

ARBITRATION AND AWARD

In the Matter of Arbitration)
Between:)
California Faculty Association,) CSU Case No. 3-04-211P
Association,) Lock and Key Policy)
and) (CSPU Pomona)
California State University,)
_____)

Arbitrator

Louis M. Zigman, Esq.
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Los Angeles, CA 90048

Dated: March 31, 2005

Appearances

For the Employer

Sharon Abernatha
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California State University
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For the Association

Rene Castro
Representation Specialist
California Faculty Association
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Introduction

This matter was heard by Louis M. Zigman, Esq., neutral arbitrator, on February 23, 2005 in Pomona, CA. The University was represented by Sharon Abernatha and the Association was represented by Rene Castro.

Both parties were afforded an opportunity to present evidence and to examine witnesses. Following the conclusion of the hearing both parties submitted written closing briefs. The matter stood as submitted as of March 28, 2005.

Based on the evidence and contentions of the parties, I issue the following decision and award.

Statement of the Case

This matter was heard pursuant to the parties' Supplemental Agreement which is entitled Negotiable Issues Regarding Campus Policy/Procedure Implementation.

Pursuant to the requirements of that procedure, the University notified the Association on March 3, 2004 that it was revising its campus Lock and Key Policy and that it was submitting the proposed revision for their review.

Following receipt of the proposal the parties met to discuss it. The parties met over a period of time but were unable to reach an agreement. As such, the dispute was presented to the undersigned in accordance with the procedure as set forth in the Supplemental Agreement.

Issue

Is the University violating the collective bargaining agreement by implementing a policy that is unnecessary and seeking to unilaterally amend subjects that are within mandatory subjects of representation and that are already addressed in the contract?¹

The dispute with regard to the Lock and Key policy involves only one provision. That provision is as follows:

¹ As proposed by the Association

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Violation of Policy

Violation of the Key Issuance and Control Policy and Procedures may result in loss of the right to be issued key(s) and could subject the person to discipline in accordance with Education Code, Article 2 of Chapter 5, Vision 8, Part 555 (commencing with Section 89530) and the applicable collective bargaining agreement. (My emphasis)

Positions of the Parties

Association's Position

The Association asserts that the University would violate the collective bargaining agreement if it were to implement the proposed policy because the proposed policy would unilaterally amend mandatory subjects of bargaining that have already been addressed in the MOU, i.e. the matter of discipline.

As a background to this dispute, the Association notes that during the term of a collective bargaining agreement a union is not obligated to accept any changes to the status quo, particularly when the subject is already addressed in the MOU. And, in this case, the subject which the University wants to change is involves discipline.

As for example, the Association points out that discipline has been negotiated and the University's right to discipline is set forth in Article 19 of the MOU. According to the Association, the Lock and Key Policy involves an attempt to broaden the University's authority to discipline employees by unilaterally adopting new policies during the life of the Agreement. While the Association notes that the parties did agree on a dispute resolution process through the Supplemental Agreement, the Association maintains that this agreement does not give the University an avenue for gaining improvements to already negotiated subjects or matters without the Association's concurrence.

According to the Association, if this new Lock and Key Policy, containing the disputed language is allowed to be adopted this policy would result in a de facto amendment to Article 19, Section 2 by adding a form of "other personnel action or recommendation or decision" to the subject of discipline. And, in the

Association's view, this additional area of discipline would be in direct conflict with the previously negotiated clear language of Article 19 of the MOU.

While noting the University's contention that it has the right to discipline employees for violations of this policy, the Association acknowledges that the University does have the authority in some situations to discipline for violations of their proposed policy under state and federal law. Therefore, since the University has the right, subject to federal and state law to impose disciplinary actions, the Association maintains that it is unnecessary to incorporate that specific authority into the collective bargaining agreement. As stated more succinctly in its closing brief:

"The contractual status quo the CSU desires to change makes it possible to violate a provision of a particular University policy and not violate a specific law, regulation or code. The authority the CSU hopes to win is the authority to impose discipline for violations of University policy that do not meet the standard under law.

Simply put, except as otherwise specified in the Agreement, the current CBA does not include a violation of University Policy as the basis for disciplinary action and the CFA seeks to preserve the CBA status quo with regard to violations of University Policy and any disciplinary implications."

