

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



KEITH WIMER, ET AL.,)
)
Charging Parties,) Case No. LA-CE-507-S
)
v.) PERB Decision No. 1329-S
)
STATE OF CALIFORNIA (DEPARTMENT OF) May 3, 1999
CORRECTIONS),)
)
Respondent.)
_____)

Appearance; California State Employees Association by Keith Wimer, Senior Steward, and Harold Lopez, Vice President/Chief Steward, for Keith Wimer, et al.

Before Caffrey, Chairman; Dyer and Amador, Members.

DECISION

AMADOR, Member: This case comes before the Public Employment Relations Board (Board) on appeal from a Board agent's dismissal (attached) of Keith Wimer, et al.'s (Charging Parties) unfair practice charge.¹ The charge alleged that the State of California (Department of Corrections) violated section 3519(a), (b) and (c) of the Ralph C. Dills Act (Dills Act)² by

¹Although the original unfair practice charge was filed by the Charging Parties as individual employees, California State Employees Association (CSEA) now seeks to join the case on appeal. PERB Regulation 32164 provides for joinder pursuant to a written application procedure. (PERB regs. are codified at Cal. Code of Regs., tit. 8, sec. 31001 et seq.) CSEA has failed to comply with the provisions of this regulation, and we deny the request for joinder.

²The Dills Act is codified at Government Code section 3512 et seq. Section 3519 states, in pertinent part:

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

unilaterally changing the sick leave policy at the California Men's Colony and retaliating against employees.

The Board has reviewed the entire record in this case, including the unfair practice charge, the warning and dismissal letters, and Charging Parties' appeal. The Board finds the warning and dismissal letters to be free of prejudicial error and adopts them as the decision of the Board itself.³

ORDER

The unfair practice charge in Case No. LA-CE-507-S is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chairman Caffrey and Member Dyer joined in this Decision.

(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.

(b) Deny to employee organizations rights guaranteed to them by this chapter.

(c) Refuse or fail to meet and confer in good faith with a recognized employee organization.

³In the appeal, Charging Parties claim that the Board agent's dismissal fails to address an information request allegation. Because an employer's obligation to provide information is owed to the exclusive representative, Charging Parties have no standing to file an unfair practice charge for an alleged refusal to provide information.

PUBLIC EMPLOYMENT RELATIONS BOARD



San Francisco Regional Office
177 Post Street, 9th Floor
San Francisco, CA 94108-4737
(415) 439-6940



January 29, 1999

Keith Wimer

RE: Keith Wimer, et al. v. State of California, Department of
Corrections
Unfair Practice Charge No. LA-CE-507-S
DISMISSAL AND REFUSAL TO ISSUE A COMPLAINT

Dear Mr. Wimer:

I indicated to you, in my attached letter dated January 20, 1999, 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 January 27, 1999, 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 January 20, 1999, 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. 32635Ca.) 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:

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).)

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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

TAMMY L. SAMSEL
Regional Director

Attachment

cc: Curtis Leavitt

PUBLIC EMPLOYMENT RELATIONS BOARD



San Francisco Regional Office
177 Post Street, 9th Floor
San Francisco, CA 94108-4737
(415) 439-6940



January 20, 1998

Keith Wimer

RE: Keith Wimer, et al. v. State of California, Department of
Corrections
Unfair Practice Charge No. LA-CE-507-S
WARNING LETTER

Dear Mr. Wimer:

In the above-referenced charge the Charging Parties allege the State of California, Department of Corrections (State) violated the Ralph C. Dills Act (Dills Act or Act) § 3519(a) and (b) by unilaterally changing the sick leave policy at the California Men's Colony (CMC) and retaliating against the employees. My investigation revealed the following information.

The Charging Parties are employees of the Respondent in Bargaining Unit 3, and are exclusively represented by the California State Employees Association (CSEA).

