

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



CALIFORNIA FEDERATION OF
INTERPRETERS-TNG/CWA,

Charging Party,

v.

REGION 2 COURT INTERPRETER
EMPLOYMENT RELATIONS COMMITTEE,
et al.,

Respondent.

Case No. SF-CE-7-I

PERB Decision No. 2099-I

February 25, 2010

Appearances: Beeson, Tayer & Bodine by Sheila K. Sexton, Attorney, for California Federation of Interpreters-TNG/CWA; Judicial Counsel of the Courts by Patti L. Williams, Attorney, for Region 2 Court Interpreter Employment Relations Committee, et al.

Before McKeag, Neuwald and Wesley, Members.

DECISION

McKEAG, Member: This case comes before the Public Employment Relations Board (PERB or Board) on appeal by the California Federation of Interpreters-TNG/CWA (Federation) of the partial dismissal of an unfair practice charge by a Board agent. The charge alleged that the Region 2 Court Interpreter Employment Relations Committee, et al. (Region 2 Committee) and the Superior Courts of San Francisco, Sonoma, Santa Cruz and Monterey Counties (collectively Courts) violated the Trial Court Interpreter Employment and Labor Relations Act (Court Interpreter Act)¹ when they provided more favorable terms and

¹ The Court Interpreter Act is codified at Government Code section 71800 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

conditions of employment to independent contractors than they did to court employees. The Federation alleged this conduct constituted a violation of Court Interpreter Act sections 71802 and 71822.

The Board agent ruled that the Federation failed to establish the alleged pay disparity between employees and independent contractors in connection with allegations by Essam Elmahgoop (Elmahgoop) and Ted Kim (Kim) was for the purpose of discouraging protected conduct. Accordingly, the Board agent dismissed those allegations for failure to establish a prima facie case of discrimination in violation of Section 71802.²

The Board has reviewed the entire record in this case and find that the unfair practice charge states a prima facie case of violation of the Court Interpreter Act section 71802. Accordingly, we reverse the partial dismissal of this charge and remand the matter to the Office of the General Counsel for the issuance of a complaint consistent with this decision.

FACTS

The Region 2 Committee is one of four regional committees created under the Court Interpreter Act to unify working conditions among trial courts with defined geographical areas. Region 2 includes the counties of the First and Sixth Appellate Districts, except Solano County.³ The Federation is the exclusive representative for all the superior court employees in Region 2 who provide interpretation services in court and related proceedings. Although the

² The Board agent also dismissed the allegations that the Region 2 Committee violated Section 71802 on the grounds that Section 71802 only defines permissible and impermissible conduct by trial courts. That ruling was not appealed by either party and, therefore, is not before the Board. Consequently, it is not a part of the Board's decision in this case.

³ The Court of Appeal for the First Appellate District adjudicates cases from the counties of Alameda, Contra Costa, Del Norte, Humboldt, Lake, Marin, Mendocino, Napa, San Francisco, San Mateo, Solano, and Sonoma. The Court of Appeal for the Sixth Appellate District adjudicates cases from the counties of Santa Clara, San Benito, Santa Cruz, and Monterey.

trial courts are the official employers, the regional committees are the designated representatives for the courts in their respective geographical area for the purpose of meeting and conferring.

The Federation and the Region 2 Committee are signatories to a collective bargaining agreement dated November 18, 2005 to September 30, 2008 (Region 2 Agreement). The Region 2 Agreement defines a regional court interpreter coordinator as an employee of the administrative office of the courts whose duty is to locate, assign and schedule available court interpreter employees for courts within and across regions which are described under Section 71807(a). The Region 2 Agreement also defines a local court interpreter coordinator as an employee of a superior court whose duty it is to locate, assign, and schedule available court interpreter employees for his or her court.

Under the Region 2 Agreement, intermittent part-time employees are defined as those employees who are either scheduled by the court to work less than twenty hours per week or work on an as-needed basis. Intermittent part-time employees receive no guarantee of work, but are considered bargaining unit members.

A. Premium Payments

Prior to May 2006, when an employee interpreter accepted a cross assignment that presented “unusual circumstances,” the employee would receive a full day’s pay for a half-day assignment. For the purposes of this practice, “unusual circumstances” included long distance travel and/or assignments that required the employee to refuse other offers of work. In May 2006, the Monterey and Sonoma County Superior Courts began informing employee

interpreters that the Region 2 Agreement precluded premium payments for interpreters who were required to travel long distances and forego other work opportunities.⁴

B. Essam Elmahgoop

Elmahgoop is an intermittent employee for the San Francisco County Superior Court. On or about May 19, 2006, Elmahgoop was offered an assignment in the Monterey County Superior Court for May 24, 2006. Although the assignment was for a half-day, Elmahgoop stated that he would accept the assignment if he was paid for a full day plus mileage reimbursement. The interpreter coordinator for the Monterey County Superior Court informed Elmahgoop that “it is our region’s policy that no employee should be paid for a half-day assignment at the full day rate of \$265.04.” Under the circumstances, Elmahgoop declined the assignment, and the court hired a non-certified contract interpreter, Samir Rizkallah (Rizkallah), who was paid \$500 for the half-day assignment.

