



STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

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|---------------------------------|---|--------------------------|
| ARTHUR ESPARZA GONZALES, |) | |
| |) | |
| Charging Party, |) | Case No. S-CE-648-S |
| |) | |
| v. |) | PERB Decision No. 1020-S |
| |) | |
| STATE OF CALIFORNIA (EMPLOYMENT |) | October 21, 1993 |
| DEVELOPMENT DEPARTMENT), |) | |
| |) | |
| Respondent. |) | |
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Appearance: Arthur Esparza Gonzales, on his own behalf.
Before Blair, Chair; Caffrey and Carlyle, Members.

DECISION AND ORDER

BLAIR, Chair: This case is before the Public Employment Relations Board (Board) on appeal by Arthur Esparza Gonzales (Gonzales) of a Board agent's dismissal (attached) of his unfair practice charge. The charge alleged that the State of California (Employment Development Department) violated section 3519(a) and (b) of the Ralph C. Dills Act (Dills Act)¹ by denying Gonzales

¹The Dills Act is codified at Government Code section 3512 et seq. Section 3519 states, in pertinent part:

It shall be unlawful for the state to do any of the following:

(a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter. For purposes of this subdivision, "employee" includes an applicant for employment or reemployment.

(b) Deny to employee organizations rights guaranteed to them by this chapter.

his right to union representation and by retaliating against him for engaging in protected union activity.

The Board has reviewed the entire record in this case and finds the Board agent's dismissal to be free of prejudicial error and adopts it as the decision of the Board itself.

The unfair practice charge in Case No. S-CE-648-S is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Caffrey and Carlyle joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD



Sacramento Regional Office
1031 18th Street, Room 102
Sacramento, CA 95814-4174
(916) 322-3198



June 11, 1993

Arthur Esparza Gonzales

Re: Arthur Esparza Gonzales v. State of California (Employment
Development Department)
Unfair Practice Charge No. S-CE-648-S
DISMISSAL LETTER

Dear Mr. Gonzales:

On March 12, 1993, you filed a charge in which you allege that the State of California (Employment Development Department) (EDD) violated section 3519(a) of the Government Code (the Dills Act). Specifically, you allege that EDD, denied your request for representation during meetings on August 5, and 12, 1992, and issued you a notice of rejection on December 21, 1992, as a reprisal against you for exercising rights guaranteed by the Dills Act.

I indicated to you, in my attached letter dated May 7, 1993, that the above-referenced charge did not state a prima facie case. In addition, you were informed that your allegation that EDD issued you a notice of rejection as a reprisal against you for exercising rights guaranteed by the Dills Act was deferrable to arbitration. You were also 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 May 18, 1993, the charge would be dismissed.

On May 17, 1993, you requested an extension of time to file an amended charge and we agreed to an extension until May 24, 1993. On May 20, 1993, you filed an amended charge.

You attached a copy of EDD's Notice of Rejection dated December 21, 1992 to your amended charge and appear to allege that because the Notice of Rejection was issued on December 21, 1992 and EDD used your request for representation as a reason for rejecting you during probation, the unfair practice occurred on December 21, 1992, thus, your original charge was filed within the six-month statute of limitations. Your amended charge also for the

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June 11, 1993
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first time appears to allege that EDD violated section 3519(b).¹

As I stated previously in my letter of May 7, 1993, the alleged denial of representation occurred on August 5, and 12, 1992. Your charge was filed with the Public Employment Relations Board (PERB) on March 12, 1993², which means that for PERB to have jurisdiction over any alleged unfair practice by EDD it would have had to occurred during the six-month statutory period which began on September 12, 1992.

The six month limitation period runs from the date the charging party knew or reasonably should have known of the alleged unfair practice, if the knowledge was obtained after the conduct occurred. Fairfield Suisun Unified School District (1985) PERB Decision No. 547.

Contrary to your position, the date of the conduct regarding the denial of representation is not December 21, 1992, the date you received EDD's Notice of Rejection, but rather August 5, and 12, 1992, the dates you requested and were denied representation. Since the conduct you complained of and your receipt of knowledge of that conduct occurred outside the six-month limitation period, the allegations in your charge regarding the denial of representation are untimely and must be dismissed.