In view of the foregoing, the Association seeks a decision ordering the University to cease and desist from the implementation of the policy, or in the alternative, that I "minimally order the CSU to remove any threats of discipline or disciplinary implications from the proposed policy."²

University's Position

The University denies that the implementation of the Lock and Key Policy would violate any of the provisions of the collective bargaining agreement and/or that it would unilaterally amend mandatory subjects of bargaining.

According to the University, it has the right to promulgate rules and regulations regarding the workplace and that this right includes its ability to take corrective action including the discipline of employees for violations of

² After the hearing, the parties were asked by the undersigned to see whether they could reach resolution. The parties met and presented proposals but were not able to reach agreement. As part of their closing briefs, both parties made specific reference to their proposals and both parties indicated that the undersigned could adopt their proposals as one possible remedy in this dispute.

this policy. As support for this proposition, the University points to the treatise on labor arbitration "How Arbitration Works," by Elkouri and Elkouri and also to Article 5 of the parties' collective bargaining agreement, i.e. the management right's clause.

In noting the manner in which the Association framed the issue to the effect that this policy is not needed (unnecessary), the University points to the last sentence in the Arbitration provision of the Supplemental Agreement which states that the arbitrator "shall have no power to determine whether the need exists for the implementation of the policy/procedure..."

In noting the parties' agreement that the issue before the undersigned is very limited and narrow and deals with the disciplinary language in the policy, the University maintains that it "has the right to implement policies and procedures to conduct its daily business." Furthermore, the University asserts that implicit in the right to conduct its business is the right to take appropriate action if an employee does not comply with policies and/or procedures.

According to the University, the disciplinary provision contained in this policy is reasonable because it conforms to the law and it also conforms with the collective bargaining agreement itself. In this regard, and as noted above, the University maintains that it has the right to discipline employees so long as the disciplinary action is in accordance with the Education Code, Section 89535 and with the principles applicable under the collective bargaining agreement.

The University, in its closing brief, states:

"The University agrees that Article 19 provides the framework of how discipline is administered and appealed. The language in the Policy does not add to or modify the language. The Policy language refers employees and management to the collective bargaining agreement. The collective bargaining agreement does not address the reasons for the discipline. The reasons for discipline are listed in the Education Code. Therefore, the Policy language refers employees to the Education Code.

.....

The proposed language merely puts employees on notice that they can be disciplined pursuant to the law, and provides the applicable legal references for any such discipline."

The University maintains that giving employees notice of the possible consequences for violations of policies is a universally accepted practice and consistent with the precepts of accepted disciplinary actions. Moreover, the University notes that policy does not require discipline. However, if disciplinary action is taken employees retain their right to appeal under the Education Code and/or under the collective bargaining agreement.

In view of the foregoing, the University asserts that "the proposed discipline language does not change the collective bargaining agreement or the law for either party," inasmuch as the language clearly states that the discipline must be in accordance with the Education Code. Furthermore, reference to the collective bargaining agreement reminds the employees of their right to appeal discipline and reprimands.

For all of these reasons, the University maintains that the Policy is fair and reasonable and more importantly that the policy does not violate any of the provisions of the collective bargaining agreement. As such, the University requests a decision denying and dismissing the grievance.

As an alternative, the University pointed to the discussions with the Association subsequent to the close of the evidentiary phase of this hearing. And, while the University points out that my authority is somewhat limited, the University states that my authority gives me the power "to accept the language as written, or to accept the alternative language or suggest a revised version of the language."

In this regard, the University points to a further modification of its proposal with reference to the issue in dispute that the University proposed to the Association following the close of the evidentiary portion of the hearing to wit:

"Violation of the Key Issuance and Control Policy and Procedures may result in loss of the right to be issued key(s) and could also subject the employee to reprimands/corrective action which may be placed in the Personnel File. Violation may also result in disciplinary action, which may only be administered in a manner consistent with the terms of the applicable collective bargaining agreement in accordance with the applicable provisions of the California Education Code."

In conclusion, the University states:

The University strongly urges you to accept the language as written, or to *accept the alternative language suggested above.*" (My emphasis).

