AIJ/RAB/crd/mtd

Mailed

OCT 17 1990

Decision 90-10-032 October 12, 1990

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

| | | |
|---|---|---|
| MUSE CORDERO CHEN, INC., Complainant, vs. PACIFIC BELL (U 1001 C), Defendant. | ) | Case 89-06-058 (Filed June 28, 1989) |

J. Melvin Muse, for Muse Cordero Chen, Inc., complainant.
Mary Vanderpan, Attorney at Law, for Pacific Bell, defendant.

## O P I N I O N

Muse Cordero Chen, Inc. (Muse), an advertising agency, seeks an order that Pacific Bell (Pacific) cease and desist from conducting its minority business enterprises program in a discriminatory manner. Pacific denies discrimination. Public hearing was held before Administrative Law Judge Robert Barnett.

The basic facts leading to the alleged discrimination are not disputed. In April 1988 Pacific issued a press release in which it announced that it sought "an Asian-owned and operated advertising agency to develop advertising and brochures in Chinese, Vietnamese and Korean." Muse, which had done advertising business with Pacific, responded. A Pacific employee, Ms. Joyce Sand, telephoned Mr. David Chew, a partner of Muse, to discuss Muse's qualifications. Ms. Sand asked about the minority makeup of the Muse agency. Mr. Chew said his company was not 51% Asian-owned and operated, but was owned by a black, a Hispanic, and an Asian. The percentage ownership is 70% black, 15% Hispanic, and 15% Asian. Ms. Sand said that because Pacific's ad campaign was targeted at

the Asian community Pacific required an advertising agency that was at least 51% Asian owned and operated; since Muse did not meet that criterion, she said it was disqualified from participating in the selection process. Seventy-four agencies had responded to Pacific's press release and eventually two were selected, both of which were at least 51% owned and operated by Asians.

Muse contends that because it is minority owned and operated, it should not have been disqualified from competing for the advertising business. It asserts that Pacific's requirement that its ad agency be of the same ethnic group as the target community is discriminatory.

Muse witness Chen testified that Muse had produced Asian targeted ads for Pacific Bell designed to increase ethnic awareness of the Universal Lifeline Telephone System which resulted in an increase in awareness 156% higher than PacBell's expectations, and that when Muse didn't get the disputed PacBell account, a lot of people wrote letters on its behalf. (Tr. 124-125.)

Pacific presented four witnesses who testified in support of Pacific's policy of using ad agencies of the same ethnic background as that of the target group. Ms. Beatrice Molina, a former past president of the Mexican American Political Association and the owner and operator of a 100% Hispanic advertising agency, testified that Pacific's policy was reasonable and furthered the aims of the various minority communities. She testified that she was, and is, an active member of numerous civil rights groups. Those groups have had problems with past advertising campaigns of large organizations like Pacific. Products developed by non-ethnic enterprises for a particular minority market, in her case, the Hispanic, were often of poor quality, were insensitive to the culture, and reflected a poor public image for the advertiser. Of equal importance she said was the need for the ethnic community to benefit financially from the relationship with the advertiser. It is not enough that a major White-owned firm hires a minority

employee to do the actual ad work; the profit from the job and the prestige of representing a large advertiser should stay in the minority community. In her opinion, the target minority agency brings ethnic and cultural sensitivities that a non-ethnic agency can never attain. She asserted that the minority organizations of which she is a member support the principle that when an Asian community is targeted by an advertising campaign, an Asian ad agency should get the job; when the Black community is targeted, a Black agency should get the job; and when the Hispanic community is targeted, an Hispanic agency should get the job.

Molina conceded that the Asian community consists of a number of subcommunities such as Koreans, Chinese, Japanese, Taiwainese and so on, and that there are extensive cultural differences between such subcommunities. She testified that Asian targeted advertising is far more complicated than advertising to Hispanic communities:

> "The Hispanic community, at least there's a commonality of language. In the Asian communities there's not that much commonality, and there certainly isn't in language, there certainly isn't in use of verbiage, use of address, use of culture, use of color. They're extremely different.
>
> "And sone of the no-nos that have been done is they tried to use one Asian visual effect to encompass all Asian cultures, and you can't possibly do that without offending somebody." (Tr. 56-57.)

