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Decision 91-12-014 December 4, 1991

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Bill Taylor Photography,

Complainant,

vs.

Pacific Gas and Electric Company,

Defendant.

(U39M)

ORIGINAL

Case 88-09-057

(Filed September 30, 1988)

Howard Moore, Jr., Attorney at Law, for Bill Taylor Photography, complainant.

Roger G. Peters, Jefferson C. Bagby, Stephen Burke, Attorneys at Law, and Ruth DeCoursey, for Pacific Gas and Electric Company, defendant.

OPINION

Bill Taylor Photography is a sole proprietorship owned by Bill Taylor. He runs a shop providing photographic services and supplies at 412-22nd Street, Oakland. On September 30, 1988 Taylor filed a complaint against Pacific Gas and Electric Company (PG&E) pertaining to his experience with PG&E regarding the Women/Minority Business Enterprise (WMBE) Program of the Commission. PG&E filed its answer to the complaint on November 1, 1988, denying the allegations and requesting that the complaint be denied.

On November 8, 1988, PG&E filed a motion to refer their complaint to the Consumer Affairs Branch (CAB), pursuant to Rule 10 of the Commission's Rules of Practice and Procedure. By letter of

December 23, 1988, the Administrative Law Judge (ALJ) informed complainant that his complaint had been referred to the CAB under Rule 10. CAB performed its informal dispute resolution duties; but no settlement of the case could be achieved.

On January 9, 1989, PG&E filed a motion for a ruling of the ALJ defining the scope of the proceeding and striking certain portions of the complaint. The ALJ granted the complainant time to obtain counsel and to file a response to PG&E's motion.

Complainant obtained counsel; and on September 8, 1989 he filed his opposition to PG&E's motion. On February 2, 1990, the ALJ issued his ruling limiting the complaint proceeding to the litigation of complainant's claim that PG&E has violated any provision of law or any order or rule of the Commission affecting him individually. The ALJ granted PG&E's motion to limit the scope of the proceeding to any dispute complainant may have under the Public Utilities (PU) Code or under General Order (GO) 156 concerning his specific relationship with PG&E. The ALJ also struck several paragraphs in the complaint which he ruled were beyond the scope of the proceeding. The ALJ also extended complainant's time to file an amended complaint that complied with PU Code § 1702 and Rules 9(a) and 10 of the Rules of Practice and Procedure.

Complainant filed his first amended complaint on March 9, 1990. The answer of PG&E to the first amended complaint was filed April 10, 1990. PG&E denied the allegations in the complaint, asking that the Commission deny relief to the complainant. It also requested that certain portions of the first amended complaint, which continued to assert issues that were appropriate to the Commission's generic investigation, I.90-02-044, be included in that proceeding. PG&E also asserted that the remainder of the complaint should be deemed a contract dispute and be dismissed in accordance with Decision (D.) 88-04-057.

A prehearing conference was held May 4, 1990. During the prehearing conference defendant renewed its request that the generic issues raised by the first amended complaint should be deemed outside the scope of this complaint proceeding. Counsel for the complainant submitted that issue on the pleadings without written or oral argument. On May 11, 1990, the ALJ issued a ruling on the motion of PG&E. The ruling struck paragraphs 24 and 25 of the first amended complaint, since they alleged facts that were beyond the scope of the proceeding. The ruling also struck certain paragraphs of the prayer. After an appropriate period for discovery, evidentiary hearings were held October 9, 10, and 11, 1990. The proceeding was submitted subject to the filing of concurrent opening and concurrent closing briefs. PG&E's opening brief was filed December 3, 1990. Complainant's opening brief was filed December 17, 1990, due to technical difficulties. PG&E filed its closing brief on January 10, 1991. Complainant did not file a closing brief.

Applicable Law

The basic principle of law governing complaint proceedings is that the complainant must allege and prove a cause of action against the defendant. This principle is embodied in PU Code § 1702, which provides:

"Complaint may be made by...any...person... setting forth any act or thing done or omitted to be done by any public utility, including any rule or charge heretofore established or fixed by or for any public utility, in violation or claimed to be in violation, of any provision of law or of any order or rule of the Commission...."

