

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



ELCIE WINSTON, JR.,)
)
Charging Party,) Case No LA-CO-45-S
)
v.) PERB Decision No. 931-S
)
ASSOCIATION OF CALIFORNIA STATE) May 14, 1992
ATTORNEYS,)
)
Respondent.)
_____)

Appearance: Elcie Winston, Jr., on his own behalf.
Before Hesse, Chairperson; Camilli and Carlyle, Members.

DECISION AND ORDER

HESSE, Chairperson: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Elcie Winston, Jr. (Winston) of the Board agent's dismissal, attached hereto, of his charge that the Association of California State Attorneys violated section 3519.5 of the Ralph C. Dills Act (Dills Act)¹ by breaching its duty of fair representation. We have reviewed the dismissal, and finding it to be free of prejudicial error, adopt it as the decision of the Board itself.

In his appeal, Winston, for the first time, raised facts demonstrating the employer's harassing conduct toward charging party. PERB Regulation section 32635² states, in pertinent part:

¹The Dills Act is codified at Government Code section 3512, et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

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

(b) Unless good cause is shown, a charging party may not present on appeal new charge allegations or new supporting evidence.

In accordance with this regulation, the Board will not consider those facts raised for the first time on appeal. Further, these additional factual allegations cannot be considered by the Board as the alleged conduct occurred more than six months prior to the filing of the unfair practice charge. (Dills Act section 3514.5(a).)

With regard to the Board agent's dismissal of Winston's unfair practice charge as untimely, Winston asserts that the Board agent informed him that he "had one year to file." Winston claims he was never informed that the time limit was six months. In Lucia Mar Unified School District (1986) PERB Decision No. 579, a Board agent dismissed an unfair practice charge on the ground that it had not been timely filed. In the appeal, the charging party acknowledged the untimely filing, but asserted that he was misled to believe that his telephone contact with the Board agent, which arguably fell within the six-month limitation period provided by statute, would constitute a timely filing. The Board determined that the appeal lacked specificity in that it failed to describe how the charging party was purportedly misled by the Board agent. The Board concluded that the charging party's general and unsupported assertion that he was misled was insufficient to indicate any irregularity in the processing of his unfair practice charge.

In the present case, Winston simply asserts that the Board agent told him that he had a year to file, and that he was never informed that the limit was six months. This statement does not indicate whether the Board agent was discussing the filing of an unfair practice charge or some other action. Further, section 3514.5(a) of the Dills Act specifically states that a timely unfair practice charge must be based on alleged conduct occurring within six months prior to the filing of the unfair practice charge. Arguably, the Board agent's comment does not excuse charging party's responsibility to file an unfair practice charge pursuant to the Dills Act and PERB Regulations. However, even assuming Winston was misinformed by the Board agent about the statute of limitations for filing an unfair practice charge, the factual allegations in the unfair practice charge do not state a prima facie violation of section 3519.5 of the Dills Act.

The unfair practice charge in Case No. LA-CO-45-S is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Camilli and Carlyle join in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD



Los Angeles Regional Office
3530 Wilshire Boulevard, Suite 650
Los Angeles, CA 90010-2334
(213) 736-3127



March 5, 1992

Elcie Winston Jr.

Re: DISMISSAL AND REFUSAL TO ISSUE COMPLAINT
Unfair Practice Charge No. LA-CO-45-S
Elcie Winston Jr. v. Association of California
State Attorneys

Dear Mr. Winston: _____

On November 6, 1991, you filed the above-referenced charge alleging that the Association of California State Attorneys (ACSA or Association) failed, as the exclusive representative, to fairly represent you and thus violated Government Code section 3519.5 of the Ralph C. Dills Act (Dills Act).¹

I indicated to you in my attached letter dated February 18, 1992 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 that would correct the deficiencies explained in that letter, you should amend the charge accordingly. You were further advised that unless you amended the charge to state a prima facie case, or withdrew it prior to February 25, 1992, the charge would be dismissed. On February 25, 1992, I granted you an extension until Wednesday, March 4, 1992, for my receipt of an amended charge. After the close of business on March 4, 1992, I left you a message that as I had not received an amended charge, I was going to issue a dismissal on March 5, 1992. I requested that you call me first thing on March 5, 1992, if you had any questions.

I have not heard from you, nor received either a request for withdrawal or an amended charge. I am therefore dismissing the charge based on the facts and reasons contained in my February 18, 1992 letter.

¹I am treating your case as one alleging a violation of the ~~union's duty of fair representation~~ (DFR) in violation of Government Code section 3519.5(b).

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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 (California 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 (5:00 p.m.) or sent by telegraph, certified or Express United States mail postmarked no later than the last date set for filing (California 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 calendar days following the date of service of the appeal (California 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 California 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 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 (California 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,

JOHN W. SPITTLER
General Counsel

By _____
Marc S. Hurwitz
Regional Attorney

Attachment

cc: Ernest F. Schulzke, Esq., Assoc. of California State
Attorneys and Administrative Law Judges

PUBLIC EMPLOYMENT RELATIONS BOARD



Los Angeles Regional Office
3530 Wilshire Boulevard, Suite 650
Los Angeles, CA 90010-2334
(213) 736-3127



February 18, 1992

Elcie Winston Jr.

