

VACATED by State of California (Department of Corrections) (2006) PERB Decision No. 1826-S

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



JULIA R. ZANCHI,

Charging Party,

v .

STATE OF CALIFORNIA (DEPARTMENT OF
CORRECTIONS),

Respondent.

Case No. LA-CE-599-S

PERB Decision No. 1579 - S

December 31, 2003

Appearances: Julia R. Zanchi, on her own behalf; State of California (Department of Personnel Administration) by Joan E. Branin, Labor Relations Counsel for State of California (Department of Corrections).

Before Baker, Whitehead and Neima, Members.

DECISION

BAKER, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Julia R. Zanchi (Zanchi) of a Board agent's dismissal of her unfair practice charge. The charge alleged that the State of California (Department of Corrections) (Corrections) violated section 3519 of the Ralph C. Dills Act (Dills Act)¹ by retaliating against Zanchi because she filed a grievance. Specifically, Zanchi alleges that Corrections initiated

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

both criminal and administrative investigations into claims she presented in a grievance.

Zanchi also alleges that as a result of filing her grievance, Corrections denied her an extension of her limited term assignment and denied her a promotion to correctional sergeant.

After reviewing the record in this matter, including the original and amended unfair practice charge, the warning and dismissal letters, Zanchi's appeal, and Corrections' response, the Board reverses the Board agent's dismissal for the reasons set forth below.

BACKGROUND

Zanchi is employed by Corrections as a correctional officer. On October 1, 2001, Zanchi accepted a voluntary promotional assignment as a correctional sergeant. The assignment was a one-year limited term position. At the time Zanchi accepted the assignment, she and her husband had a scheduled vacation to Paris, France in November and had purchased non-refundable airline tickets. Zanchi claims that she informed her supervisors about her scheduled vacation, but that they ignored her. Corrections denies that Zanchi informed anyone about her vacation and asserts that if Zanchi had informed her supervisor, she would have been allowed to take her vacation.

On November 19, 2001, Zanchi filed a grievance under the applicable memorandum of understanding (MOU) seeking reimbursement for the airline tickets. Her grievance was denied by the warden on December 14, 2001. Zanchi continued to press her grievance under the MOU. On July 10, 2002, her grievance was denied at the fourth level. On September 11, 2002, Zanchi received notice from the Corrections' office of internal affairs (OIA) central region that a complaint alleging fraud had been filed against her and that a criminal investigation was being initiated. On October 15, 2002, Zanchi's limited term assignment expired and she returned to her previous classification of correctional officer. On

December 11, 2002, Zanchi received a letter stating, in part: "Based upon the completion of the criminal investigation, an administrative investigation is now being initiated." On January 22, 2003, Zanchi received a letter from the OIA sustaining the charges against her and informing her that a report would be forwarded to the appropriate Corrections personnel. Zanchi alleges that all the questions asked of her during the investigation involved the grievance she had filed.

In addition, Zanchi alleges that Corrections denied her a promotion to sergeant and denied her an extension of her limited term assignment because of her grievance. Zanchi claims that five other individuals in limited term assignments were promoted to sergeant while the one other individual received a one-year extension. Zanchi asserts that she was informed by an individual at Corrections that she was the only person occupying a limited term position who was not promoted or given an extension.

In response, Corrections admits that Zanchi was subject to a criminal investigation, but claims that there was a legitimate reason for its actions. Corrections asserts that someone reported that Zanchi's husband had made comments indicating that he and Zanchi had decided not to travel to Paris because of the terrorist attacks of September 11, 2001. Corrections argues that if Zanchi had no intention of traveling to Paris then her claim for reimbursement was fraudulent and that a criminal investigation was justified.

Corrections also disputes Zanchi's claim that she was denied a promotion and an extension of her assignment because she filed a grievance. Corrections asserts that Zanchi's assignment was terminated, because the one-year term had expired. As for the promotion to sergeant, Corrections asserts that Zanchi was never guaranteed a promotion, and thus, the failure to promote was not an adverse employment action.

BOARD AGENT'S DISMISSAL

The Board agent held that Zanchi failed to state a prima facie case and dismissed her charge. Specifically, the Board agent found no nexus between the filing of the grievance and the criminal investigation. According to the Board agent, Corrections necessarily had to investigate Zanchi's grievance after it was filed.

The criminal and administrative investigations were a natural outgrowth of the grievance investigation when a question arose regarding reimbursement of funds under possible false pretenses. These events did not transpire solely due to the filing of the grievance itself. Had Zanchi not sought reimbursement, the fraud issue would not have surfaced and the resulting investigations not been initiated. In addition, there was no evidence presented that the employer retaliated against her for filing a grievance verses seeking monetary reimbursement under possible false pretenses. (Dismissal letter, pp. 2-3.)

DISCUSSION

Pursuant to PERB regulations,² the charging party's burden at the initial stage is to establish a prima facie case. (PERB Regs. 32620 and 32640.) In evaluating whether a prima facie case has been established, the charging party's essential allegations are deemed true. (Golden Plains Unified School District (2002) PERB Decision No. 1489; San Juan Unified School District (1977) EERB³ Decision No. 12.) Any dispute over material facts must be resolved in favor of the charging party. Once the Board agent determines that a prima facie case has been established, a complaint must be issued. (PERB Reg. 32640.)

²PERB regulations are codified at California Code of Regulations, title 8, section 31001, et seq.

³ Prior to January 1978, PERB was known as the Educational Employment Relations Board or EERB.