The Commission has reiterated this principle in its rules of practice and procedure. Rule 9 provides:

"a. A complaint may be filed by...any... person...setting forth any act or thing done or omitted to be done by any public utility including any rule or charge heretofore established or fixed by or for

any public utility, in violation or claimed to be in violation, of any provision of law or of any order or rule of the Commission."

The Commission again reasserted this principle governing complaint proceedings in GO 156 itself. In Section 5, WMBE COMPLAINTS TO THE COMMISSION, the Commission provided:

"In the event the WMBE believes that a utility WMBE Program administrator's decision, or any other act or omission of the utility, violates any provision of law or of any order or rule of the Commission, the WMBE may file a complaint with the Commission pursuant to Public Utilities Code § 1702 and Article III of the Commission's Rules of Practice and Procedure (Title 20, Chapter 1 of the California Administrative Code)."

* * *

"3. The Commission will not, however, entertain complaints which do not allege violations of any law, Commission rule, order, or decision, or utility tariff resulting from such Commission action, but which instead, involve only general contract type disputes between a utility and an existing or prospective WMBE contractor."

Relying on the sources of law cited above, the ALJ twice ruled on motions regarding the scope of the proceeding. In each ruling the ALJ attempted to focus the attention of the complainant on PU Code § 1702, Rules 9(a) and 10, and GO 156(5), explicitly ruling that: the complainant must allege, and be prepared to prove, that the defendant had violated some provision of law affecting him specifically; and that general claims about PG&E's WMBE program were inappropriate for a complaint proceeding and should be referred to the Commission's annual investigation proceeding.

Despite the ALJ's efforts, complainant in his brief begins his discussion of the issues with the statement:

"The question to be decided is not whether or not PG&E discriminated against Taylor. Rather, the question is whether or not PG&E has offered sufficient evidence to show it has discharged its duty, as a regulated public utility, to provide opportunities to Black owned business enterprises." (Complainant's brief, p. 6.)

There are two fundamental problems with the way complainant attempts to frame the issues. First, he attempts to move the focus of the proceeding away from allegations and evidence that PG&E, in its business relations with complainant, violated any law to focus instead on the adequacy of PG&E's WMBE program, as it may generally affect Black owned businesses. Second, he attempts to shift the burden of proof from himself to PG&E. We will address each of these problem areas.

The statutes of California allow complainants to litigate before the Commission only certain kinds of complaints - those alleging violations of law. (PU Code § 1702.) The Commission has in turn incorporated that limitation in its Rules of Practice and Procedure (Rules 9 and 10) and in GO 156(5). The rule that a complaint must allege and prove violations of law tends to narrow the scope of the proceeding so that it encompasses those matters with which the complainant is personally familiar. Accordingly, the complainant's own testimony, and documentary evidence in the complainant's possession, is usually sufficient to make a prima facie case and to shift the burden of producing evidence to the defendant public utility.

In contrast, when a complainant calls into question the reasonableness of a major program of a large public utility, he is attempting, in effect, to appoint himself to investigate the operations of the public utility in that area. This is, however, a prerogative that is, by statute, reserved to the Commission. Determining which utilities, and utility programs, should be investigated, when those investigations should occur, the procedures to be employed, the scope of the investigation, and the

Commission staff members to be devoted to the proceeding are all matters within the sole discretion of the Commission.

Moreover, such a complainant risks imposing significant burdens on the resources of both the Commission and the public utility. This is especially true when the Commission has opened a formal investigation proceeding for the express purpose of inquiring into the very program that the complainant seeks to critique through the complaint process.

Finally, the complainant in such a proceeding would assume a potentially crushing burden of proof, a burden which, in the usual investigative proceeding, is borne by a highly trained and expert staff.

The second problem area - burden of proof - is closely related to the first. Even assuming that complainant could sustain his burden of proof¹ regarding PG&E's alleged unlawful conduct vis-a-vis himself, it does not necessarily follow that there is anything generally defective about PG&E's WMBE program, either in its structure or in its administration. Complainant would have to conclude, based solely on some evidence of PG&E's business relations with him, that PG&E systematically discriminates against Black owned businesses in general or against Black owned businesses providing photographic services.