Later, on or about August 4, 2006, the Monterey Superior Court requested the services of Elmahgoop for a two-day trial to begin on August 7, 2006. Elmahgoop said that he was available and would accept the assignment if the court would pay for him to stay overnight rather than travel from Monterey to San Francisco and back on the night of August 7, 2006. The interpreter coordinator’s supervisor informed Elmahgoop that the court could not pay for overnight accommodations. Elmahgoop declined the assignment. Thereafter, the court hired Rizkallah who was paid \$125 per hour through the agency for which he worked, as compared to the employee rate of \$33.14 per hour.

⁴ On July 7, 2007, a complaint was issued finding the Superior Courts of Monterey, Sonoma and San Francisco unilaterally changed the premium pay policies for employee interpreters who were required to travel more than an hour for a cross-assignment.

C. Ted Kim

Kim is an intermittent employee for the San Francisco County Superior Court. In June 2006, Kim accepted a half-day assignment at Sonoma County Superior Court for the full-day rate of \$265.04. However, on June 22, 2006, Kim received a call from the Sonoma County Superior Court's interpreter coordinator, informing him that the court would only pay him at the half-day rate, despite three to four hours of travel time. As a consequence, Kim withdrew from the assignment. The court subsequently hired independent contractor Jacki Noh (Noh) for the assignment, and paid her \$500 plus round trip mileage.

D. Region 2 Committee's Response

In its response to the above-stated charges, the Region 2 Committee argued that, while it did in fact discontinue the practice of paying employees for a full-day's work when a half-day assignment was accompanied by unusual circumstances, the change was in keeping with the language and intent expressed in the Region 2 Agreement. In particular, the Region 2 Committee cited Articles 20, 21 and 22 of the Region 2 Agreement with regard to pay rates, mileage reimbursement and regular working hours. The Region 2 Committee also cited the Court Interpreter Act for the principle of unifying pay rates throughout the region.

DISCUSSION

The issue in this case is whether the courts' disparate treatment of independent contractors and court employees violated Section 71802. Because this is a case of first impression, it is necessary to formulate a test for the establishment of a prima facie violation.

Court Interpreter Act section 71802 states, in relevant part:

- (a) On and after July 1, 2003, trial courts shall appoint trial court employees, rather than independent contractors, to perform spoken language interpretation of trial court proceedings. An

interpreter may be an employee of the trial court or an employee of another trial court on cross-assignment.

(c) Notwithstanding subdivisions (a) and (b), and unless otherwise provided in a memorandum of understanding or agreement with a recognized employee organization, a trial court may also appoint an independent contractor on a day-to-day basis to perform spoken language interpretation of trial court proceedings if all of the following circumstances exist:

(3) The trial court does not provide independent contractors appointed pursuant to this subdivision with lesser duties or more favorable working conditions than those to which a court interpreter pro tempore employed by that trial court would be subject for the purpose of discouraging interpreters from applying for pro tempore employment with the trial court. The trial court is not required to apply the employee training, disciplinary, supervisory, and evaluation procedures of the trial court to any independent contractor.

Section 71802(c)(3) states that hiring independent contractors with lesser duties or more favorable conditions is a violation of the statute if it is done for the purpose of discouraging interpreters from applying for pro tempore employment with the Court. The Court Interpreter Act, however, does not define “lesser duties” or “more favorable conditions.” These phrases, however, clearly relate to the working conditions required of contractors as compared to those of employees. Moreover, it is equally clear that violations of Section 71802(c)(3) require an unlawful motivation for the disparate treatment of independent contractors.

A. Circumstantial Evidence May Be Used To Establish Unlawful Motive

It should be noted that direct evidence of unlawful motive is rare. Consequently, the courts and PERB have held that unlawful discriminatory motive can be established by circumstantial evidence and inferred from the record as a whole. (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 354; *Novato Unified School District* (1982) PERB Decision No. 210.)

In such cases, an employee who claims discrimination must first make a prima facie case. According to the California Supreme Court, this step is “designed to eliminate at the outset the most patently meritless claims.” (*Ibid.*, at p. 355.) Although the employee’s burden at this stage is not overly burdensome, the employee must show, at a minimum, that one can infer from the employer’s actions, if such actions remain unexplained, that it is more likely than not that the employer’s conduct was such actions were “based on a [prohibited] discriminatory criterion.” (*Ibid.*)

B. Establishing A Prima Facie Violation Of Section 71802(c)(3)

Based on the foregoing, we find that in order to establish a prima facie violation of Section 71802(c)(3), the charging party must establish that: (1) an independent contractor was afforded lesser duties or more favorable working conditions than an employee interpreter was (or would have been) afforded; and (2) the employer applied the disparate treatment for the purpose of discouraging independent contractors from applying for pro tempore interpreter jobs. With regard to the second element, the charging party must show a substantial disparity in the duties or working conditions between employee interpreters and independent contractors, plus some other factual circumstances that suggest unlawful motive. Such facts may include, but are not limited to, the employer’s departure from established procedures and standards, evidence that the employer actively discouraged interpreters from applying for pro tempore employment; or other facts that might demonstrate the employer’s unlawful motive.⁵

It should be noted that in determining whether the charging party has stated a prima facie case, the Board assumes the essential facts alleged in the charge are true. (*Golden Plains Unified School District* (2002) PERB Decision No. 1489.) Consistent with this premise, the

⁵ This list is not exhaustive. Other factors may be added on a case-by-case basis.