The Executive Director of Self-Help for the Elderly, a nonprofit service organization, testified by affidavit that the expertise of an Asian advertising agency is the best way in which the cultural awareness of the Asian communities can be incorporated in ads targeted to the Asian community. The Asian-owned and operated agency will be aware of the cultural appropriateness of even simple things such as what color to wear and what words to

use. The Asian-owned agency will know of the Asian owned newspapers and television stations. And especially, the Asian-owned agency will know of the subtle differences between the numerous Asian cultures--Chinese, Japanese, Korean, Vietnamese, etc.

Pacific's Executive Director of Marketing Communications testified that it was Pacific's policy to use an ad agency of the ethnic makeup of the target customer group. Pacific's concerns were the same as the previous witnesses': The agency should be expert in the culture of the target community, be best able to communicate with the target community, and be able to retain in the target community the intangible benefits of representing a large company. He said that he had three ad campaigns targeted to minority communities--the Black community, the Hispanic community, and the Asian community. In each case the ad agency that was awarded the contract was at least 51% owned and operated by persons of the target minority group. In his opinion, Pacific receives a better work product by having a 51% owned and operated target group requirement. He testified that the sole reason for eliminating Muse for consideration for the Asian ad work was the fact that Muse was not 51% or more owned and operated by Asians. However, all minority ad agencies are considered for all advertising contracts, except those targeted to specific minority groups.

When asked "suppose there is a second-, third-, or fourth- generation Japanese-American advertising professional, owns an advertising agency, but he has no knowledge at all of Asian languages. And he will be qualified because he owns 51 percent of that agency, in your review of Asian advertising agencies?", the marketing director responded: "He might be initially qualified." (Tr. 98-99.)

The Director of Women and Minority Business Enterprise (WMBE) Programs for Pacific testified that she supported Pacific's policy for the same reasons given by the other witnesses. She said

that since 1984 total dollars spent with WMBE firms increased from 3% of purchasing to 11% in 1989, or from $94 million annually to $200 million. Pacific has used a target community criterion for selecting a vendor in only three instances to date, the three ad campaigns targeting the Black, Asian, and Hispanic communities. In terms of total dollars, the three campaigns are a very small part of Pacific's minority business expenditures.

Discussion

In 1986 the Commission was directed by the legislature to establish guidelines for electric, gas, and telephone utilities with gross annual revenues exceeding $25,000,000 to be utilized by the utilities in establishing plans to increase women and minority business enterprise procurement in all categories. A minority business is defined as one at least 51% owned and operated by Black Americans, Hispanic Americans, Native Americans, or Asian Pacific Americans. (Public Utilities (PU) Code §§ 8281-8285.) Pursuant to that directive, the Commission promulgated General Order (GO) 156 "Rules Governing the Development of Programs to Increase Participation of Female and Minority Business Enterprises" (Adopted April 27, 1988, effective May 30, 1988, D.88-04-057 in R.87-02-026; modified by D.88-09-024.) The general order adopted the statutory definitions of women and minority owned and operated businesses and provided details of how the individual utilities should set up their plans, establish a clearinghouse to identify and verify women and minority businesses, establish goals, and report annually to the Commission. The businesses affected by the general order are referred to as WMBEs.

The question presented in this complaint is whether a utility which targets a particular minority group as the recipient of an advertising campaign may limit its search for a WMBE advertising agency to an agency that is at least 51% owned and operated by members of the target group. We hold that it may not.