We agree with the ALJ's rulings limiting the scope of the proceeding; and we will accordingly discuss and decide only those issues that pertain to PG&E's alleged unlawful conduct in its business relations with complainant. In doing so we observe that complainant does not cite in his brief any constitutional

1 As we stated in D.89-08-026, in a generic WMBE proceeding, "[i]t is the utility's responsibility to show that its policy and program are in compliance with GO 156 and the utility therefore has the burden of proof on this issue." (D.89-08-026, p. 12.) This is not the case here.

provision, statute, tariff rule, or general order allegedly violated by PG&E in its business relations with complainant. The only sources of law he cites are: FEPC v. California State Personnel Board (1981) 117 Cal. App. 3d 322; Northern Invo Hospital v. FEPC (1974) 38 Cal. App. 3d 14. Since these cases involve employee-employer relations in the public sector, they are distinguishable on their facts.²

Thus, complainant has made no showing that PG&E has violated any law applicable to it in its contractual relations with complainant. Since complainant has made no showing that PG&E had any obligation imposed by law to contract with him at all, or, once having done business with him, to continue to do so, irrespective of the quality of services rendered by complainant to PG&E, PG&E's argument that the complaint should be dismissed is well taken. However, we will briefly discuss the facts giving rise to the complaint. In summary, they show that PG&E extended business opportunities to complainant; but complainant's services were less than satisfactory.

Statement of Facts

Complainant, dba Bill Taylor Photography, operates a photography business at 412-22nd Street, Oakland, as a sole proprietor. He provides photographic and photo lab services. He does business, fashion, and wedding photography. He also provides one-hour and custom lab services. A one-hour lab is a machine that processes and prints film within one hour. Complainant provides custom lab services to professional photographers and others.

² Both cases involve the enforcement of the rights of employees of public agencies under the provisions of Labor Code § 1420. Complainant cites no statute or case extending those statutory rights to contractual relations between independent businesses in the private sector.

Complainant makes custom prints from negatives supplied to him. The printing process may involve dodging and burning.

Complainant attended college in Chicago for more than four years, majoring in political science, but did not receive a degree. He has had no formal training in photography, other than seminars. He is by his testimony self-taught. He has been involved in the photography business at his current location since 1978. Prior to that time he was an artist.

Complainant's business is open to the public Monday through Friday between 8:30 a.m. and 5:30 p.m. He does not have any employees, a fact from which we infer that he is available to handle fashion, business, and wedding photographic assignments only in the early mornings, in the evenings, and on weekends. He did testify that he works seven days each week.

Complainant first contacted PG&E in 1980 or 1981 about business opportunities. PG&E asked him to submit a business profile, which he did at that time, and annually thereafter. Between 1981 and 1987 he received no commissions from PG&E.

In September, 1987, complainant wrote to PG&E about business opportunities. (Exhibit 11.) The letter resulted in a meeting with Daniel Marler, a PG&E manager in San Francisco. Complainant testified that a month or two later Marler came to complainant's studio and gave him a 4 x 5 inch negative and asked him to make two 8 x 10 inch color prints. Complainant did not make the prints himself, in his own laboratory. Rather, he sent them to AAA Laboratory in San Francisco, a lab to which - he was informed - PG&E had sent such business. Complainant testified that he sent PG&E's commission to AAA Laboratory because he believed that PG&E would not judge his own services fairly. He testified that he was "paranoid about PG&E" (Tr. 1:23) because of reports he had heard,

indirectly, about PG&E's relations with other Black-owned businesses.³

Copies of the prints made by AAA Laboratory were delivered to PG&E and to complainant. PG&E later reported to complainant that the prints delivered to it were unsatisfactory. Complainant did not subpoena, and thus did not offer as evidence, the copies of the prints delivered to PG&E. Complainant did offer the copies delivered to him. (Exhs. 58 and 59.) However, those prints do not constitute evidence of the condition of the prints delivered to PG&E. Moreover, complainant did not call any witness from AAA Laboratory to testify as to the condition of the prints delivered to PG&E, their handling by the lab, or the method of transmittal to PG&E.

At one time, either before or after complainant filed this complaint, PG&E approached him to purchase and develop 220 film. Complainant could not supply 220 film, because he did not stock it. He testified that such film is rarely sold.

