STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

REGGIE TORAN, Charging Party, v. CALIFORNIA STATE EMPLOYEES ASSOCIATION, Respondent.	Case No. SA-CO-246-S PERB Decision No. 1593-S February 9, 2004

Appearances: Reggie Toran, on his own behalf.

Before Baker, Whitehead and Neima, Members.

DECISION

NEIMA, Member: This case is before the Public Employment Relations Board (Board) on appeal by Reggie Toran (Toran) of a Board agent's dismissal (attached) of his unfair practice charge. The charge alleged that the California State Employees Association violated the Ralph C. Dills (Dills Act)[1] by failing to meet its duty of fair representation.

The Board has reviewed the entire record in this matter including the original and amended unfair practice charge, the warning and dismissal letters and Toran's appeal. Toran's appeal reiterates arguments in support of his charge made to the Board agent and fails to adequately address the Board agent's finding that the charge was untimely filed. As the timeliness of the charge is not established, the Board's inquiry into whether the charge states a prima facie case ends. It is therefore not necessary to determine whether Toran's allegations

[1]The Dills Act is codified at Government Code section 3512 et seq.

constitute a prima facie violation of the Dills Act. (Long Beach Community College District (2002) PERB Decision No. 1475.) The Board therefore adopts the portion of the dismissal letter which dismisses Toran's charge as untimely.

ORDER

The unfair practice charge in Case No. SA-CO-246-S is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Baker and Neima joined in this Decision.

STATE OF CALIFORNIA GRAY DAVIS, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
1031 18th Street
Sacramento, CA 95814-4174
Telephone: (916) 322-3198
Fax: (916) 327-6377

June 19, 2002

Reggie Toran

Re: Reggie Toran v. California State Employees Association
Unfair Practice Charge No. SA-CO-246-S
DISMISSAL LETTER

Dear Mr. Toran:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on March 19, 2002. Your charge alleges that the California State Employees Association violated the Ralph C. Dills Act (Dills Act)[1] when it failed to fairly represent you.

I indicated in the attached letter dated May 24, 2002, that the above-referenced charge did not state a prima facie case. You were advised that if there were any factual inaccuracies or additional facts which would correct the deficiencies explained in that letter, you should amend the charge. You were further advised that unless you amended the charge to state a prima facie case or withdrew it prior to June 6, 2002, the charge would be dismissed. You filed an amended charge on June 5, 2002.

Your amended charge responds to the concerns raised in the attached letter that your charge is untimely filed. You contend that under a continuing violation theory your charge is timely.

On September 6, 2000, CSEA Representative Doug Moffett presented you with a proposed agreement to settle PERB Charge No. SA-CE-1217-S. The agreement provided that you would be reinstated to the classification of Research Program Specialist I and would receive back pay and restoration of vacation leave. Your employer, the Office of Criminal Justice Planning, also agreed to place you on paid administrative leave for five months during which time you would search for other State employment. The agreement provided that if after five months you did not find a position elsewhere, you would resign from OCJP.

Although emotionally and physically distressed at the time, you signed the agreement on September 6, 2000.

[1] The Dills Act is codified at Government Code section 3512 et seq. The text of the Dills Act and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

Despite having submitted over 300 applications for lateral transfer positions, you were unable to obtain employment with another State agency prior to February 6, 2001. On February 6, 2001, OCJP "resigned" you from State service.

Your charge alleges that CSEA breached its duty of fair representation because Mr. Moffett, knowing your distressed mental state, allowed you to sign the settlement agreement without a cooling off period to give you time to review the agreement. You also contend that CSEA had an obligation to renegotiate the agreement and did not initiate negotiations in a timely manner.

You appealed your resignation from State service and on December 4, 2001 and February 14 and 21, 2002, an appeal hearing was conducted by DPA. You assert in your amended charge that you "did not realize the intensity and bad faith of CSEA until the testimony and evidence that was introduced at the DPA Hearing." You allege that the CSEA representatives called to testify at the hearing by your employer provided inconsistent testimony. Mr. Moffett testified that the agreement you signed on September 6, 2000 had been previously reviewed by a CSEA attorney. CSEA attorney Nancy Yamada testified, however, that she had not reviewed the settlement agreement until two weeks after the agreement was signed.

