

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



INTERNATIONAL UNION OF OPERATING)
ENGINEERS, CRAFT MAINTENANCE)
DIVISION, UNIT 12,)
)
Charging Party,) Case No. SA-CE-1264-S
)
v.) PERB Decision No. 1395-S
)
STATE OF CALIFORNIA (DEPARTMENT)
OF GENERAL SERVICES),)
)
Respondent.)
)
_____)

Appearances: Van Bourg, Weinberg, Roger & Rosenfeld by William A. Sokol, Attorney, for International Union of Operating Engineers, Craft Maintenance Division, Unit 12; State of California (Department of Personnel Administration) by Wendi L. Ross, Labor Relations Counsel, and Sandra L. Lusich, Legal Counsel, for State of California (Department of General Services).

Before Dyer, Amador and Baker, Members.

DECISION

AMADOR, Member: This case comes before the Public Employment Relations Board (Board) on appeal by International Union of Operating Engineers, Craft Maintenance Division, Unit 12 (IUOE) from a Board agent's dismissal (attached) of its unfair practice charge. The charge alleged that the State of California (Department of General Services) (State) substantially reduced Larry Atwood's annual performance evaluation results because he filed a grievance against the State. This conduct is alleged to

violate section 3519(a) and (b) of the Ralph C. Dills Act (Dills Act).¹

The Board has reviewed the entire record in this case, including the unfair practice charge, the warning and dismissal letters, IUOE's appeal and the State's response. The Board finds the dismissal and warning letters to be free from prejudicial error and adopts them as the decision of the Board itself.

ORDER

The unfair practice charge in Case No. SA-CE-1264-S is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Member Dyer joined in this Decision.

Member Baker's concurrence begins on page 3.

¹The Dills Act is codified at Government Code section 3512 et seq. Dills Act section 3519 provides, in relevant 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.

BAKER, Member, concurring: I concur in the majority's decision to dismiss this unfair practice charge.

I write separately to emphasize certain facts and to identify an issue that should be dealt with by the Public Employment Relations Board (Board) in future cases.

The record reflects that the Board agent sent the International Union of Operating Engineers, Craft Maintenance Division, Unit 12 (IUOE) a warning letter indicating that the charge would be dismissed if IUOE did not specify when the alleged violations occurred. She also informed IUOE of its right to amend the charge to cure this defect, but IUOE did not do so. Because IUOE failed to provide the critical information requested by the Board agent in the warning letter, this charge is appropriately dismissed as untimely. (Tehachapi Unified School District (1993) PERB Decision No. 1024.)

The Board agent also held that the conduct in question was subject to deferral to binding arbitration. In its appeal, IUOE questions the wisdom of deferring this charge to the same grievance and arbitration process that is at the heart of the alleged violations. This issue deserves serious review. If IUOE had provided the necessary facts to establish the timeliness of its charge, the Board could have undertaken a review of the deferral issue that IUOE raises. However, such consideration must wait for a future case.

PUBLIC EMPLOYMENT RELATIONS BOARD



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



February 28, 2000

William A. Sokol
Van Bourg, Weinberg, Roger & Rosenfeld
180 Grand Avenue, Suite 1400
Oakland, CA 94612

Re: International Union of Operating Engineers, Craft
Maintenance Division, Unit 12 v. State of California
(Department of General Services)
Unfair Practice Charge No. SA-CE-1264-S
DISMISSAL LETTER

Dear Mr. Sokol:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board on February 8, 2000. The charge alleges that the State of California (Department of General Services) violated the Ralph C. Dills Act (Dills Act), Government Code section 3519(a) and (b), when it discriminated against an employee, Larry Atwood.

I indicated to you in my attached letter dated February 11, 2000, 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 February 22, 2000, the charge would be dismissed.

I have not received either an amended charge or a request for withdrawal. Therefore, I am dismissing the charge based on the facts and reasons contained in my February 11, 2000 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 Regs., tit. 8, sec. 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

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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. (Cal. Code Regs., tit. 8, sec. 32135(a); see also Cal. Code Regs., tit. 8, sec. 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 Cal. Code Regs., tit. 8, sec. 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. (Cal. Code Regs., tit. 8, secs. 32135(b), (c) and (d); see also Cal. Code Regs., tit. 8, secs. 32090 and 32130.)

The Board's address is:

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. (Cal. Code 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 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. A document filed by facsimile transmission may be concurrently served via facsimile transmission on all parties to the proceeding. (Cal. Code Regs., tit. 8, sec. 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.

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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 Regs., tit. 8, sec. 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
Deputy General Counsel

By
Robin W. Wesley
Regional Attorney

Attachment

cc: Larry Menth
Wendi L. Ross

PUBLIC EMPLOYMENT RELATIONS BOARD



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



February 11, 2000

William A. Sokol
Van Bourg, Weinberg, Roger & Rosenfeld
180 Grand Avenue, Suite 1400
Oakland, CA 94612

Re: International Union of Operating Engineers, Craft
Maintenance Division, - Unit 12 v. State of California
(Department of General Services)
Unfair Practice Charge No. SA-CE-1264-S
WARNING LETTER

Dear Mr. Sokol:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board on February 8, 2000. The charge alleges that the State of California (Department of General Services) violated the Ralph C. Dills Act (Dills Act), Government Code section 3519(a) and (b), when it discriminated against an employee, Larry Atwood.

The International Union of Operating Engineers (IUOE) alleges in its charge that the Department retaliated against Mr. Atwood "by substantially reducing his annual performance evaluation results" because he filed a grievance concerning an unrelated matter.

IUOE and the State are parties to a memorandum of understanding (MOU) effective July 2, 1999 through July 2, 2001. The MOU contains a grievance procedure which ends in binding arbitration. In addition, Section 20.3 of the MOU states:

The State and IUOE 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 Dills Act or any right given by this Agreement.

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

PERB Regulation 32615 (a) (5) requires that an unfair practice charge include a "clear and concise statement of the facts and conduct alleged to constitute an unfair practice." A charging party must alleged the "who, what, when, where and how" of an

unfair practice. (State of California (Department of Food and Agriculture) (1994) PERB Decision No. 1071-S, citing United Teachers-Los Angeles (Ragsdale) (1992) PERB Decision No. 944.) Mere legal conclusions are not sufficient to state a prima facie case. (Ibid.; Charter Oak Unified School District (1991) PERB Decision No. 873.)

Furthermore, Dills Act section 3514.5(a) states that PERB "shall not . . . 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."

PERB has held that the "six month statutory limitations period begins to run when the charging party knew or should have known of the conduct giving rise to the alleged unfair practice. (Regents of the University of California (1983) PERB Decision No. 359-H.)

The charge fails to provide any facts which indicate when the alleged unfair practices occurred. Since it cannot be determined whether the unfair practices occurred within the statutory limitations period, the charge must be dismissed.

Even assuming the charge was timely filed, the charge is subject to deferral to the parties' grievance and arbitration procedure.

Section 3514.5(a) 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 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 Regulation 32620(b)(5) (Cal. 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.

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These standards are met with respect to this case. First, the grievance machinery of the MOU covers the dispute raised by the unfair practice charge and culminates in binding arbitration. Second, the conduct complained of in this charge, that the Department discriminated against Mr. Atwood because he filed a grievance, is arguably prohibited by Section 20.3 of the MOU.

Accordingly, if timely filed, this charge must be dismissed and deferred to arbitration. 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 Reg. 32661 [Cal. 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 February 22, 2000, I shall dismiss your charge without leave to amend. If you have any questions, please call me at (916) 327-8385.

Sincerely

RobinW. Wesley
Regional Attorney

cc: Larry Menth