Re: WARNING LETTER, Unfair Practice Charge No. LA-CO-45-S
Elcie Winston Jr. v. Association of California State
Attorneys

Dear Mr. Winston:

On November 6, 1991, you filed the above-referenced charge alleging that the Association of California State Attorneys (ACSA or Association) failed, as the exclusive representative, to fairly represent you and thus violated Government Code section 3519.5 of the Ralph C. Dills Act (Dills Act).¹

Your charge fails to state a prima facie case¹ for the reasons that follow. First, PERB Regulation 32615(a)(5) (California Code of Regulations, title 8, section 32615(a)(5) requires that a charge contain a "clear and concise statement of the facts and conduct alleged to constitute an unfair practice."

You have generally alleged that the exclusive representative denied you the right to fair representation in dealing with your employer, and thus violated Dills Act section 3519.5(b). You have indicated a number of areas where you believe the Association did a poor job in prosecuting your grievance before and during the binding arbitration hearing on or about April 26, 1991.

The duty of fair representation imposed on the exclusive representative extends to grievance handling. Fremont Teachers Association (King) (1980) PERB Decision No. 125; United Teachers

¹I am treating your case as one alleging a violation of the union's duty of fair representation (DFR) in violation of Government Code section 3519.5(b).

²The grievance was filed after your employer, the Board of Prison Terms, reassigned your headquarters in July 1990 from your residence, to a prison 240 miles from your residence. You believed that this action was made for the purpose of harassing or disciplining you in violation of Article XIII, section 14 of the Collective Bargaining Agreement (Agreement) between the Association and the State of California, effective January 30, 1989 through June 30, 1991.

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of Los Angeles (Collins) (1983) PERB Decision No. 258. In order to state a prima facie violation of this section of the Dills Act, Charging Party must show that the Association's conduct was arbitrary, discriminatory, or in bad faith. In United Teachers of Los Angeles (Collins), Id., the Public Employment Relations Board (PERB) stated:

Absent bad faith, discrimination, or arbitrary conduct, mere negligence or poor judgment in handling a grievance does not constitute a breach of the union's duty.

.

A union may exercise its discretion to determine how far to **pursue a grievance** on the employee's behalf as long as **it** does not arbitrarily ignore a **meritorious grievance** or process a grievance in a **perfunctory fashion**. **A union is also not required to process an employee's grievance if the chances for success are minimal.**

In order to state a prima facie case of arbitrary conduct violating the duty of fair **representation, a Charging Party:**

. . . must, at a minimum, include an assertion of sufficient facts from which it becomes apparent how or in what manner the exclusive representative's action or inaction was without a rational basis or devoid of honest judgment. Reed District Teachers Association, CTA/NEA (Reyes) (1983) PERB Decision No. 332, citing Rocklin Teachers Professional Association (Romero) (1980) PERB Decision No. 124.

The Association also denied a number of your requests or suggestions. You have not provided a clear and concise statement showing how, or in what manner your representative, John Sikora's actions or inactions were without a rational basis, devoid of honest judgment, discriminatory or in bad faith. You have not cited any union rule, contract section, or any other legal authority which your representative clearly violated.³ Even if

³You allege, in part, that two days prior to the April 26, 1991 hearing, your representative, John Sikora refused to allow

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the Association's conduct was improper/negligent, negligence is not enough to violate the duty of fair representation.⁴

Second, the Dills Act does not allow a complaint to issue regarding a charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge. Government Code section 3514.5(a). It is the charging party's burden, as part of the prima facie case, to prove the charge was timely filed. Furthermore, there is no longer any equitable tolling of the six months limitations period. The Regents of the University of California (1990) PERB Decision No. 826-H. This charge was filed on November 6, 1991. Therefore, we may only consider alleged unlawful conduct of the union occurring after on or about May 6, 1991. Thus, all allegations of unlawful conduct by the Association occurring before this date, including conduct at, or before, an arbitration hearing in or about April 1991, are untimely and will be dismissed. On February 14, 1992, you advised me, in part, that you did not receive the arbitrator's written decision, denying your grievance until July 1991. At that time, you learned that the union breached its duty. It is arguable that you knew or should have known of the union's alleged unlawful conduct at, or before, the hearing in or about April 1991. The statute does not begin to run later on in July 1991 when you received the arbitrator's decision. See International Union of Operating Engineers. Local 501 (Reich) (1986) PERB Decision No 591-H.

For these reasons, as I indicated to you on February 18, 1992, the charge as presently written does not state a prima facie

you to represent yourself, or allow your own attorney to represent you. Article VII, section 12.a. gives the Association the right to submit the grievance to arbitration. It does not indicate that a grievant may appear in pro per or with his own counsel. Thus, Mr. Sikora's response to your request does not appear to be improper.

⁴In some additional information you sent to me dated February 2, 1992, you indicated **in part**, "How do represent (sic) **someone** if you refuse to discuss **the** complaint with them or allow **them to be** present when you **meet to resolve** the **complaint**? Other employees were present, but not me." If you are **contending** that you were treated by the union in a disparate manner, compared to other employees, you must provide facts to show that their circumstances were identical to yours, and facts showing who was involved, what happened, when it happened, and where the discriminatory conduct took place.

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case. If there are any factual inaccuracies in this letter or any additional facts that would correct the deficiencies explained above, please amend the charge accordingly. 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 must be signed under penalty of perjury by the charging party. The amended charge must be served on the respondent⁵ and the original proof of service must be filed with PERB. If I do not receive an amended charge or withdrawal from you before February 25, 1992, I shall dismiss your charge. If you have any questions, please call me at (213) 736-3127.

Sincerely,

Marc S. Hurwitz
Regional Attorney

⁵Ernest F. Schulzke, Esq., Association of California State Attorneys and Administrative Law Judges, 660 J Street, Suite 480, Sacramento, CA 95814.