Your charge also alleges that at the DPA hearing you obtained copies of e-mail messages between Mr. Moffett and OCJP's representative regarding the settlement negotiations. You allege that in the e-mail messages the parties exchanged personal greetings and information and expressed "apparent jubilant celebration" when you agreed to the proposed settlement. You contend that this conduct demonstrates "complicity, bad faith and/or arbitrary conduct."

At the DPA hearing, Mr. Moffett testified that you had made enemies due to your involvement with CDU. You contend that because all CDU activists are targeted by CSEA, this testimony demonstrates that you were also targeted as a CDU activist and, thus, you did not receive fair representation from CSEA representatives.

You also assert that CSEA insisted that you relinquish your EEOC claims and included this provision in the settlement agreement without your authority.

Finally, you assert that the failure to meet statutory time limits should be excused because you were afraid to file a charge prior to the DPA hearing because you believed CSEA might withdraw the funds it provided to you to retain counsel for the hearing.

As discussed in the attached letter, Dills Act section 3514.5(a)(1) prohibits PERB from issuing a complaint with respect to "any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge." The limitations period begins to run once the charging party knows, or should have known, of the conduct underlying the charge. (Gavilan Joint Community College District (1996) PERB Decision No. 1177.) The charging party bears the burden of demonstrating that the charge is timely filed. (Tehachapi Unified School District (1993) PERB Decision No. 1024; State of California (Department of Insurance) (1997) PERB Decision No. 1197-S.)

Your charge was filed on March 19, 2002. I explained to you that the statute of limitations period extends six months prior to the filing of the charge to September 19, 2001. Only alleged unfair practices which occurred on or after September 19, 2001 are timely filed.

In San Dieguito Union High School District (1982) PERB Decision No. 194, the Board held that an unfair practice allegation may still be considered to be timely filed if the alleged violation is a continuing one. A continuing violation occurs if the violation has been revived by subsequent unlawful conduct within the six-month statute of limitations.

The Dills Act imposes upon an exclusive representative a duty to fairly represent all bargaining unit members in matters involving contract negotiations, administration of the collective bargaining agreement and grievance handling. (California State Employees' Association (Norgard) (1984) PERB Decision No. 451-S.) In order to state a prima facie violation of this section of the Dills Act, Charging Party must show that the Respondent's conduct was arbitrary, discriminatory or in bad faith. In United Teachers of Los Angeles (Collins), the Public Employment Relations Board stated:

> Absent bad faith, discrimination, or arbitrary conduct, mere negligence or poor judgment in handling a grievance does not constitute a breach of the union's duty. [Citations omitted.]

In order to state a prima facie case of arbitrary conduct violating the duty of fair representation, a Charging Party:

> ". . . must at a minimum include an assertion of sufficient facts from which it becomes apparent how or in what manner the exclusive representative's action or inaction was without a rational basis or devoid of honest judgment. (Emphasis added.)" [Reed District Teachers Association, CTA/NEA (Reyes) (1983) PERB Decision No. 332, p. 9, citing Rocklin Teachers Professional Association (Romero) (1980) PERB Decision No. 124.]

None of the new allegations raised in your amended charge demonstrates that CSEA breached its duty of fair representation. The fact that a CSEA attorney did not review the settlement agreement before you signed it does not demonstrate arbitrary conduct. Similarly, e-mail messages which contain personal information between CSEA and OCJP representatives and which take pleasure in the conclusion of settlement negotiations, does not demonstrate bad faith. Finally, your claim that you did not receive fair representation because CSEA targets all CDU activists is not supported by the factual allegations.

You also contend that CSEA included the relinquishment of your EEOC claims as part of the settlement agreement without your authority. As discussed in the attached letter, however, you were aware, or should have been aware, of the contents of the proposed settlement agreement on September 6, 2000. At that time, you could have objected to any or all of the terms of the

agreement. The fact that you failed or refused or were unable to read the terms of the agreement on September 6, 2000, does not demonstrate arbitrary, discriminatory or bad faith conduct by CSEA.