Complainant asserts, and defendant does not dispute, that complainant was not considered for the advertising contract solely because it was a Black owned and operated WMBE. Defendant asserts that the advertising contract was awarded to a qualified WMBE, an Asian American enterprise, and that complainant was not considered for the contract for a substantial business reason: the WMBE from the target community brings ethnic and cultural sensitivities that an outsider cannot attain, and revenue from the contract stays in the target community.

Muse claims discrimination and cites City of Richmond v. Croson Co. (1989) 488 US __, 102 L Ed 2d 854 in support of its position that a race-conscious classification is suspect, and that Pacific, when awarding a contract to a WMBE, should look no further than determining if the applicant is a WMBE.

In Croson, the City of Richmond adopted an ordinance which required non-minority-owned prime contractors awarded city construction contracts to subcontract at least 30% of the dollar amount of the contract to Minority Business Enterprises (MBE). A White owned company was the only bidder on a city contract but did not have any MBE participants. The city refused to honor the bid and decided to rebid the project. The contractor sued to have the ordinance declared unconstitutional under the equal protection clause of the Fourteenth Amendment. The Supreme Court held the ordinance to be invalid under the equal protection clause. It said that classifications based on race are suspect and subject to strict scrutiny, but may be valid as a remedy for past discrimination.

Croson considered the constitutionality of a city ordinance which established a 30% set aside for minorities. Muse attacks neither the enabling statute (Public Utilities Code §§ 8281-8285) nor our general order (GO 156) and so their validity is not before us; therefore, Croson is not directly applicable.

The question before us is not whether the statute and general order are valid, but rather whether it is permissible for Pacific to use race or ethnicity as the sole criteria to determine who may be considered for advertising contracts aimed at specific ethnic groups.

After a careful review of the record, we conclude that Pacific's decision, however well intentioned, to exclude Muse from consideration for Asian targeted advertising contracts solely on the basis of the race of Muse's owners was impermissible.

We have no problem with Pacific's desire to make sure that ethnic community targeted advertising is effective, and with the proposition that if advertising is to be effective it must consider the language and customs of the target group. We recognize that membership in the targeted group may well give an advertiser a natural advantage in this area.

We do, however, have a problem with the assumption that the only way to find the best advertiser for such a targeted campaign is to exclude from consideration all those who are not members of the targeted group.

Here, Muse witnesses testified that Muse had successfully engaged in Asian targeted ad campaigns for Pacific in the past, and had achieved results far exceeding the utility's goals. Muse was clearly qualified to create Asian targeted ads even though Muse is not owned by Asians. Since Muse was at the outset eliminated from consideration solely because it was not 51% Asian owned, as defined in GO 156, it is impossible to determine whether Muse was more or less qualified than the advertising agencies ultimately awarded the contract in question.

Pacific's witnesses not only conceded that the Asian community was highly diverse, making it unlikely that a representative of one Asian subcommunity would have any special expertise regarding the language or cultural heritage of another Asian subcommunity, they conceded that a fourth-generation

Japanese-American with no knowledge of any Asian language or culture would have been allowed to bid for the Asian targeted ad campaign contract. Muse, with its demonstrated expertise in the field, was not allowed to have its bid even considered.

Because the Commission does not award damages, there is little reason for us to delve into the procedural and substantive issues that might be addressed in discrimination litigation under various statutes and constitutional provisions. Neither party adequately addressed these issues, and we decline to make detailed findings regarding Pacific's compliance with these laws on the basis of the record in this proceeding.

Next, we will review Muse's allegation that Pacific's actions violated GO 156. We believe it is also necessary to review those actions in light of the legislation it implements, PU Code §§ 8281-8285. We find there are conflicting ways to view Pacific's actions under this statute and our regulations.

PU Code § 8281(a) states in pertinent part that:

> "The Legislature hereby finds and declares that the essence of the American economic system of private enterprise is free competition. Only through full and free competition can free markets, reasonable and just prices, free entry into business, and opportunities for the expression and growth of personal initiative and individual judgment be assured. The preservation and expansion of that competition is basic to the economic well-being of this state and that well-being cannot be realized unless the actual and potential capacity of women and minority business enterprises is encouraged and developed."

