; (2) the arbitrator accepted documents from the Respondent without providing the Charging Party with the opportunity to examine

those documents; (3) the reopening of the hearing prevented the decision from being rendered within 30 days; and (4) the arbitrator engaged in ex parte communications with the Respondent.

Initially, the AAA indicated that the proceedings were considered closed on July 17, 2000. On August 2, 2000 the arbitrator requested documents from the Respondent through the AAA case manager. On August 9, 2000, the Respondent's attorney wrote a letter to the arbitrator which indicated that she had spoken with the arbitrator by telephone. The Charging Party was not included in that conversation.

On August 25, 2000, the Arbitrator acknowledged receipt of documents from the Respondent, and requested the Respondent to prepare a memorandum regarding the issue of jurisdiction. The Arbitrator's letter stated in pertinent part:

> For now: I would appreciate receiving the memorandum I have requested; the record is still open; time limits for opinion and decision are suspended; a hearing is possible, although not favored; probably, I will make copies of all correspondence with accompanying materials available to challengers, but not now; challengers could be asked to waive any residual rights they may have to opt for another forum to object to agency fees, if I should be persuaded that I have limited jurisdiction in the case.
>
> Since the record is still open in this case, the American Arbitration Association has authorized that you communicate directly with me, copy to that association.

On September 28, 2000, the AAA notified the Charging Party that the arbitrator had requested additional information from the Respondent and had thereby reopened the proceedings. The letter indicated that the hearing was now considered closed as of September 8, 2000. The award issued on September 28, 2000.

AAA rule 15 indicates, in pertinent part "Parties shall be afforded an opportunity to examine all documents submitted in the proceedings." AAA rule 22 indicates there shall be no communication between the parties and the arbitrator other than at oral hearings. AAA rule 17 states:

> The hearings may be reopened by the arbitrator at will or on the motion of any

> party, for good cause shown, at any time before the award is made, but if the reopening of the hearings would prevent the making of the award within the time specified in the applicable law and the union's internal procedures, the matter may not be reopened.

As stated previously, the Charging Party alleged the proceedings were unfair and irregular because: the arbitrator reopened the proceedings without providing the Charging Party with notice; the arbitrator accepted documents from the Respondent without providing the Charging Party with the opportunity to examine those documents; the reopening of the hearing prevented the decision from being rendered within 30 days; and the arbitrator engaged in ex parte communications with the Respondent.

Taking the above-stated information as true,[1] the charge demonstrates the arbitration proceeding violated several AAA rules. The communication and the documents exchanged between the Respondent and the Arbitrator seem to only address the question of whether the arbitrator had jurisdiction. The jurisdictional question appears to have been raised by the Arbitrator, and involved whether the Respondent provided fair notice to the agency fee challengers that objections could be heard in a forum other than arbitration. The Arbitrator ruled he had jurisdiction to comment on the adequacy of the notice, and concluded a decision on the adequacy of the notice could be considered in another proceeding.

Although failure to comply with the AAA rules is a serious matter, the rule violations involved an issue tangential to the issues raised by the Charging Party. The Charging Party raised objections regarding whether the Respondent's expenses were chargeable or non-chargeable, not whether the Respondent's notice adequately informed him of the possibility of other forums. As such, the proceedings appear to have been fair and regular as they pertained to the Charging Party's objections, except as to whether the award was issued in a timely manner.

The award issued six weeks after the original due date. However, the failure of the Arbitrator to issue the award in a timely manner is insufficient to demonstrate the proceedings were conducted in an irregular and unfair manner. In Sawin & Co., Inc. and Hector Rodas (1985) 277 NLRB No. 44, the NLRB held the Board does not require that the strict standard of a Board

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[1](See Mark West Union School District (1993) PERB Decision No. 1011.)

hearing be met in order for the award to be honored.[2] In the instant charge, the arbitrator's failure to meet a deadline similarly fails to render the proceeding unfair. Moreover, the Charging Party fails to demonstrate the delay in the issuance of the award resulted in any harm.

The Charging Party alleges the arbitrator's award is repugnant to the Act because a comparison of the Respondent's financial statements and the Respondent's IRS Form 990 for 1998 reveal different figures and that the Respondent used different accounting methods to calculate these figures. However, the charge fails to demonstrate that such a comparison renders the decision clearly repugnant to the Act. The award analyzes the Respondent's system for identifying chargeable and non-chargeable expenses and concludes the system is fair and reasonable. Several other arbitration awards and court decisions similarly found the system to be adequate. The award also addresses Witke's specific objections and concludes the Respondent provided him with adequate notice and detailed schedules of chargeable and non-chargeable expenses. Even in a case where PERB may have reached different conclusions than the arbitrator, that alone does not demonstrate the award is repugnant to the Act. (See Oakland Unified School District (1985) PERB Decision No. 538.) Thus, the charge fails to demonstrate the award is clearly repugnant to the Act, and must be dismissed.

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 Regs., tit. 8, sec. 32635(a).) Any document filed with the Board must contain the case name and number, and the original and five (5) copies of all documents must be provided to the Board.

A document is considered "filed" when actually received before the close of business (5 p.m.) on the last day set for filing or when mailed by certified or Express United States mail, as shown on the postal receipt or postmark, or delivered to a common carrier promising overnight delivery, as shown on the carrier's receipt, not later than the last day set for filing. (Cal. Code Regs., tit. 8, sec. 32135(a); see also Cal. Code Regs., tit. 8, sec. 32130.)

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[2]In that case, the alleged discriminates were denied an opportunity to cross-examine witnesses because the employer did not present witnesses at the hearing, and instead submitted affidavits. The NLRB deferred to the award.