Section 8.2, Sick Leave, of the 1992-1995 Memorandum of Understanding (MOU) between the State and CSEA provides in pertinent part:

d. The department head or designee shall approve sick leave only after having ascertained that the absence is for an authorized reason and may require the employee to submit substantiating evidence including, but not limited to, a physician's or licensed practitioner's verification. Such substantiation shall include, but not be limited to, the general nature of the employee's illness or injury, the anticipated length of the absence, any restrictions upon return to work and anticipated future absences. If the department head or designee does not consider the evidence adequate, the request for sick leave shall be disapproved. Upon request, a denial of sick leave shall be in writing state the reasons for the denial.

e. An employee shall not be required to provide a physician's verification of sick

leave when he/she uses up to two (2) consecutive days of sick leave except when:

- (1) the employee has a demonstrable pattern of sick leave abuse; or
- (2) the supervisor believes the absence was for an unauthorized reason; or
- (3) the employee has an above average use of sick leave.

In addition to the MOU, employee duty statements recommended that employees strive to maintain a sick leave balance above the established 80 hour minimum.

In February 1997, the Supervisor of Academic Education, R. Sadowski implemented the "CMC Extraordinary Sick Leave Usage Policy." The Charging Parties allege that document changed the sick leave policy in Section 8.2. In March 1997, Warden Duncan rescinded the "CMC Extraordinary Sick Leave Usage Policy" after CSEA protested its implementation.

On July 1, 1997, at least one of the Charging Parties received a notice indicating he had demonstrated "a pattern of sick leave abuse/an above average use of sick leave." The notice referred to the MOU's Section 8.2(d) and (e). The notice also indicated the employee must provide written verification of any absences for the next 12-month period. The Charging Parties allege these notices established a new sick leave policy. The charge provides:

In July of 1997, R. Sadowski implemented the "Sick Leave Abuse Policy" which cited nine members for "abuse," had no specific dates of usage, and a duration of one year. (see Exhibit #1, Attachment #1) Supervisors gave vague and conflicting reasons for placement, (see Exhibit #1, Attachments #13 and #14, and Exhibit #5)

In July 1997, CSEA Labor Relations Representative, Kathleen Thompson, asked whether the State was implementing a new policy. An Employee Relations Officer told her that there was not a new policy. On ...September 26, 1991 Thompson met with Sadowski and Connor regarding the sick leave issues. Thompson requested that the sick leave notices be more specific regarding why the employees were being placed on sick leave verification. On October 9, 1997, Associate Warden for Inmate Services, C. Wilson wrote to Thompson and indicated that employees had been verbally notified of the specific reasons which supported their placement on sick leave verification. Wilson also agreed that future

notices would provide the specifics as to why the employees were being placed on sick leave verification.

On January 5, 1998, Wilson wrote to Thompson. The letter indicated in pertinent part:

The question was raised if all employees had, in fact, been verbally informed of the basis for their placement on extraordinary sick leave notice at the time they were reissued same. Through further review, it appears that not all had been verbally apprised, as I believed to be the case.

Wilson and Thompson agreed to issue addendums to the Sick Leave Abuse Policy Notices previously issued. The addendums would provide specific reasons justifying the issuance of the notices. In February 1998, CMC supervisors issued "Addendums to Sick Leave Notices" which detailed the sick leave usage of employees who had been placed on notice in July 1997.

The Charging Parties allege the addendum notices were insufficient and contained errors in the calculated sick leave. In February 1998, employees filed individual grievances regarding the addendum notices. The charge alleges during conferences regarding these grievances, the supervisors indicated that specific criteria for "abuse" did not exist, and that placement on notice was up to supervisor discretion. The charge also alleges Sadowski criticized the employees and Thompson for not accepting the CMC Extraordinary Sick Leave Usage policy originally implemented in February of 1997 which provided specific criteria.

In March 1998, several employees received "Sick Leave Abuse Notices." In May 1998, Employee Relations Officer, Herb Connor, refused to explain to employees the specific criteria defining "abuse" and "above average use" of sick leave as those terms were used in the notices.

