

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



ADOLPH DONINS,)
)
 Charging Party,) Case No. LA-CE-132-S
)
 v.) PERB Decision No. 423-S
)
 STATE OF CALIFORNIA (DEPARTMENT) October 24, 1984
 OF DEVELOPMENTAL SERVICES),)
)
 Respondent.)
)
 _____)

Appearances; Adolph Donins, in propria persona.

Before Hesse, Chairperson; Morgenstern and Burt, Members.

DECISION

MORGENSTERN, Member: Charging Party Adolph Donins appeals the attached dismissal of his charges alleging violations of section 3519 of the State Employer-Employee Relations Act (Government Code section 3512 et seq.).

The Public Employment Relations Board (Board) has reviewed the regional attorney's dismissal in light of the appeal and the entire record herein and, finding it free from prejudicial error, adopts it as the decision of the Board itself.¹

¹We disagree that the allegation of discrimination by the hospital's initial refusal to permit Donins to file a grievance was rendered "moot" by the hospital's subsequent acceptance of the grievance. Nonetheless, this finding is not prejudicial since the allegation was properly dismissed on the grounds that the hospital's subsequent conduct served to dispel any inference of unlawful motivation.

ORDER

Adolph Donins' appeal in Case No. LA-CE-132-S is hereby
DENIED.

Chairperson Hesse and Member Burt joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD

Los Angeles Regional Office
3470 Wilshire Blvd., Suite 1001
Los Angeles, California 90010
(213)736-3127



November 10, 1983

Adolph Donins

Wayne Heine
Dept, of Develop. Services
1600 9th Street
Sacramento, CA 95814

Rich McWilliam, Labor Relations Officer
Department of Personnel Administration
1115 - 11th Street
Sacramento, CA 95814

RE: DISMISSAL OF UNFAIR PRACTICE CHARGE
LA-CE-132-S, Adolph Donins v. State of California
(Department of Mental Health)

Dear Parties:

The above charge was filed on September 12, 1983, and alleges that the Camarillo State Hospital retaliated and discriminated against Adolph Donins by not allowing him to return to work after he had obtained a medical release from a doctor who did not initially certify Donins¹ disability. Donins further claims that he was discriminated and retaliated against by the hospital's refusal to allow him to file a grievance. As a related allegation, Donins alleges that the hospital changed its policy and past practice by refusing to honor his personal doctor's medical release to return to work, and by insisting that he obtain a release from Doctor Borreli, who initially certified the disability.

My investigation revealed the following facts. Adolph Donins is a psychiatric technician for the Camarillo State Hospital, age 58. His duties over the many years there (25) as a "psych-tech", include restraining often-violent mental patients. As a result of his job, Mr. Donins has sustained a recurring injury to his elbow and shoulder area. The initial injury occurred on or about August 23, 1979, while Mr. Donins had to use a great deal of force to restrain a patient who attacked him. Since then, there has been a history of recurring problems with this injury, and recurring medical examinations and injury leaves, followed by light-duty assignments upon return.

On about September, 1982, Donins reinjured his right arm and was certified disabled by Doctor Lawrence Borreli. During the period of September, 1982 to August 7, 1983, Donins was on an injury leave and received several physical examinations, all of which indicated that the symptoms of the disability continued.

On August 8, 1983, however, Donins obtained a release-to-work letter from Doctor Daniel A. Capen, and used it to request the hospital to reinstate him. The situation baffled the hospital because Doctor Capen issued a second letter dated August 9, 1983, which indicated that, although Donins could return to work, he recommended that Donins not resume "performing activities on a continuous basis with his upper extremities".

During this period of disability, Donins was on a rehabilitation program under Worker Compensation wherein he was receiving training and monetary benefits. Just prior to August 8, 1983, Donins failed to pass a written examination on a training test for respiratory technician. Mr. Donins signed a statement acknowledging this failure on August 8, 1983, and was made aware that his rehabilitation moneys would be stopped if he continued to fail the retraining program. The hospital, aware of this, was apprehensive about the coincidence of these events.