Board has held that disputed facts and conflicting theories of law must be resolved through the hearing process. (*Ibid.*) Thus, the focus in Section 71802 cases at the charge investigation stage is limited to whether the charging party has plead facts sufficient to establish the two elements of the prima facie case.

In the event a complaint is issued and the matter progresses to a formal hearing, the charging party will be required to prove the facts necessary to support the establishment of a prima facie case. If a prima facie case is established, the employer will be afforded an opportunity to present evidence that its disparate treatment was taken for a legitimate reason, notwithstanding evidence of unlawful motive.

C. Essam Elmahgoop

1. May 24, 2006 Assignment

The Federation alleged that on May 19, 2006, Elmahgoop, an employee interpreter, was offered a half-day assignment in Monterey County Superior Court for May 24, 2006. Given the distance and travel time between San Francisco and Monterey, Elmagoop indicated he would accept the assignment if the court would pay him the full-day rate (\$265.04) plus mileage. The court denied the request and Elmahgoop declined the assignment. Thereafter, the court hired Rizhallah, a non-certified independent contractor, and paid him \$500 for the assignment.

Applying the above-stated test to these facts, we find that because Rizhallah was paid almost twice as much as Elmahgoop would have received, the court clearly afforded more favorable working conditions to an independent contractor than it did to an employee interpreter. Thus, the first element of the test is satisfied. Next, based on the magnitude of the disparity, plus the fact that the court allegedly unilaterally changed its premium pay policies

for employees but not for independent contractors, we find the Federation has demonstrated evidence of unlawful motive.⁶

Accordingly, we find both elements have been established and, therefore, conclude the Federation established a prima facie case that the court's disparate treatment of Rizhallah in connection with the May 24, 2006, assignment constituted a violation of Section 71802.

2. August 7, 2006 Assignment

The Federation also demonstrated that on or about August 4, 2006, the Monterey County Superior Court requested the services of Elmahgoop for a two-day trial to begin on August 7, 2006. Elmahgoop said that he was available and would accept the assignment if the court would pay for him to stay overnight rather than travel from Monterey to San Francisco and back on the night of August 7, 2006. The court denied the request and Elmahgoop declined the assignment. The court hired Rizkallah, who was paid \$125 per hour, through the agency for which he worked, as compared to the employee rate of \$33.14 per hour.

Applying the test to these facts, Rizkallah was paid almost four times the employee rate. Under these circumstances, there is no doubt Rizkallah was afforded more favorable working conditions than Elmahgoop would have received. Thus, the first element of the test is satisfied. Moreover, in light of the magnitude of this disparity in pay, plus the fact that the court allegedly unilaterally changed its premium pay policies for employees but not for independent contractors, we conclude the Federation has demonstrated evidence of unlawful motive. Accordingly, like the May 19, 2006 allegation, both elements of the prima facie case

⁶ The Federation also alleges the court's action is based on union animus because it was the driving force behind the legislative enactment of the Court Interpreter Act. Other than this mere assertion, however, there are no facts to show such animus.

have been satisfied for this allegation. We, therefore, find the Federation established a prima facie case that the court's disparate treatment of Rizhallah in connection with the August 7, 2006 assignment constituted a violation of Section 71802.

D. Ted Kim

The Federation established that in late June 2006, Kim, an employee interpreter, accepted a half-day assignment at Sonoma County Superior Court for the full-day rate of \$265.04. However, on June 22, 2006, Kim was informed by the court that it would only pay him at the half-day rate, despite three to four hours of travel time. Consequently, Kim withdrew from the assignment and the court subsequently hired Noh, an independent contractor, for the assignment. Noh was paid \$500 plus round trip mileage.

Applying the test to these facts, because Noh was paid almost twice as much as Kim would have received, there is no question that the court afforded more favorable working conditions to an independent contractor than it did to Kim. Last, based on the magnitude of this disparity, plus the fact that the court allegedly unilaterally changed its premium pay policies for employees but not for independent contractors, we find the Federation demonstrated evidence of unlawful motive. Accordingly, we find both elements have been established and, therefore, conclude the Federation established a prima facie case that the court's disparate treatment of Noh constituted a violation of Section 71802.

Based on the foregoing, we conclude the Federation established a prima facie case that the Monterey County Superior Court violated Section 71802 when it paid an independent contractor more than Elmahgoop would have received in connection with the May 24, 2006, and August 7, 2006, assignments. In addition, we find the Federation also established a prima

facie case that Sonoma County Superior Court violated Section 71802 when it paid an independent contractor more than Kim would have received in connection with the June 2006 assignment.

ORDER

The unfair practice charge in Case No. SF-CE-7-I is hereby REMANDED to the Office of the General Counsel for the issuance of a complaint consistent with this decision.

Members Neuwald and Wesley joined in this Decision.