A document is also considered "filed" when received by facsimile transmission before the close of business on the last day for filing together with a Facsimile Transmission Cover Sheet which meets the requirements of Cal. Code Regs., tit. 8, sec. 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code. Regs., tit. 8, secs. 32135(b), (c) and (d); see also Cal. Code Regs., tit. 8, secs. 32090 and 32130.)

The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95814-4174
FAX: (916) 327-7960

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 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 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. A document filed by facsimile transmission may be concurrently served via facsimile transmission on all parties to the proceeding. (Cal. Code Regs., tit. 8, sec. 32135(c).)

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 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
Tammy L. Samsel
Regional Attorney

Attachment

cc: Carla Siegel

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
1515 Clay Street, Suite 2201
Oakland, CA 94612
(510) 622-1016

December 15, 2000

Werner Franz Witke

Re: Werner Franz Witke v. University Professional and Technical Employees, CWA Local 9119
Unfair Practice Charge No. LA-CO-69-H
Warning Letter

Dear Mr. Witke:

In the above-referenced charge, filed on September 27, 2000, Werner Franz Witke alleges the University Professional and Technical Employees, CWA (UPTE or CWA) violated the Higher Education Employer-Employee Relations Act (HEERA or Act). The charge alleges: (1) the arbitrator's award did not issue within 30 days of the close of the hearing; and (2) UPTE failed to provide a reasonable basis by which chargeable and nonchargeable agency fee expenses could be calculated. My investigation revealed the following information.

Witke filed an agency fee objection under UPTE's appeal procedure. UPTE requested a hearing regarding the agency fee before an independent arbitrator employed by the American Arbitration Association (AAA). On July 13, 2000, Mark Miller, case manager for the AAA sent a letter to the arbitrator stating:

> Please find enclosed CWA's Reply Memorandum and Attachments in the above styled matter. As you know, this is the final submission that will be made by any of the parties in this case. Therefore, the record will be considered closed on July 17, 2000 making your decision due on or before August 17, 2000.

On August 31, 2000 Witke wrote to Miller indicating that he had not yet received a copy of the arbitrator's award. On September 1, 2000 Witke called Miller and learned that a decision had not yet been made, and complaining that he was not given an opportunity to respond to CWA's Reply Memorandum because he received it the same day as the record was closed.

On September 28, 2000, Miller sent a letter to the agency fee challengers, including Witke, which stated:

> Please be advised that Arbitrator Ables requested additional information from CWA, the last of which he received on September 8, 2000. Therefore, the arbitrator's opinion and decision in this proceeding are now due, to be submitted to the American Arbitration Association, no later than October 7, 2000. The arbitrator expects to meet this deadline.

On October 5, 2000, AAA sent a cover letter issuing the arbitration award which was dated September 28, 2000. The award indicates that CWA's system of calculating chargeable and nonchargeable expenses is fair and reasonable. The award also provided, in pertinent part:

> with the exception that CWA shall take such action as will result in an increase to 25 percent of the monthly stipend of UPTE's officer(s) as a non-chargeable expense, CWA has met its burden to show that allocations in issue were fair and reasonable.

The award indicated that Witke's September 1, 2000 letter to Miller was accepted and considered by the arbitrator since he had kept the record open until September 8, 2000 pending receipt from CWA of requested information.

The above-stated information fails to state a prima facie violation for the reasons that follow. As stated previously, the charge includes two allegations: (1) the arbitrator's award was not issued within 30 days of the close of hearing; and (2) UPTE failed to provide a reasonable basis by which chargeable and nonchargeable agency fee expenses could be calculated.

PERB Regulation 32994(b)(8) states:

> All decisions of the agency fee impartial decisionmaker shall be in writing, and shall be rendered no later than 30 days after the close of the hearing.

At the time of the filing of this charge, September 27, 2000, the arbitrator's award had not yet issued. However, the award has since issued and is dated September 28, 2000.

Witke alleges UPTE violated PERB Regulation 32994(b) when the arbitrator failed to issue the award on or before August 17, 2000. However, the facts demonstrate the arbitrator kept the hearing open until September 8, 2000 while he waited for CWA to

comply with his request for documents. Thus, the 30-day period started on September 8, 2000. The September 28, 2000 award complies with the 30-day requirement of PERB regulation 32994(b)(8). Thus, this allegation does not state a prima facie violation and must be dismissed.

In reviewing the charge's second allegation concerning agency fee objections, the following standard applies. When the agency fee arbitration has already concluded, PERB will defer to an arbitrator's award and refuse to issue a complaint in which: (1) the arbitration proceedings were fair and regular; and (2) the arbitrator's award is not clearly repugnant to the purposes of the Act. (ABC Federation of Teachers (1998) PERB Decision No. 1295.)

The Charging Party's allegation that the arbitrator failed to issue his award within 30 days will be evaluated as evidence of whether the arbitration proceedings were fair and regular. The AAA case manager responded to Witke's inquiries regarding why the award did not issue by August 17, 2000 and explained that the hearing was kept open pending the receipt of the requested information. As discussed above, the award issued on September 28, 2000, less than 30 days after the arbitrator closed the hearing. The charge does not include other facts indicating that the proceedings were unfair and irregular. Nor does the charge present facts indicating that the arbitrator's award is clearly repugnant to the purposes of the Act. Thus, the charge fails to demonstrate a prima facie violation and must be dismissed.

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 have the case number written on the top right hand corner of the charge form. The amended charge must be served on the respondent's representative and the original proof of service must be filed with PERB. If I do not receive an

amended charge or withdrawal from you before December 29, 2000, I shall dismiss your charge. If you have any questions, please call me at (510)622-1023.

Sincerely,

TAMMY L. SAMSEL
Regional Attorney