It was the same type of apprehension created by the ambiguous release that had prompted the hospital to implement a policy back in May, 1982, to require employees returning from a disability to produce a release from the physician who initially certified the disability. The hospital produced evidence during this investigation to show that, in fact, a uniform policy had been implemented beginning in May, 1982 (prior to the most recent collective bargaining agreement) that required Donins to obtain a release from Doctor Borreli. Independent employee witnesses confirmed that such a policy had been in effect.¹

Therefore, in response to Donins¹ request to return to work in August, 1983, the hospital personnel official informed Mr. Donins that he would first have to obtain a written release

¹Donins stated during the investigation that he was unsure of the hospital's past practice since he did not have access to hospital records. He has not given any evidence that the past practice is different than that procedure that was applied to his situation.

from Doctor Borreli. Donins thereafter sought to file a grievance based upon the hospital's failure to allow him to return to work. The hospital failed to allow him to file such a grievance, but counseled him to file a "Complaint" under the contractual grievance procedure. The Complaint, with no recourse to binding arbitration as are other grievances, was summarily rejected as not having merit. Thereafter, Donins filed the instant unfair practice charge.

During the investigation of the unfair practice charge, Donins agreed to be examined by Doctor Borreli. The hospital was informed by Donins that although Borreli had verbally released him to work, he refused to provide Donins with a written release. In light of these developments and the facts that Donins had complied with all previous requirements asked for by the hospital, and based upon its desire to settle the unfair practice dispute, the hospital decided to allow Donins to return to work. Donins had effectively won his grievance, and was told to report to work.

However, on October 13, 1983, the hospital received a written letter from Doctor Borreli stating that, although the disability in the elbow and shoulders was gone, he had some reservations about Donins returning to work, noting his age, weight, and the risk involved in Donins working around violent patients. Thus, when the hospital officially notified Donins in writing that he could return to work, he was asked to submit to a subsequent orthopedic examination. Donins argues that this is further evidence of discrimination, retaliation against him, and a change from past practice.

However, this investigation has drawn evidence that, although Donins did engage in protected activities, the hospital's actions were consistent with its past practice. The investigation revealed that other employees in like circumstances were treated the same way as Mr. Donins. The requirements imposed upon Donins as preconditions to his return to work were imposed uniformly, notwithstanding any protected activities. It should also be noted that Donins's most recent protected activities date back to late July or early August, 1982. In sum, there is no evidence of disparate treatment.

As noted above, there is also no evidence of a unilateral change of terms and conditions of employment, much less a unilateral change of the same.

Insofar as the hospital requires that Donins submit to a post-employment examination, this is not contrary to past practice, nor is it a requirement which has generalized effect or a "continuing impact upon the terms and conditions of employment of bargaining unit members". See Grant Joint Union High School District (2/26/82) PERB Decision No. 196. Instead, the hospital, faced with two ambiguous medical releases, and potential legal liability should Donins suffer avoidable physical harm, decided to require Donins to submit to such a medical examination, while allowing him to work in the meantime. No facts have been alleged or produced to indicate that such post-employment examinations, in circumstances such as these, are a departure from established practice or that such was discriminatorily motivated. Nor was such an examination made a prerequisite to Donins' return to work.

For all of the foregoing reasons, the facts alleged in the charge and those produced during this investigation indicate that a prima facie violation of the SEERA does not exist. Because the hospital has since allowed Donins to file a grievance, which Donins effectively won, that issue is now moot. Therefore, the unfair practice charge is dismissed.

Pursuant to Public Employment Relations Board regulation 32635 (California Administrative Code, title 8, party III), you may appeal the refusal to issue a complaint (dismissal) to the Board itself.

Right to Appeal

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 Notice (section 32635 (a)). To be timely filed, the original and five (5) copies of such appeal must be actually received by the Board itself before the close of business (5:00 p.m.) on November 30, 1983, or sent by telegraph or certified United States mail postmarked not later than November 30, 1983 (section 32135). The Board's address is:

Public Employment Relations Board
1031 18th Street
Sacramento, CA 95814

If you file a timely appeal of the refusal, any other party may file with the executive assistant to the Board an original and

five (5) copies of a statement in opposition within twenty (20) calendar days following the date of service of the appeal (section 32635(b)).

Service

All documents authorized to be filed herein except for amendments to the charge must also be "served" upon all parties to the proceeding, and a "proof of service" must accompany the document filed with the Regional Office or the Board itself (see section 32140 for the required contents and a sample form). The documents will be considered properly "served" when personally delivered or deposited in the first-class mail postage paid and properly addressed.

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 executive assistant to the Board at the previously noted address. A request for an extension in which to file a document with the Regional Office should be addressed to the Regional Attorney. A request for an extension must be filed at least three (3) calendar days before the expiration of the time required for filing the subject document. The request must indicate good cause for the position of each other party regarding the extension and shall be accompanied by proof of service of the request upon each party (section 32132).

Final Date

If no appeal is filed within the specified time limits, the dismissal will become final when the time limits have expired.

Very truly yours,

Dennis Sullivan
General Counsel

Manuel M. Melgoza
Regional Attorney

MMM:djm