Section 8281 goes on to note that:

> "It is in the state's interest to expeditiously improve the economically disadvantaged position of women and minority business enterprises," (§ 8281 (b)(1)(C),"

and that:

> "(F) That procurement also benefits the public utilities and consumers of the state by encouraging the expansion of the number of suppliers for procurements, thereby expanding competition among the suppliers and promoting econonic efficiency in the process."

Section 8281(b)(2) declares that:

> "It is the purpose of this article to do all of the following: ... "(B) Promote competition among regulated public utility suppliers in order to enhance economic efficiency in the procurement of electric, gas, and telephone corporation contracts...."

Section 4.2.1.1 of GO 156 states that utilities are to "[a]ctively seek out opportunities to identify WMBE contractors and to expand WMBE source pools...".

The logic calling for inclusion of WMBEs as a class within the list of suppliers from whom the utilities procure goods and services calls equally for the inclusion of all qualified WMBEs within the class of suppliers who are considered for a particular utility contract. In either situation, the pool of potential supplier competitors is expanded by a policy favoring inclusion rather than exclusion of potential suppliers. Pacific's exclusion of non-Asian bidders from consideration for its Asian targeted ad campaign clearly diminishes the opportunity for non-Asians to do business with utilities. For this reason, Pacific appears to have violated the spirit if not the letter of PU Code §§ 8281-8285 and GO 156.

There is, however, a countervailing policy consideration. As Pacific points out, a natural byproduct of its effort to develop business relationships with WMBEs is a commitment to make business opportunities available to a cross-section of qualified WMBEs. We agree with Pacific that this commitment is neither inconsistent with nor prohibited by GO 156.

Having concluded that Pacific's decision to consider only bids by Asian businesses for its Asian targeted ad campaign and was not an appropriate method for ensuring the selection of the best

firm for the job, we will order Pacific not to use race, national origin, or ethnicity as the sole basis for determining whose bids will be considered for contracts for the procurement of goods and services.

Further, PU Code § 453(b) states that "No public utility shall prejudice, disadvantage, or require different rates or deposit amounts from a person because of race...[or] national origin..." We believe that Pacific's conduct in this case violated Section 453(b) and we shall so find.

Once again, we emphasize that while a utility may not arbitrarily exclude a class of persons on grounds unrelated to their qualifications, the utility retains its authority to use its legitimate business judgment to select the best person for the work at hand. Advertisers from the targeted community may have a natural advantage regarding cultural sensitivity. But members of all racial, ethnic, and national origin classifications must be allowed to compete; no one can be excluded because of an assumption that one class of persons is unable to understand another.

As we noted earlier, since Muse was at the outset eliminated from consideration for the contract because its owners were not Asian we have no basis for determining whether Muse was in fact more or less well qualified to do Asian targeted advertising than the firms actually awarded the contract. It is, therefore, impossible for us to determine whether or not Muse would have been awarded the contract had it not been for the race of its owners. For this reason, we cannot grant Muse's request that we order Pacific to do business with it.

From a review of Pacific's 1989 report on the WMBE program, we note that Pacific has made steady progress over the last three years in increasing its purchases from WMBE vendors. This improvement has been consistent with the letter and the spirit of the program, and we commend Pacific for it. Given this record of accomplishment we hope that the instant case reflects an

aberration or misunderstanding on Pacific's part rather than a fundamental problem, and we would encourage Pacific to continue its level of commitment to pursue further improvement in the coming years.

Findings of Fact

1. In April 1988 Pacific sought an Asian owned and operated advertising agency to develop advertising and brochures in Chinese, Vietnamese, and Korean.

2. Muse, an ad agency whose ownership is 70% Black, 15% Hispanic, and 15% Asian, applied for the contract but was not considered because it was not at least 51% owned and operated by Asians.

