STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

ALDO LUCKETTA, Charging Party, v. STATE OF CALIFORNIA (DEPARTMENT OF CORRECTIONS), Respondent.	Case No. SA-CE-1434-S PERB Decision No. 1723-S December 13, 2004

Appearances: Law Office of Steven B. Bassoff by Steven B. Bassoff, Attorney, for Aldo Lucketta; State of California (Department of Personnel Administration) by Gail T. Onodera, Labor Relations Counsel, for State of California (Department of Corrections).

Before Duncan, Chairman; Whitehead and Neima, Members.

DECISION

DUNCAN, Chairman: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Aldo Lucketta (Lucketta) of a Board agent's dismissal (attached) of his unfair practice charge. The charge alleged that the State of California (Department of Corrections) (Corrections) violated the Ralph C. Dills Act (Dills Act) [1] by discriminating against Lucketta because of his protected activity.

The Board has reviewed the entire record in this case including, the original and amended unfair practice charge, the appeal by Lucketta and response from Corrections. The Board finds the warning and dismissal letters of the Board agent to be free of prejudicial error and adopts them as the decision of the Board itself, subject to the discussion below.

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

DISCUSSION

Lucketta is an officer in the California Association of Psychiatric Technicians. He is the vice president and job steward at California State Prison-Corcoran. On December 23, 2003, supervising nurse Belinda Haven (Haven) posted a memo to all psych techs regarding medicine management. The instruction with it was that it was to be read by all psych techs and then signed to show who had read it so Haven could confirm all psych techs had the information. Following the posting, Lucketta sent out two memos to Haven related to concerns over the medication changes. Those memos were dated December 24 and December 26, 2003.

The December 24 Lucketta memo stated the psych techs would not sign the memo until all psych techs had "been advised how to operate their clinic" and "all disciplines have been fully notified." On January 14, 2004, Haven issued a letter of instruction (LOI) to Lucketta. The LOI criticized Lucketta for instructing staff not to sign the medical management memo and also for not properly following sick leave policy. The later was related to Lucketta instructing psych techs to call him or the EOP clinic to report in sick rather than calling a supervisor as stated in written policy.

To demonstrate a violation of Dills Act section 3519(a), the charging party must show that: (1) the employee exercised rights under the Dills Act; (2) the employer had knowledge of the exercise of those rights; and (3) the employer imposed or threatened to impose reprisals, discriminated or threatened to discriminate, or otherwise interfered with, restrained or coerced the employees because of the exercise of those rights. (Novato Unified School District (1982) PERB Decision No. 210 (Novato); Carlsbad Unified School District (1979) PERB Decision No. 89.)

Although the timing of the employer's adverse action in close temporal proximity to the employee's protected conduct is an important factor (North Sacramento School District (1982)

PERB Decision No. 264 (North Sacramento)), it does not, without more, demonstrate the necessary connection or "nexus" between the adverse action and the protected conduct. (Moreland Elementary School District (1982) PERB Decision No. 227.) Facts establishing one or more of the following additional factors must also be present: (1) the employer's disparate treatment of the employee (State of California (Department of Transportation) (1984) PERB Decision No. 459-S); (2) the employer's departure from established procedures and standards when dealing with the employee (Santa Clara Unified School District (1979) PERB Decision No. 104); (3) the employer's inconsistent or contradictory justifications for its actions (State of California (Department of Parks and Recreation) (1983) PERB Decision No. 328-S); (4) the employer's cursory investigation of the employee's misconduct; (5) the employer's failure to offer the employee justification at the time it took action or the offering of exaggerated, vague, or ambiguous reasons; (6) employer animosity towards union activists (Cupertino Union Elementary School District) (1986) PERB Decision No. 572); or (7) any other facts which might demonstrate the employer's unlawful motive. (Novato; North Sacramento.)

Evidence of adverse action is also required to support a claim of discrimination or reprisal under the Novato standard. (Palo Verde Unified School District (1988) PERB Decision No. 689.) In determining whether such evidence is established, the Board uses an objective test and will not rely upon the subjective reactions of the employee. (Ibid.) In a later decision, the Board further explained that:

> The test which must be satisfied is not whether the employee found the employer's action to be adverse, but whether a reasonable person under the same circumstances would consider the action to have an adverse impact on the employee's employment. [Newark Unified School District (1991) PERB Decision No. 864; emphasis added; fn. omitted.]