The above-described conduct, which occurred within the statutory limitations period, does not demonstrate a prima facie violation of a duty of fair representation. Thus, your charge fails to establish that the charge is timely under a continuing violation theory.[2]

Finally, you assert that the timeliness of your charge should be excused because you were afraid that CSEA would withdraw the funds it provided you for outside counsel if you filed an unfair practice charge against CSEA before the DPA hearing. Dills Act section 3514.5(a)(1) establishes a statutory limit on PERB's jurisdiction over unfair labor practices. PERB has no discretion to grant exceptions to the established six-month limitations period. Accordingly, for the reasons discussed above and in the attached letter, your charge is untimely filed and is hereby dismissed.

Right to Appeal

Pursuant to PERB Regulations,[3] 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 dismissal. (Regulation 32635(a).) Any document filed with the Board must contain the case name and number, and the original and five (5) copies of all documents must be provided to the Board.

A document is considered "filed" when actually received before the close of business (5 p.m.) on the last day set for filing or when mailed by certified or Express United States mail, as shown on the postal receipt or postmark, or delivered to a common carrier promising overnight delivery, as shown on the carrier's receipt, not later than the last day set for filing. (Regulations 32135(a) and 32130.)

A document is also considered "filed" when received by facsimile transmission before the close of business on the last day for filing together with a Facsimile Transmission Cover Sheet which meets the requirements of Regulation 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Regulations 32135(b), (c) and (d); see also Regulations 32090 and 32130.)

The Board's address is:

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[2] Your reference to National R.R. Passenger Corp. v. Morgan, __ S.Ct. __, 2002 WL 1270268 U.S., 2002, June 10, 2002, in inapplicable. This decision addressed the timeliness of cases arising under Title VII of the Civil Rights Act of 1964.

[3] PERB's Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95814-4174
FAX: (916) 327-7960

If you file a timely appeal of the refusal to issue a complaint, any other party may file with the Board an original and five copies of a statement in opposition within twenty (20) calendar days following the date of service of the appeal. (Regulation 32635(b).)

Service

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding, and a "proof of service" must accompany each copy of a document served upon a party or filed with the Board itself. (See Regulation 32140 for the required contents and a sample form.) The document will be considered properly "served" when personally delivered or deposited in the first-class mail, postage paid and properly addressed. A document filed by facsimile transmission may be concurrently served via facsimile transmission on all parties to the proceeding. (Regulation 32135(c).)

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 Board at the previously noted address. A request for an extension must be filed at least three (3) calendar days before the expiration of the time required for filing the document. The request must indicate good cause for and, if known, the position of each other party regarding the extension, and shall be accompanied by proof of service of the request upon each party. (Regulation 32132.)

Final Date

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

Sincerely,

ROBERT THOMPSON
General Counsel

By
Robin W. Wesley
Regional Attorney

cc: Harry J. Gibbons

STATE OF CALIFORNIA GRAY DAVIS, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD

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1031 18th Street
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Telephone: (916) 322-3198
Fax: (916) 327-6377

May 24, 2002

Reggie Toran

Re: Reggie Toran v. California State Employees Association
Unfair Practice Charge No. SA-CO-246-S
WARNING LETTER

Dear Mr. Toran:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on March 19, 2002. Your charge alleges that the California State Employees Association violated the Ralph C. Dills Act (Dills Act)[1] when it failed to fairly represent you.

Investigation of the charge revealed the following information. You were first employed by the State of California with the Office of Criminal Justice Planning on August 28, 1989. During your employment with the State you served as a CSEA District Bargaining Unit Representative and a District Labor Council President. You were also an activist for the Caucus for a Democratic Union.

On October 30, 1998, during your probationary period for your new position as a Research Program Specialist I, you were failed on probation, demoted two levels and transferred out of the Program Evaluation Branch. After several months, CSEA was able to get you returned to your last permanent position and restore your back pay. However, you were not returned to the Program Evaluation Branch.

On March 8, 1999, CSEA filed an unfair practice charge on your behalf concerning the prior action taken against you by OCJP. A complaint was issued and in August 2002, at your request, CSEA initiated settlement negotiations with OCJP.