3. Muse has in the past successfully produced Asian targeted advertisements for Pacific.

4. Because Muse was at the outset eliminated from consideration for the Asian targeted advertising contract solely because it was not 51% owned by Asians, it is impossible to determine whether Muse was more or less well qualified than the firms actually awarded the contract.

5. PU Code §§ 8281-8285 and GO 156 encourage expansion of the pool of vendors of goods and services to utilities.

6. Neither PU Code §§ 8281-8285 nor GO 156 requires utilities to diversify their sources of supply within the WMBE community as a whole, but neither prohibits a utility from doing so.

7. Pacific's decision to consider only bids from advertising agencies which were at least 51% Asian owned and operated for its contract to provide advertising and brochures for the target Asian community was not an appropriate means for selecting the best agency for the job.

Conclusions of Law

1. Since Pacific's exclusion of Muse from consideration for the Asian targeted advertising contract occurred before any consideration of Muse's merits as an advertiser, it is impossible to determine whether Muse was more or less qualified than the firms actually awarded contracts; without such information, the contract relief requested in the complaint should be denied.

2. Pacific should be ordered not to use race, ethnicity, or national origin as the sole basis for determining who will be considered for contracts to supply the utility with goods and services.

3. Pacific's exclusion of Muse from consideration for the Asian targeted advertising contract constituted a violation of PU Code § 453(b).

## O R D E R

IT IS ORDERED that:

1. The contract relief requested in the complaint is denied.

2. Pacific shall not use race, ethnicity, or national origin as the sole basis for determining who will be considered for contracts to supply the utility with goods and services.

This order is effective today.

Dated October 12, 1990, at San Francisco, California.

G. MITCHELL WILK
President
FREDERICK R. DUDA
STANLEY W. HULETT
JOHN B. OHANIAN
PATRICIA M. ECKERT
Commissioners

I will file a written concurrence.

/s/ FREDERICK R. DUDA
Commissioner

I CERTIFY THAT THIS DECISION WAS APPROVED BY THE ABOVE COMMISSIONERS TODAY

NEAL J. SHOEMAKER, Executive Director

FREDERICK R. DUDA, Commissioner, concurring.

I agree with the majority that Pacific Bell violated PU Code § 453 in refusing to consider Muse Cordero Chen's (Muse) bid for an Asian targeted advertising contract on the ground that Muse was primarily owned by Blacks rather than Asians.

I would go further, however, and point out that Pacific Bell appears to have violated a number of other federal and state constitutional provisions and statutes prohibiting racial discrimination as well.

First, 42 USC § 1981, which implements the Thirteenth and Fourteenth Amendments to the United States Constitution, states that all persons within the United States shall have the same right to make and enforce contracts as White persons. This section has been applied in cases involving discrimination against any race in favor of any other race. (McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273, 295 (1976).) Section 1981 provides the right to maintain an action against a private entity such as Pacific Bell. (Runyon v. McCrary, 427 U.S. 160 (1976); Patterson v. McClean Credit Union, ___ U.S.___, 105 L.Ed.2d 132 (1989).) Patterson makes clear that "The statute prohibits, when based on race, the refusal to enter into a contract with someone, as well as the offer to make a contract only on a discriminatory basis." (Id., supra, at 150.)

Second, Title VII of the 1964 Civil Rights Act, 42 USC §§ 2000e et. seq., prohibits employers from refusing to hire an individual on the basis of race, or from limiting, segregating, or classifying employees or applicants for employment in any way which would deprive any individual of employment opportunities on the basis of the individual's race.

Third, Article I, § 7 (a) of the California Constitution provides that "A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of

the laws." Section 7 (a) prohibits public utilities from excluding qualified individuals from employment opportunities. After noting that "employment discrimination by a public utility can be particularly pernicious because, in light of the utility's position, the general public cannot avoid giving indirect support to such discriminatory practices...," Gay Law Students concludes that "in this state a public utility bears a constitutional obligation to avoid arbitrary employment discrimination." (Id., at 469 - 472.)[1]

Fourth, Article 1, § 8 of the California Constitution states that "[a] person may not be disqualified from entering or pursuing a business, profession, vocation or employment because of sex, race, creed, color or national or ethnic origin."