In addition, your amended charge failed to address the allegation regarding EDD's Notice of Rejection being a reprisal and subject to being deferred to arbitration. Accordingly, that allegation will be dismissed and deferred to arbitration.

Your amended charge also appears to allege that EDD's conduct violates section 3519(b) of the Dills Act. To establish a violation of section 3519(b), a charging party must show actual denial of the union's rights under the Dills Act. A showing of theoretical impact is insufficient. State of California (Franchise Tax Board) (1992) PERB Decision No. 954-S. Your charge fails to demonstrate a denial of union rights under the Dills Act separate and apart from the harm allegedly suffered by you. Accordingly, that allegation shall be dismissed.

¹Subsection 6c on the unfair practice charge form has "3519(b)" written in as an additional violation. There is no other reference to section 3519(b) of the Dills Act in your amended charge.

²The Unfair Practice Charge filed by Charging Party is dated January 11, 1993. However, the charge was not received by PERB until March 12, 1993. Furthermore, the proof of service, signed by Maryann Gonzales is dated March 10, 1993.

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Therefore, I am dismissing your charge based on the facts and reasons contained in this letter and my May 7, 1993 letter.

Right to Appeal

Pursuant to Public Employment Relations Board regulations, 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. (Cal. Code of Regs., tit. 8, sec. 32635(a).) To be timely filed, the original and five copies of such appeal must be actually received by the Board itself before the close of business (5 p.m.) or sent by telegraph, certified or Express United States mail postmarked no later than the last date set for filing. (Cal. Code of Regs., tit. 8, sec. 32135.) Code of Civil Procedure section 1013 shall apply. The Board's address is:

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

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. (Cal. Code of Regs., tit. 8, sec. 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 Cal. Code of Regs., tit. 8, sec. 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.

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. (Cal. Code of Regs., tit. 8, sec. 32132.)

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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
Deputy General Counsel

By
Michael E. Gash
Regional Attorney

Attachment

cc: Claire Iandoli, Attorney
Warren Stracener, Labor Relations Counsel

PUBLIC EMPLOYMENT RELATIONS BOARD



Sacramento Regional Office
1031 18th Street, Room 102
Sacramento, CA 95814-4174
(916) 322-3198



May 7, 1993

Arthur Esparza Gonzales
Attorney

Re: Arthur Esparza **Gonzales** v. State of California (Employment
Development Department)
Unfair Practice Charge No. S-CE-648-S
WARNING LETTER

Dear Mr. Gonzales:

On March 12, 1993, you filed a charge in which you allege that the State of California (Employment Development Department) (EDD) violated section 3519(a) of the Government Code (the Dills Act). Specifically, you allege that EDD, denied your request for representation during meetings on August 5, and 12, 1992, and issued you a notice of rejection on December 21, 1992, as a reprisal against you for exercising rights guaranteed by the Dills Act. My investigation reveals the following facts.

On or about August 5, 1992, Charging Party's request for representation was denied during a meeting with Supervisor Coehlo and Assistant Manager Guiroz. The meeting was about alleged errors with Charging Party's work and was used to deny Charging Party training. Charging Party also alleges that this meeting was a reprisal against him for reporting the misconduct of another supervisor.

On or about August 13, 1992, Manager Flores called Charging Party into his office to admonish him for filing grievances and telling other perspective managers. Charging Party alleges that Flores thought he was a troublemaker for filing grievances. During this meeting Charging Party was asked to defend his conduct and was interviewed in an investigatory manner to obtain information to be used as a basis for discipline. Charging Party read a card

issued by the California State Employees Association (CSEA) which requested CSEA representation. Manager Flores denied Charging Party's request and informed Charging Party that no representation was necessary since the interview or outcome would not be used adversely against the employee.

On or about December 21, 1992, Charging Party received a notice of rejection which used the interview of August 13, 1992 and Charging Party's exercise of "employee rights" as a basis for the rejection.

