

an employee union representation at a meeting with management. After investigation, the Board agent dismissed the charge for failure to establish a prima facie case of a violation of the Dills Act.

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

The unfair practice charge in Case No. SA-CE-1033-S is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chairman Caffrey and Member Jackson joined in this Decision.

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.

PUBLIC EMPLOYMENT RELATIONS BOARD



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



November 19, 1997

William A. Sokol, Esq.
Van Bourg, Weinberg, Roger & Rosenfeld
180 Grand Avenue, Suite 1400
Oakland, CA 95814

Re: International Union of Operating Engineers v. State of California (Department of Corrections)
Unfair Practice Charge No. SA-CE-1033-S
DISMISSAL LETTER

Dear Mr. Sokol:

This charge, filed on October 6, 1997, on behalf of the International Union of Operating Engineers (IUOE), alleges that the State of California, Department of Corrections (State or CDC) violated the Ralph C. Dills Act, specifically Government Code sections 3519(a), (b) and (c), by denying CDC employee and IUOE member Stacy Esau union representation at a meeting with management.

I indicated to you, in my attached letter dated November 4, 1997, 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 November 12, 1997, 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 November 4, 1997 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 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 p.m.) or sent by telegraph, certified or Express United States mail postmarked no later than the last date set for filing. (Cal. Code of Regs., tit. 8, sec. 32135.) Code of Civil Procedure section 1013 shall apply. The Board's address is:

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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 (20) calendar days following the date of service of the appeal. (Cal. 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 Cal. 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 (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. (Cal. Code of 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

RICK C. KIGER
Board Agent

Attachment

cc: Timothy G. Yeung, DPA Legal Counsel

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November 4, 1997

William A. Sokol, Esq.
Van Bourg, Weinberg, Roger & Rosenfeld
180 Grand Avenue, Suite 1400
Oakland, California 95612

Re: International Union of Operating Engineers v. State of California (Department of Corrections)
Unfair Practice Charge No. SA-CE-1033-S
WARNING LETTER

Dear Mr. Sokol:

This charge, filed on October 6, 1997, on behalf of the International Union of Operating Engineers (IUOE), alleges that the State of California, Department of Corrections (State or CDC) violated the Ralph C. Dills Act, specifically Government Code sections 3519(a), (b) and (c), by denying CDC employee and IUOE member Stacy Esau union representation at a meeting with management.

My investigation of these charges revealed the following information. IUOE alleges that:

On or about September 4, 1997 at 1:15 p.m., Ms. Esau was called into a meeting with Supervisor Gary Lewis. Per Ms. Esau's statement, Mr. Lewis "began to holler" at Ms. Esau, stating in effect that Ms. Esau had left her work area for too long a period, he had looked everywhere for her, that she did not follow instructions, that she was not to leave the reception area, and that he had told her repeatedly that she was not to leave the reception area. Mr. Lewis then informed Ms. Esau that she should finish cleaning up her job and return to his office. He then stated that they were going to meet with Brian Lauthe on Tuesday and "this was going to come out."

At 2:30 p.m. that day, Ms. Esau returned to Mr. Lewis's office. According to Ms. Esau's statement, Mr. Lewis was still agitated and proceeded to castigate her over her work performance, and stated that she was gone too long from her work area, that she left her workers unsupervised, that was exactly the type of thing she had been written up for in the past, and that he was going to write her up for this.

Ms. Esau and Mr. Lewis then left for Jerry Pacheco's, DVT, Correctional Plant Manager, office. At this time Ms. Esau requested and was denied union representation. Mr. Pacheco instructed Ms. Esau to quit interrupting Mr. Lewis until he was

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finished. Mr. Lewis then reiterated his previous statements, concluding with the statement that he was going to bring this to Brian's (Lauthe) attention on Wednesday. When Mr. Lewis was finished, Mr. Pacheco stated that "Wednesday would not work, as they had interviews next week. We can have this anytime this month. The disciplinary process has to be done anytime within 30 days."

ANALYSIS

Employees have the right to union representation at disciplinary and investigatory interviews. (California Department of Forestry (1988) PERB Decision No. 690-S.) The right to representation does not exist for "routine or perfunctory conversations, training, or correcting work techniques." An employee has the right to union representation at an investigatory interview which the employee reasonably believes would lead to discipline or an interview in which highly unusual circumstances are present. (Redwoods Community College District v. PERB (Redwoods) (1984) 159 Cal.App.3d 617, 626.) Furthermore, the Court of Appeal held that "representation should be granted, absent the discipline element, only in highly unusual circumstances." (Redwoods, supra.)

In the instant case, the investigatory aspect of Redwoods is not present. All the remarks made by Mr. Lewis to Ms. Esau were in the nature of declaratory statements regarding Ms. Esau's current actions and related past behavior. The one apparent question, "Why can't you follow instructions?", can be construed as rhetorical in light of the other statements by Mr. Lewis.

Based upon the foregoing, the meeting between CDC management and Ms. Esau does not appear to be investigatory in nature. Mr. Lewis's words were stated in an emotional way and were accusatory towards Ms. Esau, but were not designed to elicit facts from Ms. Esau. Without the investigatory aspect, the right to representation derived from Redwoods cannot be invoked.

Nor does there appear to be the "highly unusual circumstances" as stated in Redwoods. In that case, the employee was "required to participate in an interview which she no longer sought, before a high-level administrator, and to respond to questions concerning her work performance." (Redwoods, supra at pg. 625.) In the instant case, Ms. Esau was called in to meet with her immediate supervisor, Mr. Lewis, who criticized her for allegedly leaving her work area and not informing him of that fact. Mr. Pacheco, Mr. Lewis's supervisor, was only minimally involved. Ms. Esau was not questioned in regards to her work performance. The above facts do not appear to meet the "highly unusual circumstances"

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standard of Redwoods. Therefore the right of representation does not attach in this instance.

For these reasons the charges, as presently written, does not state a prima facie case. If there are any factual inaccuracies in this letter or additional facts which would correct the deficiencies explained above, please amend the charges. The amended charges should be prepared on standard PERB unfair practice charge forms, 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 charges must be served on the respondent and the original proofs of service must be filed with PERB. If I do not receive amended charges or withdrawals from you before November 12, 1997, I shall dismiss your charges. If you have any questions, please call me at (916) 322-3198, extension 354.

Sincerely,

RICK C. KIGER
Board Agent