Fifth, the Fair Employment Practices Act (FEPA), Government Code §§ 12900 et seq., prohibits employers from discriminating against present or prospective employees on the basis of race. The principles of Fair Employment and Housing Commission (FEHC) litigation are similar to Title VII. But, unlike Title VII, Government Code § 12940 provides an exception from the FEPA racial discrimination prohibition where race is a bona fide occupational qualification. Gauvin v. Trombatore , 682 F. Supp. 1067 (N.D.Cal. 1988), suggests that the FEPA would be relevant whether or not the relationship was considered an employer - employee or contractor - subcontractor relationship. (Id., at 1073.)

Pacific argues that although its decision to exclude Muse was race based, it was justified because Asian ownership was a

---

1 While the California Constitution precludes a utility from automatically excluding any classification of persons because of personal whim, prejudice, or any other arbitrary reason, it does not deny utility management the authority to exercise legitimate judgment in employment or contract decisions. (Gay Law Students, supra, 24 C. 3d at 474-475.)

necessary occupational qualification for the firm awarded the Asian targeted advertising contract.

The record shows, however, that Asian ownership is not a bona fide occupational qualification for a business engaged in Asian targeted advertising. As the majority recognizes, Pacific's own witnesses not only conceded that the Asian community was highly diverse, making it unlikely that a representative of one Asian subcommunity would have any special expertise regarding the culture of another Asian subcommunity, they conceded that a fourth-generation Japanese-American with no knowledge of any Asian language or culture would have been allowed to bid on the contract.

There is simply no reason to conclude that no one outside a targeted minority group can acquire language skills and cultural knowledge necessary to prepare appropriate targeted advertising. Nor is there any reason to conclude that all those within the definition of the targeted group, no matter how attenuated their connection with that group, are innately better able to produce targeted ads than anyone from outside the group. This is especially true when the targeted group is highly diversified as to language and culture.

Pacific's refusal to consider Muse's bid for the Asian targeted advertising contract was based solely on the race of Muse's owners, and occurred prior to any consideration of Muse's actual qualifications. Pacific assumed that any Asian would be better qualified to prepare an Asian targeted advertising campaign than any non-Asian. Pacific's refusal was also based on the asserted preference of the targeted group to be advertised to by a member of that group. Pacific probably would not have made a similar decision if the targeted community was White. I conclude that Pacific had no legitimate business reason for excluding, and therefore disadvantaging, all those who are not Asian.

I point these facts out not to rub Pacific's nose in what appears to have been a well intentioned error in judgment, but

rather because I believe that when a complainant such as Kuse raises an issue of racial discrimination in a context in which it is clear that complainant was treated differently than others solely because of its race, I feel the Commission has an obligation to determine whether the defendant's actions violated any of the myriad laws prohibiting such discrimination. The parties' failure to cite all specific relevant statutory and constitutional provisions does not excuse the Commission from examining the issue thoroughly.

Gay Law Students Association v. Pacific Telephone and Telegraph Co., 24 C.3d 458 (1979) makes it clear that the state has an obligation to make sure utilities do not discriminate and do not deprive people of their constitutional or statutory rights: "In California a public utility is in many respects more akin to a governmental entity that to a purely private employer. In this state, the breadth and depth of governmental regulation of a public utility's business practices inextricably ties the state to a public utility's conduct....;" thus, "the state cannot avoid responsibility for a utility's systematic business practices...." (Id., at 469-470.)

Because the Commission does not award damages, however, it may make more sense for a complainant to seek remedies for discrimination in a federal or state court or administrative agency authorized to provide such relief.

Frederick R. Duda, Commissioner

October 12, 1990
San Francisco, California