On many occasions after the filing of the complaint PG&E asked complainant to pick up for processing a single roll of film with 12 exposures. Although such a service was not economically advantageous to complainant, he nevertheless complied with PG&E's requests on many occasions.

Complainant also testified that PG&E provided negatives that were underexposed. Although he could not recall any occasions when underexposed negatives were provided, he did offer in evidence an invoice on which he had written a note stating: "most rolls I get from you are underexposed, please check your batteries or camera." (Tr. 35.) The invoice is dated January 25, 1989, about 4 months after the filing of the complaint. (Exh. 60.)

³ Actually, Marler gave complainant 2 negatives and asked him to make a print of each. (Exhs. 58 and 59.)

In October, 1989, PG&E retained complainant to conduct a 3-day shoot, or photography session, at its offices in San Francisco. The subjects of the shoot were PG&E employees. The employees were to appear at 5 minute intervals between 8:00 a.m. and noon and between 1:00 p.m. and 4:00 p.m. over 3 consecutive days. According to complainant's testimony, PG&E did not adhere to the schedule and the shoot took longer than expected. Complainant did not know how long the shoot took or whether it was completed. He did not conduct the shoot himself, but had someone else take the photographs.

Discussion

The foregoing paragraphs summarize the testimony of the complainant. He called no other witnesses. At most, complainant's evidence shows that he has a dispute with PG&E over the quality of the services he rendered to PG&E. That is, complainant's evidence shows only that he received commissions from PG&E to provide photographic services and that he provided services of the type contracted for. PG&E and complainant disagree about whether the services he provided were satisfactory.

It would serve no useful purpose to summarize PG&E's voluminous evidence, consisting of the testimony of 9 witnesses and dozens of documentary exhibits. The weight of the evidence, literally and figuratively, shows that the services complainant rendered were not satisfactory. We do not make a finding of fact on this point, however, as we are not litigating a dispute about the fulfillment of contractual terms or the discharge of business obligations.⁴ Complaint proceedings generally focus on violations of law. In this proceeding complainant had the burden

⁴ "The Commission will not...entertain complaints...which...involve only general contract type disputes between a utility and an existing or prospective WMBE contractor." (GO 156(5))

ORDER

IT IS ORDERED that the complaint is denied.
This order becomes effective 30 days from today.

Dated December 4, 1991, at San Francisco, California.

PATRICIA M. ECKERT,
President

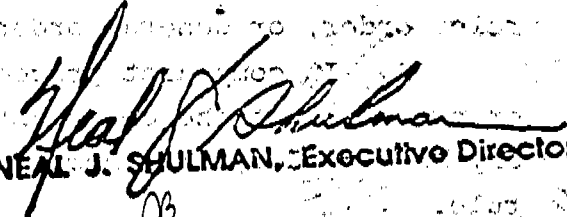
JOHN B. OHANIAN,

DANIEL Wm. FESSLER,

NORMAN D. SHUMWAY,

Commissioners

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


NEAL J. SHULMAN, Executive Director

of demonstrating that PG&E had violated some law, which burden he did not sustain. Accordingly, the complaint should be denied.

Complainant's Motion for
An ALJ's Proposed Opinion

On the last day of hearing the complainant moved that the ALJ write a proposed opinion and publish it for comment by the parties, pursuant to PU Code § 311 and Rule 77.1, et seq. PG&E joined in the motion, which the ALJ granted.

Findings of Fact

1. Complainant has failed to sustain his burden of proof that in PG&E's business relations with him it violated any law, Commission rule, order, or decision, or any utility tariff resulting from such Commission action.

2. Complainant's evidence and the evidentiary record taken as a whole show only that complainant and PG&E disagree whether the services provided by complainant were satisfactory.

Conclusions of Law

~~WOMINGO~~ ~~PU~~ ~~Code~~ ~~§~~ ~~1702~~ Rule 9 of the Commission's Rules of Practice and Procedure, and GO 156(5) require that a complainant must allege that the defendant has violated a law, a Commission rule, order, or general order, or a tariff rule.

2. In complaint proceedings the complainant has the burden of proving that the defendant has violated any provision of law or any rule, order, or general order of the Commission, or any tariff rule.

3. The Commission will not entertain complaints that involve only general contract type disputes between a utility and an existing WMBE contractor.

4. The complaint should be denied for failure of proof.