Analysis and Conclusion

Initially, I note that the Association, by narrowing this dispute to the disciplinary language in the policy, has impliedly assented to the underlying elements of the Lock and Key Policy. Inasmuch as the overall policy is therefore acceptable, one of the critical issues as described by the Association is whether the University can "threaten" the employees with disciplinary action for violations of the policy and/or whether this portion of the policy conflicts with the collective bargaining agreement or would unilaterally amend mandatory subjects of bargaining.

While I agree with the University that an employer has an inherent right to establish reasonable rules, regulations and policies and that an employer has the inherent power to take corrective action, including discipline, with regard to employees who violate clearly enunciated reasonable rules, regulations and policies, one cannot simply accept the "inherent right" proposition as applicable in all cases. This is so, because many collective bargaining agreements contain provisions which limit or narrow these rights of management.

While noting the University's contention that Article 5 gives management the right to impose discipline and to impose reasonable rules, regulations and policies, these management rights may be limited by other provisions of the MOU or by state or federal law. Indeed, the Association alleges that the University's right to discipline is limited under the language in Article 19.2.

After having considered the evidence and contentions of the parties, I found the University's arguments persuasive that the University does have the authority under the collective bargaining agreement to discipline employees who may violate the Lock and Key Policy so long as the discipline does not otherwise violate the provisions of the California Education Code, federal law and/or the collective bargaining agreement. As such, if employees are in fact disciplined for purported violations, those employees and the Association are free to make any and all arguments they deem relevant to reverse the disciplinary action in accordance with their collective bargaining agreement and/or federal and state law.

Given the University's right to take corrective/disciplinary action and given the Association's ability to appeal the disciplinary action to an independent neutral body, if necessary, I found considerable weight in the University's arguments that it is both a well-accepted and a sound practice for employers to advise employees of the possible consequences of conduct in violation of their policies. While the Association may characterize the statement as a "threat," others characterize this reference to possible disciplinary action as "notice" to employees of possible consequences for violations of the policy.

And finally, with respect to the Association's contention that the University is forbidden to take disciplinary action for violations of University policies, based on the language in Article 19.2, I found the Association's arguments consistent with its position. However, I simply did not find those arguments persuasive. The reason being is because I do not read and interpret the language in Article 19.2 as expansive as the Association suggests, particularly so in the absence of any specific evidence to support that interpretation as for example, bargaining history and/or the existence of a practice.

More specifically, I do not find that the disciplinary portion of the Lock and Key Policy "broadens" the University's authority beyond what is in the collective bargaining agreement because disciplinary action, if imposed, is still subject to appeal under that procedure.

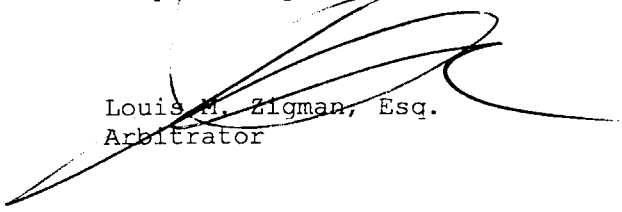
In noting that the University states that I have the authority to accept the alternative language proposed by the University and in noting the Association's contention that I have the authority to change the language by "minimally ordering the University to remove any threats of discipline or disciplinary implications from the proposed policy," and in noting that the parties informed me of their positions with respect to these proposals after the close of the evidentiary portion of the hearing, and in view of the fact that their proposals are really very close in terms of the use of disciplinary action, and because I believe that the University's last proposal provides somewhat more clarity, and because I found no credible evidence to conclude that the Lock and Key Policy unilaterally amends mandatory subjects of bargaining in light of the facts in this case, I shall adopt the University's most recent proposal as is set forth on page 7 above.

Award

The Lock and Key Policy shall include the following language under the paragraph entitled Violation of Policy:

"Violation of the Key Issuance and Control Policy and Procedures may result in loss of the right to be issued key(s) and could also subject the employee to reprimands/corrective action which may be placed in the Personnel File. Violation may also result in disciplinary action, which may only be administered in a manner consistent with the terms of the applicable collective bargaining agreement in accordance with the applicable provisions of the California Education Code."

Respectfully submitted,


Louis M. Zigman, Esq.
Arbitrator