Lucketta has failed to state a prima facie case because he has not met the requirements of the Novato test. There was no adverse action by the employer related to protected activity. The LOI did not discipline Lucketta for protected activity but rather addressed Lucketta telling the psych techs to go against written policy and act in a manner inconsistent with management directives. Telling employees to violate management directives is not protected activity.

ORDER

The unfair practice charge in Case No. SA-CE-1434-S is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Whitehead and Neima joined in this Decision.

STATE OF CALIFORNIA ARNOLD SCHWARZENEGGER, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
1031 18th Street
Sacramento, CA 95814-4174
Telephone: (916) 327-8386
Fax: (916) 327-6377

October 21, 2004

Steven B. Bassoff, Consultant
Ken Murch, Consultant
California Association of Psychiatric Technicians
2000 O Street, Suite 250
Sacramento, CA 95818

Re: Aldo Lucketta v. State of California (Department of Corrections)
Unfair Practice Charge No. SA-CE-1434-S
DISMISSAL LETTER

Dear Mr. Bassoff and Mr. Murch:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on June 10, 2004. Aldo Lucketta alleges that the State of California (Department of Corrections) violated the Ralph C. Dills Act (Dills Act)[1] by taking an illegal reprisal against a union officer.

I indicated to you in my attached letter dated October 13, 2004, 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 October 20, the charge would be dismissed.

I received your amended charge on October 19, 2004. In that amended charge you continue to contend that Lucketta received a Letter of Instruction because of his protected activities. Specifically, you reference Lucketta's two memoes to supervisor Haven regarding concerns over a change in medication policy as protected activity.

As discussed in my previous letter, the reprimand received by Lucketta criticizes him for instructing staff not to sign the management directive regarding medications and for failure to follow the sick leave policy.

You state in your amended charge that "one basis for the letter [reprimand] was that staff never signed the memo in question, blaming Lucketta for this failure and contending that he was insubordinate and willfully disobedient in instructing staff not to sign the memo." You state

[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.

that the "charge he was responsible for staff not signing the memo is untrue" and attach a page of paper containing five signatures, with remarks (including two "Signed under protest!") dated December 2003. You state that this exhibit "shows that the affected psychiatric technicians signed the memo, and that management was aware of that fact well before the letter was issued on January 14th." In fact, the signatures are not attached to any writing nor do you provide facts regarding this document being presented to management. Nor is it clear what percentage of affected employees are represented by these signatures.

However, assuming these signatures were attached to the medical directive in question and submitted to management prior to the reprimand of January 14th, your charge remains deficient.

The Letter of Instruction clearly reprimands Lucketta for instructing staff not to initial the medical directive. There is a statement in the employer's factual description of the events of December 13, 2003, that "The staff never did initial the memo due to your directions." [2] The memo later states, "Your act of instructing staff to not initial the memo, acknowledging that they read it, was an act of insubordination and willful disobedience (DOM 330305.2.15) which will not be tolerated."

You also contend, "The charge by management that Lucketta made a mistake about notification [on January 12] concerning psychiatric technician Hance is false". Rather, on January 12 Lucketta asked supervisor Howell whether Hance called in that day; he did not tell Howell that Hance had called in on Monday January 12th. The Letter of Instruction, in part, states,

> On Monday January 12, 2004 you called the Lead RN S. Howell to inform her that LPT Hance had called in sick today. When I called you to inquire as to why you had been notified of her sick call. You [sic] informed me that you had told all of the LPTs to call you or the EOP clinic if they were calling in sick. When I asked why you had instructed them to do this you replied, "Well then they don't have to bother you".
>
> In reality, Hance called in sick on Sunday January 11, 2004, not on Monday as you stated. This could have caused much confusion had I not realized your mistake this morning.

That the above fact cited by the employer in the reprimand was incorrect does not change the criticism contained therein regarding sick call procedure. That criticism was that Lucketta "told all of the LPTs to call you or the EOP clinic if they were calling in sick" while "Our written policy and procedure does not state that LPTS are to call the EOP clinic. The LPTs have been given a supervisor schedule and phone numbers. They have been instructed to call

[2] The five signatures you provided are dated December 24 and December 26.

the supervisor on duty or the supervisor on call." Later, Lucketta is directed, "You are to follow the sick call Policy and Procedure."

In sum, the letter of reprimand criticizes Lucketta for instructing employees not to initial the the medical directive and for advising employees to call him or EOP when sick rather than following sick call policy and procedure. You allege that this reprimand was issued as a reprisal for the protected activities of Lucketta. As stated in my prior letter, improper motive is not demonstrated on the face of the document. Nor have you provided other facts which demonstrate that the employer was improperly motivated to issue the document.