In May 1998 through August 1998, previously approved leaves of absences were denied to five employees because of sick leave abuse.....In July, 1998, Sadowski placed notes in the personnel files and notes on the personnel evaluations of employees removed from mandatory verification status which commended them for their "more prudent" use of sick leave.

The above-stated information fails to state a prima facie violation of the Dills Act for the reasons that follow.

Unilateral Change

The Charging Parties allege the State unilaterally implemented new sick leave policies.

In determining whether a party has violated Dills Act section 3519(c), PERB utilizes either the "per se" or "totality of the conduct" test, depending on the specific conduct involved and the effect of such conduct on the negotiating process.

(Stockton Unified School District (1980) PERB Decision No. 143.) Unilateral changes are considered "per se" violations if certain criteria are met. Those criteria are: (1) the employer implemented a change in policy concerning a matter within the scope of representation, and (2) the change was implemented before the employer notified the exclusive representative and gave it an opportunity to request negotiations. (Walnut Valley Unified School District (1981) PERB Decision No. 160; Grant Joint Unified High School District (1982) PERB Decision No. 196.)

Although the unilateral implementation of a new sick leave policy could be considered a "per se" violation of the Dills Act. Individual employees do not have standing to allege unilateral change violations. (Oxnard School District (Gorcey/Tripp) (1988) PERB Decision No. 667.) As the Charging Parties are individual employees and not the exclusive representative they lack standing to file a unilateral change violation. Thus, these allegations must be dismissed.

Even if the Charging Parties have standing to file the unilateral change allegation, the charge does not state a prima facie violation for the reasons that follow.

Dills Act § 3514.5(a)(1) provides the Public Employment Relations Board shall not, "issue a complaint in respect of any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge." It is your burden, as the Charging Parties to demonstrate the charge has been timely filed. (See Tehachapi Unified School District (1993) PERB Decision No. 1024.)

The Charging Parties allege the charge is timely filed for the reasons stated below:

1. The unilateral changes were implemented gradually, and important information was withheld, making significant change obvious only when viewed over time.
2. Grievances were filed asking for a meet and confer/discuss in good faith. It was reasonable to expect the California Men's

Colony or the Department of Corrections to grant such remedy at any stage of the grievance process based on contract language and the spirit of maintaining "harmonious" and "peaceful" employer-employee relations per BU 3 and 4 MOUs and Government Code, sec. 3512. Further, Gov. Code, sec 3514.5(a) tolls the six-month filing deadline during the grievance process.

3. This filing is within six months of several of the unilateral changes (e.g. issuance of removal of notices) and examples of reprisals (e.g. denial of leaves).

The Charging Parties' arguments are unpersuasive. As an initial matter Dills Act § 3514.5 (a) does not toll the statute of limitations period when, as is the case here, the parties' contract containing a grievance process ending in binding arbitration has expired.

The charge alleges the State implemented the CMC Extraordinary Sick Leave Usage Policy in February 1997. The charge does not deny that the Charging Parties had actual notice of the policy change in February 1997. In fact, the charge indicates the State rescinded the CMC Extraordinary Sick Leave Usage Policy in March 1997 after CSEA protested its implementation. This charge was filed on October 31, 1998. As the charge was not filed within six months of February 1997, it is untimely filed and outside of the jurisdiction of PERB.

The charge also alleges the State unilaterally implemented the Sick Leave Abuse Policy in July 1997. Again the charge indicates the Charging Parties had actual notice of the new policy in July 1997. Since this charge was not filed within six months of July 1997, this allegation is untimely filed and outside the jurisdiction of PERB.

The charge also alleges that the State's issuance of the Addendum to Sick Leave notices in February 1998, and Sick Leave Abuse Notices in March 1998 were also unilateral changes. There is some question as to whether these notices are unilateral changes separate from the Sick Leave Abuse Policy implemented in July 1997. Even if considered as distinct unilateral changes, this unfair practice charge was not filed within six months of February 1998. Nor was it filed within six months of March 1998, therefore these allegations are also untimely filed and outside the jurisdiction of PERB.