In order to state a prima facie case a Charging Party must allege and ultimately establish that the conduct complained of either occurred or was discovered within the six-month period immediately preceding the filing of the charge. San Dieguito Union High School District (1982) PERB Decision No. 194. Government Code section 3514.5(a) states in relevant part:

Any employee, employee organization, or employer shall have the right to file an unfair practice charge, except that the board shall not do either of the following: (1) issue a complaint in respect of any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge, . . .

Your charge was filed with the Public Employment Relations Board (PERB) on March 12, 1993¹, which means that for PERB to have jurisdiction over any alleged unfair practice by the EDD it would have had to occurred during the six-month statutory period which began on September 12, 1992.

The six month limitation period runs from the date the charging party knew or reasonably should have known of the alleged unfair practice, if the knowledge was obtained after the conduct occurred. Fairfield Suisun Unified School District (1985) PERB Decision No. 547.

On August 5, and 12, 1992, you requested and were denied representation. Since the conduct you complained of and your receipt of knowledge of that conduct occurred outside the six-month limitation period, the allegations in your charge regarding the denial of representation are untimely and must be dismissed.

¹The Unfair Practice Charge filed by Charging Party is dated January 11, 1993. However, the charge was not received by PERB until March 12, 1993. Furthermore, the proof of service, signed by Maryann Gonzales is dated March 10, 1993.

Your charge also alleges that EDD issued a notice of rejection on December 21, 1992 as a reprisal against you for exercising rights guaranteed by the Dills Act. There is a Collective Bargaining Agreement (Agreement) between the State and the CSEA with effective dates of July 1, 1992 through June 30, 1995.

Article 5, subsection 5.5, of that contract provides the following provision:

The State and CSEA Local 1000 shall be prohibited from imposing or threatening to impose reprisals by discriminating or threatening to discriminate against employees, or otherwise interfering with, restraining, or coercing employees because of the exercise of their rights under the Ralph C. Dills Act or any right given by this Contract. The principles of agency shall be liberally construed.

In addition, Article 6 of the Agreement contains a grievance procedure which culminates in final and binding arbitration. Section 3514.5(a)(2) of the Dills Act states, in pertinent part, that PERB,

shall not. . . issue a complaint against conduct also prohibited by the provisions of the. . . [collective bargaining agreement in effect] between the parties until the grievance machinery of the agreement, if it exists and covers the matter at issue, has been exhausted either by settlement or binding arbitration.

In Lake Elsinore School District, (1987) PERB Decision No. 646, PERB held that section 3541.5(a) of the Educational Employment Relations Act, which contains language identical to Section 3514.5(a) of the Dills Act, established a jurisdictional rule requiring that a charge be dismissed and deferred if: (1) the grievance machinery of the agreement covers the matter at issue and culminates in binding arbitration; and, (2) the conduct complained of in the unfair practice charge is prohibited by the provisions of the agreement between the parties. PERB Rule 32620(b)(5) (California Code of Regs., tit. 8, sec. 32620(b)(5)) also requires the investigating board agent to dismiss a charge where the allegations are properly deferred to binding arbitration.

These standards are met with respect to this case. First, the grievance machinery of the Agreement covers the dispute raised by the unfair practice charge and culminates in binding arbitration. Second, the conduct complained of in this charge that EDD took

reprisals against you for exercising rights guaranteed by the Dills Act is arguably prohibited by Article 5, subsection 5.5 of the agreement.

Accordingly, this allegation must be deferred to arbitration and will be dismissed. Such dismissal is without prejudice to the Charging Party's right, after arbitration, to seek a repugnancy review by PERB of the arbitrator's decision under the Dry Creek criteria. See PERB Regulation 32661 (California Code of Regs., tit. 8, sec. 32661; Los Angeles Unified School District (1982) PERB Decision No. 218; Dry Creek Joint Elementary School District, (1980) PERB Order No. Ad-81a.

If there are any factual inaccuracies in this letter or any additional facts which would require a different conclusion than the one 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 be served on the Respondent and the original proof of service filed with PERB. If I do not receive an amended charge or withdrawal from you before May 18, 1993, I shall dismiss the above-described allegation from your charge. If you have any questions, please call me at (916) 322-3198.

Sincerely,

Michael E. Gash
Regional Attorney