Your amended unfair practice charge does not provide the additional facts necessary to demonstrate a prima facie case. Therefore, I am dismissing the charge based on the facts and reasons contained here and in my October 13 letter.

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. (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:

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).)

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

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
Bernard McMonigle
Regional Attorney

Attachment

cc: Gail T. Onodera

STATE OF CALIFORNIA ARNOLD SCHWARZENEGGER, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
1031 18th Street
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October 13, 2004

Ken Murch, Consultant
California Association of Psychiatric Technicians
2000 O Street
Sacramento, CA 95818

Re: Aldo Lucketta v. State of California (Department of Corrections)
Unfair Practice Charge No. SA-CE-1434-S
WARNING LETTER

Dear Mr. Murch:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on June 10, 2004. The Aldo Lucketta alleges that the State of California (Department of Corrections) violated the Ralph C. Dills Act (Dills Act)[1] by taking an illegal reprisal against a union officer.

On December 23, 2003, Supervising Nurse Belinda Haven posted a memo regarding medicine management which she instructed to be read by all Psych Techs who dispense medications.

Aldo Lucketta is a CAPT Vice President and job steward at CSP-Corcoran. On December 24 and December 26, Lucketta sent memorandums to Haven addressing concerns about the medication changes. The December 24 memo states in part that once all Psych Techs have been "advised how to operate their clinic" and "all disciplines have been fully notified" they will sign the 12/23 memo posted by Haven.

On January 14, 2004, Lucketta was issued a Letter of Instruction by Haven. The LOI criticized Lucketta for instructing staff not to sign the medical management memo. The document also chastised Lucketta for not properly following sick leave policy by instructing Psych Techs to call him (or the EOP clinic) rather than a supervisor.

To demonstrate a violation of Dills Act section 3519(a), the charging party must show that: (1) the employee exercised rights under the Dills Act; (2) the employer had knowledge of the exercise of those rights; and (3) the employer imposed or threatened to impose reprisals, discriminated or threatened to discriminate, or otherwise interfered with, restrained or coerced the employees because of the exercise of those rights. (Novato Unified School District (1982)

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PERB Decision No. 210 (Novato); Carlsbad Unified School District (1979) PERB Decision No. 89.)

Although the timing of the employer's adverse action in close temporal proximity to the employee's protected conduct is an important factor (North Sacramento School District (1982) PERB Decision No. 264), it does not, without more, demonstrate the necessary connection or "nexus" between the adverse action and the protected conduct. (Moreland Elementary School District (1982) PERB Decision No. 227.) Facts establishing one or more of the following additional factors must also be present: (1) the employer's disparate treatment of the employee (State of California (Department of Transportation) (1984) PERB Decision No. 459-S); (2) the employer's departure from established procedures and standards when dealing with the employee (Santa Clara Unified School District (1979) PERB Decision No. 104.); (3) the employer's inconsistent or contradictory justifications for its actions (State of California (Department of Parks and Recreation) (1983) PERB Decision No. 328-S; (4) the employer's cursory investigation of the employee's misconduct; (5) the employer's failure to offer the employee justification at the time it took action or the offering of exaggerated, vague, or ambiguous reasons; (6) employer animosity towards union activists (Cupertino Union Elementary School District) (1986) PERB Decision No. 572.); or (7) any other facts which might demonstrate the employer's unlawful motive. (Novato; North Sacramento School District, supra, PERB Decision No. 264.)

Evidence of adverse action is also required to support a claim of discrimination or reprisal under the Novato standard. (Palo Verde Unified School District (1988) PERB Decision No. 689.) In determining whether such evidence is established, the Board uses an objective test and will not rely upon the subjective reactions of the employee. (Ibid.) In a later decision, the Board further explained that:

> The test which must be satisfied is not whether the employee found the employer's action to be adverse, but whether a reasonable person under the same circumstances would consider the action to have an adverse impact on the employee's employment. [Newark Unified School District (1991) PERB Decision No. 864; emphasis added; footnote omitted.]

The Letter of Instruction addressed Lucketta instructing other Psych Techs to act in a manner inconsistent with management directives. On its face, the document does not discipline Lucketta for protected union activity. Rather, it appears that Lucketta was advising other employees to ignore management directives regarding medical management and sick leave; I am aware of no caselaw which makes such activity protected under the Dills Act. You have provided no other facts that demonstrate that the employer was improperly motivated when it issued the LOI.

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 October 20, 2004, I shall dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Bernard McMonigle
Regional Attorney

BMC