On September 6, 2000, CSEA representative Doug Moffett presented you with a settlement agreement. The agreement provided that you would be reinstated to the classification of Research Program Specialist I and would receive back pay and restoration of vacation leave. OCJP also agreed to place you on unpaid administrative leave for five months during which time you would search for other State employment. The agreement provided that if after five months you did not find a position elsewhere, you would resign from OCJP.

[1] The Dills Act is codified at Government Code section 3512 et seq. The text of the Dills Act and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

Mr. Moffett spent approximately 30 minutes with you reviewing the agreement. During this period of time, Mr. Moffett assembled and made copies of the agreement; explained the terms of the agreement to you; advised you not to discuss or show the agreement to anyone; and explained that you would have to sign four releases withdrawing other legal actions before OCJP would sign the agreement. Mr. Moffett also told you that if the agreement was not signed that day, the offer would be withdrawn.

Although you were emotionally and physically distressed at the time, you signed the agreement on September 6, 2000.

In late September 2000, you sent an e-mail message to CSEA staff attorney Nancy Yamada in which you expressed concern about the provision in the agreement which would force you to resign. You told Ms. Yamada that you wanted the agreement either rescinded or modified. Ms. Yamada responded by telling you not to worry about the provision because you would find another job within the five-month period.

In a November 21, 2000 e-mail, you told Ms. Yamada that OCJP had been continually violating the settlement agreement's confidentiality provision by informing OCJP staff of the terms of the agreement. You requested that OCJP either extend your leave or that the agreement be rescinded.

On December 17, 2000, you e-mailed Ms. Yamada expressing concern that you had not yet obtained other State employment. You believed that OCJP was providing negative recommendations to prospective employers. You also stated that you were under a great deal of stress at the time you signed the agreement. You stated that you would not have signed an agreement that required you to resign from State service if your mental state had been better. You requested that Ms. Yamada renegotiate the agreement to either extend your paid administrative leave or allow you to return to work.

On January 7, 2001, you contacted Ms. Yamada telling her that your office voice mail was to remain active while you were on administrative leave to accept phone calls from prospective employers. However, you learned that OCJP employees were answering your phone rather than letting the call go to voice mail and telling callers that you no longer worked at OCJP. You again asked to have the agreement modified or rescinded.

On January 8, 2001, Ms. Yamada responded in an e-mail message stating that she had had an extensive discussion with OCJP's counsel requesting that the Agency extend your leave. She stated that she would get back to you as soon as she heard from OCJP. Ms. Yamada also reported that your voice mail was still operational and was not to be answered by other employees. She requested information from you concerning the names of the individuals who were told that you no longer worked at OCJP.

On January 25, 2001, Ms. Yamada sent a letter to OCJP Chief Counsel John Reece requesting that your resignation date be extended for an additional six months because of the interference

with your voice mail. She also requested that you continue to be allowed to use the Agency's voice mail.

Despite having submitted over 300 applications for lateral transferred positions, you were unable to obtain employment with another State agency prior to February 6, 2001. On February 6, 2001, OCJP "resigned" you from State service.

On February 8, 2001, Ms. Yamada sent a letter to DPA Labor Relations Counsel Gayle Onodera expressing disappointment that OCJP did not respond to her January 25, 2001 letter. Ms. Yamada reported that you were presently being considered for other State positions and she requested that OCJP continue your voice mail and refrain from placing any separation documents in your personnel file.

Your resignation was completed and in March 2001, CSEA Labor Relations Representative Lois Kugelmass filed an appeal with DPA to set aside your resignation.

In late March 2001, CSEA informed you that it would not represent you at the DPA appeal hearing, citing a conflict of interest. CSEA did agree to provide you with funds to retain outside counsel to represent you at the hearing.

The DPA hearing was held on December 4, 2001 and February 14 and 21, 2002. Mr. Moffett and Ms. Yamada were called to testify by OCJP. Mr. Moffett testified that you were extremely stressed and in a poor state of mind at the time the settlement agreement was signed. He also testified that he advised you not to sign the agreement because of the resignation clause. Mr. Moffett stated that Ms. Yamada had reviewed and approved the settlement agreement before it was presented to you. However, Ms. Yamada testified that she did not see the completed agreement until two weeks after you signed the agreement.

