

**STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD**

JESSE VICKERS,

Charging Party,

v.

STATE OF CALIFORNIA (DEPARTMENT OF
CORRECTIONS),

Respondent.

Case No. LA-CE-595-S

Request for Reconsideration
PERB Decision No. 1540-S

PERB Decision No. 1540a-S

February 24, 2004

Appearance: Jesse Vickers, on his own behalf.

Before Baker, Whitehead and Neima, Members.

DECISION

WHITEHEAD, Member: This case is before the Public Employment Relations Board (PERB or Board) on review of Jesse Vickers' (Vickers) motion to excuse a late-filed second amended charge and a request for reconsideration of State of California (Department of Corrections) (2003) PERB Decision No. 1540-S (Corrections).¹ The charge alleged that the State of California (Department of Corrections) (Corrections) violated the Ralph C. Dills Act (Dills Act)² by discriminating against him for his activities as a job steward and for filing grievances. Vickers alleged that this conduct constituted a violation of Dills Act section 3519(a).³ The Board agent deferred to arbitration and dismissed the charge because the issues

¹The Board has consolidated these two cases in this decision.

²The Dills Act is codified at Government Code section 3512 et seq. Unless otherwise indicated, all statutory references are to the Government Code.

³Section 3519 states, in pertinent part:

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

underlying the charge met the standards set forth in Dry Creek Joint Elementary School District (1980) PERB Order No. Ad-81 and State of California (Department of Food and Agriculture) (2002) PERB Decision No. 1473-S. The Board issued its decision in Corrections on June 30, 2003 adopting the Board agent's dismissal and Vickers filed this request for reconsideration on July 21, 2003. On August 6, 2003, Vickers filed a second amended charge. The attached proof of service identified the second amended charge as a request for reconsideration. By letter dated August 11, 2003, the Appeals Assistant informed Vickers that since a request for reconsideration was due no later than July 25, 2003, the latter document was not timely filed. On August 21, 2003, Vickers filed an administrative appeal to the Appeals Assistant's determination.

ADMINISTRATIVE APPEAL

Vickers contends that the Board should accept the second amended charge because it reduces the issues in contention from seven to three. He explains that this is a positive step toward reconciliation and so in this light, the Board should excuse the late filing.

Under PERB Regulation 32136⁴, a late filing may be excused by the Board for good cause only. In general, "good cause exists only where, under all the surrounding circumstances, it is evident that the party made a conscientious effort to timely file and the delay caused no prejudice to any party in the case." (United Teachers of Los Angeles (Kestin) (2003) PERB Order No. Ad-325, citing State of California (State Teachers Retirement System)

(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.

⁴PERB regulations are codified at California Code of Regulations, title 8, section 31001, et seq.

(1999) PERB Order No. Ad-296-S.) In this matter, Vickers filed the second amended charge on August 6, 2003 when an amended charge was due no later than December 18, 2002. Even if deemed a request for reconsideration, the request was due July 25, 2003. Vickers has not provided any information that demonstrates any effort to file the document on a timely basis. Therefore, the Board does not excuse the late filing.

In addition, Vickers has also timely filed a request for reconsideration, which we shall address below.

REQUEST FOR RECONSIDERATION

PERB Regulation 32410 governs requests for reconsideration. Section 32410 provides, in pertinent part:

(a) Any party to a decision of the Board itself may, because of extraordinary circumstances, file a request to reconsider the decision within 20 days following the date of service of the decision. An original and five copies of the request for reconsideration shall be filed with the Board itself in the headquarters office and shall state with specificity the grounds claimed and, where applicable, shall specify the page of the record relied on. Service and proof of service of the request pursuant to Section 32140 are required. The grounds for requesting reconsideration are limited to claims that: (1) the decision of the Board itself contains prejudicial errors of fact, or (2) the party has newly discovered evidence which was not previously available and could not have been discovered with the exercise of reasonable diligence. A request for reconsideration based upon the discovery of new evidence must be supported by a declaration under the penalty of perjury which establishes that the evidence: (1) was not previously available; (2) could not have been discovered prior to the hearing with the exercise of reasonable diligence; (3) was submitted within a reasonable time of its discovery; (4) is relevant to the issues sought to be reconsidered; and (5) impacts or alters the decision of the previously decided case.

In this case, Corrections was issued by the Board on June 30, 2003. The Board in Corrections adopted the Board agent's deferral to arbitration and dismissal of Vickers' charge. In his request for reconsideration, Vickers alleges and has attached a letter from the California

Correctional Peace Officer Association (CCPOA) dated June 18, 2003. The letter states that Corrections had denied the grievance at the third level, as confirmed by an attached letter from Corrections dated May 27, 2003, and since the grievances involved a “policy” dispute, section 6.02(B) of the Bargaining Unit 6 contract precluded arbitration of the grievance. CCPOA stated that there was no further action it could pursue for the grievances under the grievance procedure and so was closing the case file.⁵ Where the union lacks the right to pursue the grievance to arbitration, deferral is inappropriate. (Moreno Valley Unified School District (1995) PERB Decision No. 1106; Antelope Valley Union High School District (1998) PERB Decision No. 1287; Inglewood Unified School District (1991) PERB Order No. Ad-222; see also, State of California (Department of Parks and Recreation) (1995) PERB Decision No. 1125-S.) As a result, given Vickers’ allegations in the request, the Board should no longer defer this matter and should investigate the allegations to determine whether Vickers has stated a prima facie violation of the Dills Act.

We therefore find that Vickers’ request for reconsideration warrants approval. Vickers has introduced newly discovered evidence which was not previously available. By letter dated June 18, 2003, Vickers learned that CCPOA could not pursue his grievance to arbitration under the Section 6.02(B) of the Bargaining Unit 6 contract. This information was discovered well after Vickers’ appeal was docketed on February 10, 2003 and soon before the Board’s decision in Corrections was issued. The information was submitted as a timely request for reconsideration approximately one month after it was discovered.

⁵The June 18, 2003 letter quoted Section 6.02(B) as follows:

A policy grievance may be processed only to the Director’s level of this grievance procedure unless otherwise capped at a lower level in this agreement (e.g., LOIs/WIDs), and is not arbitrable. (Emphasis added.)

ORDER

Jesse Vickers' request for reconsideration of the Board's decision in State of California (Department of Corrections) (2003) PERB Decision No. 1540-S is hereby GRANTED. The charge shall be thereby REMANDED to the General Counsel's Office for further investigation.

Jesse Vickers' request that the Board accept the late-filed second-amended charge in Case No. LA-CE-595-S is hereby DENIED.

Members Baker and Neima joined in this Decision.