With respect to allegations of retaliation for the exercise of protected activity, it is well-settled that to establish a prima facie case, the charging party must show that: (1) the charging party 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.) Once the charging party has established a prima facie case, the burden of proof shifts to the employer to establish that it would have taken the action complained of even in the absence of the employee's protected activities. (Novato; Martori Brothers Distributors v. Agricultural Labor Relations Bd. (1981) 29 Cal.3d 721, 730 [175 Cal.Rptr. 626].) It is important to note, however, that the legitimacy of the employer's proffered defense is not part of the charging party's prima facie case. In other words, the charging party is not required to refute an employer's proffered defense to establish a prima facie case. To place such a requirement on the charging party would be fundamentally inconsistent with the concept of "burden shifting." Indeed, if a charging party were required to refute an employer's proffered defense to establish a prima facie case there would be no "burden shifting" at all. Further, such a requirement would be unfair, since the charging party is without the benefit of subpoena powers prior to the issuance of a complaint. Accordingly, the Board has long held that the charging party's burden at the initial stage is only to establish a prima facie case.

Applying the above principles to this matter, the Board finds that Zanchi has established a prima facie case and that a complaint should issue. First, there can be no dispute

that Zanchi's filing of a grievance under the MOU was protected activity. (California State University (San Francisco) (1986) PERB Decision No. 559-H.) It is also undisputed that Corrections had knowledge of Zanchi's grievance.

With respect to the third prong of Novato, the Board finds that Corrections' criminal and administrative investigations of Zanchi constitute adverse actions based on the alleged facts. To determine whether adverse action is established, the Board uses an objective test and does not rely upon the subjective reactions of employees. (Palo Verde Unified School District (1988) PERB Decision No. 689.) Zanchi alleges that the investigations damaged her career. Corrections asserts that merely being investigated is not an adverse action as a matter of law. The Board disagrees. Here, Corrections accused Zanchi of fraud and initiated criminal and administrative investigations. Zanchi is a peace officer and as such is held to a higher standard of conduct. (Ackerman v. State Personnel Bd. (1983) 145 Cal.App.3d 395 [193 Cal.Rptr. 190] (Ackerman); Paulino v. Civil Service Com. (1985) 175 Cal.App.3d 962 [221 Cal.Rptr. 90].) Honesty and credibility are crucial to the proper performance of a peace officer's duties and dishonesty is generally never tolerated. (Ackerman at p. 400.) A trier of fact could easily conclude that Zanchi's career was damaged by the mere initiation of a criminal investigation for fraud. The fact that the allegations against Zanchi were apparently sustained further supports a finding that her career was potentially damaged.

The Board also concludes that Zanchi has established a nexus between the adverse action and her protected activity. Zanchi alleges, and Corrections does not dispute, that the focus of the investigations was Zanchi's claim for reimbursement contained in her grievance. Under these facts, it is not necessary to explore timing, disparate treatment, or other

circumstantial evidence of animus. Zanchi has established direct evidence of motive since it is undisputed that the investigations were initiated because of the claims made in Zanchi's grievance.

Corrections responds that Zanchi was not investigated because she filed a grievance, but because she was making a fraudulent claim for money. However, this distinction rests on Corrections' state of mind and, at this initial stage, is a distinction without a difference. In establishing a prima facie case, the charging party should not be required to establish the respondent's state of mind, or lack thereof. This is especially true where the respondent's state of mind is a fact placed in contention solely by the respondent. It is enough that Zanchi has shown that the investigations were initiated because of the claims presented in her grievance. Corrections' contention as to its state of mind is an issue to be presented to an administrative law judge (ALJ).

Corrections also argues that Zanchi's claim for reimbursement would have been investigated regardless of whether it was presented in a grievance or some other forum. Similarly, the Board agent opined that had Zanchi not sought reimbursement, the fraud issue would not have surfaced and the resulting investigations would not have been initiated. This may or may not be true. Regardless, this argument does not go to the issue of nexus, but rather constitutes Corrections' defense for its actions. Zanchi is not required to refute Corrections' proffered defense at this initial stage. That is an issue to be presented to the ALJ.

In addition to the criminal and administrative investigations, Zanchi also alleges that Corrections took adverse action against her because of her grievance by denying her an extension of her limited term assignment and denying her a promotion to sergeant. Corrections asserts that unlike the criminal and administrative investigations, Zanchi has failed to establish

any nexus between these actions and the filing of her grievance. Specifically, Corrections argues that Zanchi knew her limited term assignment would last only one year. Corrections also argues that there is no evidence that Zanchi's grievance affected her promotional opportunities to sergeant.

The flaw in Corrections' argument is that it analyzes the denial of promotional opportunities separately from the criminal and administrative investigations. Viewed in isolation, the Board agrees that Zanchi has presented insufficient evidence of nexus between her grievance and the denial of promotional opportunities. However, these separate adverse actions should not be viewed in isolation, since they stem from the same protected activity. The Board has held that unlawful animus may be imputed where an employment action is taken, even innocently, based on inaccurate or biased information. (State of California (Department of Parks and Recreation) (1983) PERB Decision No. 328-S.) Here, the Board has already held that Zanchi has established a prima facie case of retaliation with respect to the criminal and administrative investigations. The investigations constitute adverse actions because Zanchi has alleged that her career was damaged. In essence, Zanchi's allegation is that she was denied promotional opportunities because she was under criminal investigation at the time. Given this allegation, the unlawful animus established as a result of the criminal and administrative investigations may also be used to establish unlawful animus for the denial of promotional opportunities. Accordingly, a complaint must also issue on Corrections' refusal to extend Zanchi's limited term position and Corrections' denial of promotion to sergeant.

Based on the above, the Board agent's dismissal must be overturned and a complaint issued.

ORDER

The Board REVERSES the Board agent's dismissal in Case No. LA-CE-599-S and REMANDS the case to Office of the General Counsel for issuance of a complaint consistent with this Decision.

Members Whitehead and Neima joined in this Decision.