Retaliation

The charge alleges the State retaliated against the Charging Parties by taking various actions relating to sick leave.

As stated previously, under Dills Act § 3514.5(a)(1) PERB cannot issue a complaint based upon unfair practices occurring more than six months prior to the filing of the charge. Since this charge was filed on October 31, 1998, the charge's allegations of adverse actions occurring before April 31, 1998 are untimely filed and outside the jurisdiction of PERB. Thus, those allegations must be dismissed.

The charge alleges the State retaliated against the Charging Parties on several occasions following April 31, 1998. These allegations appear to be timely filed and are discussed below.

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; Carlsbad Unified School District (1979) PERB Decision No. 89; Department of Developmental Services (1982) PERB Decision No. 228-S; California State University (Sacramento) (1982) PERB Decision No. 211-H.)

Although the timing of the employer's adverse action in close temporal proximity to the employee's protected conduct is an important factor, 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; (2) the employer's departure from established procedures and standards when dealing with the employee; (3) the employer's inconsistent or contradictory justifications for its actions; (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; or (6) any other facts which might demonstrate the employer's unlawful motive. (Novato Unified School District, supra; North Sacramento School District (1982) PERB Decision No. 264.)

The charge alleges that in May 1998 the State denied employees the specific criteria the State was using to determine whether employees were engaging in "sick leave abuse" and "above average use" of sick leave. The charge does not provide any facts demonstrating the State is required to provide the employees specific criteria for determining "sick leave abuse" and "above average use" of sick leave. CSEA, as the exclusive representative, negotiated with the State to include those terms into the parties 1992-1995 Memorandum of Understanding. Section 8.2 (e) (1) and (3) use those terms without indicating the State must further define those terms or provide the employees with specific criteria. Thus, it does not appear that the State's failure to further define those terms is an adverse action. Thus, this allegation must be dismissed.

The charge alleges between May 1998 and August 1998, the State denied five employees' leave of absence requests because of the employees' "sick leave abuse." The charge does not provide facts indicating the names of the specific employees whose leave of absence requests were denied. Nor does it provide facts indicating that these five employees engaged in any protected conduct. A charging party should allege the "who, what, when, where, and how" of an unfair practice. (United Teachers-Los Angeles (Ragsdale) (1992) PERB Decision 944.) Mere legal conclusions are insufficient. (See State of California (Department of Food and Agriculture) (1994) PERB Decision No. 1071-S.) Even if the charge had provided such information the charge does not state a prima facie violation. The charge does not provide facts indicating the State may not discipline employees for engaging in "sick leave abuse." As previously stated, CSEA and the State negotiated an MOU including that term. Thus, it appears the State's denial of leave of absence requests was in accord with the parties' MOU and not retaliatory. Thus, this allegation must be dismissed.

The charge also alleges the State commended employees for their more prudent use of sick leave in July 1998. As this fact does not allege any adverse action was taken or threatened but is congratulatory in nature, it does not state a prima facie violation.

Finally, the charge alleges that by July-1998 the State had placed 15 employees on sick leave abuse status. The charge does not provide the names or dates of when the employees were placed on sick leave abuse status. A charging party should allege the "who, what, when, where, and how" of an unfair practice. (United Teachers-Los Angeles (Ragsdale) (1992) PERB Decision 944.) Nor does it provide facts indicating that the employees engaged in protected activities. In addition, the charge fails to factually demonstrate that the State is prohibited from disciplining

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employees for engaging in "sick leave abuse." Again the parties' negotiated that term into the parties' 1992-1995 MOU, and it appears the State acted in accord with the parties' MOU.

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 which 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 January 27, 1999, I shall dismiss your charge. If you have any questions, please call me at (415) 439-6940.

Sincerely,

TAMMY IT. SAMSEL
Regional Director