On February 26, 2002, the DPA administrative law judge issued a decision denying your petition to set aside your resignation.

Your charge alleges that CSEA breached its duty of fair representation because Mr. Moffett, knowing your mental state, allowed you to sign the settlement agreement without a cooling off period to give you time to review the agreement. You also contend that CSEA had an obligation to renegotiate the agreement and did not initiate negotiations in a timely manner.

Based on the facts stated above, the charge fails to state a prima facie case.

Dills Act section 3514.5(a)(1) prohibits PERB from issuing a complaint with respect to "any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge." The limitations period begins to run once the charging party knows, or should have known, of the conduct underlying the charge. (Gavilan Joint Community College District (1996) PERB Decision No. 1177.) The charging party bears the burden of demonstrating that the charge is timely filed. (Tehachapi Unified School District (1993) PERB Decision No. 1024; State of California (Department of Insurance) (1997) PERB Decision No. 1197-S.)

Your charge was filed on March 19, 2002. Thus, the statute of limitations period extends six months prior to the filing of the charge to September 19, 2001. Accordingly, only alleged unfair practices which occurred on or after September 19, 2001 are timely filed.

Your charge alleges that CSEA breached its duty of fair representation because Mr. Moffett, knowing your mental state, allowed you to sign the settlement agreement on September 6, 2000. However, in late September 2000, you contacted Ms. Yamada expressing concern about the resignation clause. You told Ms. Yamada that you wanted the agreement either rescinded or modified. This conduct demonstrates that you were aware of the effect of the resignation clause well before September 19, 2001. Thus, this allegation is untimely filed and must be dismissed.

Your charge also alleges that CSEA had an obligation to renegotiate the agreement and did not initiate negotiations in a timely manner. The agreement was concluded on February 6, 2001 when OCJP "resigned" you from State employment. You were certainly aware by this date that CSEA had not timely initiated negotiations to attempt to rescind or modify the agreement. This time period falls well outside the statutory limitations period and this allegation must also be dismissed.

Even assuming the charge was timely filed, the charge fails to demonstrate a breach of the duty of fair representation.

The Dills Act imposes upon an exclusive representative a duty to fairly represent all bargaining unit members in matters involving contract negotiations, administration of the collective bargaining agreement and grievance handling. (California State Employees' Association (Norgard) (1984) PERB Decision No. 451-S.) However, an exclusive representative does not owe a duty of fair representation to unit members in a forum over which the union does not exclusively control the means to a particular remedy. (California State Employees Association (Parisi) (1989) PERB Decision No. 733-S.) This is because the unit member may seek representation outside of the exclusive representative in extra-contractual forums. Accordingly, PERB has held that the duty of fair representation does not attach to an exclusive representative in extra-contractual proceedings such as PERB or the SPB. (California Union of Safety Employees (John) (1994) PERB Decision No. 1064-S; California State Employees Association (Carrillo) (1997) PERB Decision No. 1199-S.)

Your charge alleges that CSEA breached its duty of fair representation concerning the PERB settlement agreement. Since PERB proceedings are not a contractual matter exclusively controlled by CSEA, the Union does not owe you a duty of fair representation when it represents you in PERB proceedings. Thus, your charge fails to demonstrate a prima facie case of a violation of the duty of fair representation.

For these reasons the charge, as presently written, does not state a prima facie case. If there are any factual inaccuracies in this letter or additional facts that would correct the deficiencies explained above, please amend the charge. The amended charge should be prepared on a

standard PERB unfair practice charge form, clearly labeled First Amended Charge, contain all the facts and allegations you wish to make, and be signed under penalty of perjury by the charging party. The amended charge must have the case number written on the top right hand corner of the charge form. The amended charge must be served on the respondent's representative and the original proof of service must be filed with PERB. If I do not receive an amended charge or withdrawal from you before June 6, 2002, I shall dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Robin W. Wesley
Regional Attorney