STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA STATE EMPLOYEES ASSOCIATION, LOCAL 1000, SEIU, AFL, CIO-CLC,	)	
Charging Party,	)	Case No. SF-CE-165-S
v.	)	PERB Decision No. 1373-S
STATE OF CALIFORNIA (DEPARTMENT OF CORRECTIONS),	)	February 28, 2000
Respondent.	)	

Appearance; Terrence Ryan, Labor Relations Representative, for California State Employees Association, Local 1000, SEIU, AFL, CIO-CLC.

Before Caffrey, Chairman; Dyer and Amador, Members.

DECISION AND ORDER

AMADOR, Member: This case comes before the Public Employment Relations Board (Board) on appeal by the California State Employees Association, Local 1000, SEIU, AFL, CIO-CLC (CSEA) to a Board agent's dismissal (attached) of its unfair practice charge. CSEA filed a charge alleging that the State of California (Department of Corrections) violated section 3519(a) and (b) of the Ralph C. Dills Act (Dills Act)[1] when it imposed

[1]The 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:
>
> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise

reprisals against Cori Nofuentes by: (1) recouping overpayments for catastrophic time bank credits granted to her; (2) issuing her a counseling memorandum; and (3) refusing to reasonably accommodate her.

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 the unfair practice charge, the warning and dismissal letters and CSEA's 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.

The unfair practice charge in Case No. SF-CE-165-S is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chairman Caffrey and Member Dyer joined in this Decision.

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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

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

October 20, 1999

Terrence Ryan
Labor Relations Representative
California State Employees Association
2020 Challenger Drive, Suite 102
Alameda, California 94501-1017

Re: **DISMISSAL OF UNFAIR PRACTICE CHARGE/REFUSAL TO ISSUE COMPLAINT**
California State Employees Association, Local 1000, SEIU, AFL-CIO, CLC v. State of California (Department of Corrections)
Unfair Practice Charge No. SF-CE-165-S

Dear Mr. Ryan:

The above-referenced unfair practice charge, filed on June 18, 1997, and amended on August 29, 1997, December 19, 1997, and June 22, 1998, alleges that the State of California (Department of Corrections) (State or Department) discriminated against Cori Nofuentes because of her activities on behalf of the California State Employees Association, Local 100, SEIU, AFL-CIO, CLC (Association). This conduct is alleged to violate Government Code section 3519(a) and (b) of the Ralph C. Dills Act (Dills Act).

I indicated to you, in my attached letter dated October 8, 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 October 19, 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 October 8, 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 Regs., tit. 8, sec. 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 or when mailed by certified or Express United States mail, as shown on the postal receipt or postmark, or delivered to a common carrier promising overnight delivery, as shown on the carrier's receipt, not later than the last day set for filing. (Cal. Code Regs., tit. 8, sec. 32135(a); see also Cal. Code Regs., tit. 8, sec. 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 Cal. Code Regs., tit. 8, sec. 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. (Cal. Code. Regs., tit. 8, secs. 32135(b), (c) and (d); see also Cal. Code Regs., tit. 8, secs. 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. (Cal. Code 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 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. A document filed by facsimile transmission may be concurrently served via facsimile transmission on all parties to the proceeding. (Cal. Code Regs., tit. 8, sec. 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. (Cal. Code 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

DONN GINOZA
Regional Attorney

Attachment

cc: Robert Allen

PUBLIC EMPLOYMENT RELATIONS BOARD

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

October 8, 1999

Terrence Ryan
Labor Relations Representative
California State Employees Association
2020 Challenger Drive, Suite 102
Alameda, California 94501-1017

Re: **WARNING LETTER**
California State Employees Association, Local 1000, SEIU, AFL-CIO, CLC v. State of California (Department of Corrections)
Unfair Practice Charge No. SF-CE-165-S

Dear Mr. Ryan:

The above-referenced unfair practice charge, filed on June 18, 1997, and amended on August 29, 1997, December 19, 1997, and June 22, 1998, alleges that the State of California (Department of Corrections) (State or Department) discriminated against Cori Nofuentes because of her activities on behalf of the California State Employees Association, Local 100, SEIU, AFL-CIO, CLC (Association). This conduct is alleged to violate Government Code section 3519(a) and (b) of the Ralph C. Dills Act (Dills Act).

Investigation of the charge revealed the following. The Association is an exclusive representative of the State bargaining unit composed of office and allied workers. Cori Nofuentes is a member of this bargaining unit who has been employed at the California Medical Facility (CMF). At CMF, she held the position of Office-Technician, Custody Timekeeper.

Nofuentes was certified as a steward for the Association in September 1993. She has engaged in representational activities in this capacity, although the charge does not describe them in any detail. At some unspecified time, she was also elected treasurer of the Association's District Labor Council 747.

In the 1980s, Nofuentes was assaulted by an inmate and as a result suffered an injury to the cervical portion of her spine. Years later, in June 1996, apparently as a result of the cumulative stress of her computer work combined with the earlier injury, she suffered a disability that required her to begin taking a substantial amount of time off from work.

When Nofuentes returned to work later in the summer of 1996, she claimed that continued performance of duties on her computer conflicted with her physician's restrictions. She made a request

for reasonable accommodation. The request included numerous ergonomic changes to her computer work station. The Department failed to act immediately on her request. She filed a grievance in August 1996, alleging reprisals for union activity based on the Department's refusal to discuss her requests with her. As a result of the grievance, the Department, on or about September 3, 1996, agreed to move her computer to a table with adjustable keyboard height, a lower monitor height, and a document holder. In addition, she was provided with an ergonomic model chair.

For the period from June through September 1996, Nofuentes was granted leave hours from the Catastrophic Time Bank (CTB). This followed the exhaustion of her own personal leave credits. The CTB is a depository for employees wishing to donate excess leave time to employees who have exhausted their personal leave and face financial hardship without additional leave benefits. Nofuentes received a total of 290 hours from the CTB.

According to the State, Nofuentes did not claim from the outset that her spinal injury was work-related. In September 1996, this changed, after a diagnosis from her doctor that her injury was work-related. She then applied for Worker's Compensation benefits from the State Compensation Insurance Fund (SCIF). Her was claim was granted retroactive to June 5, 1996. Beginning in September 1996, Nofuentes was allowed to charge her absences to Worker's Compensation.

After SCIF granted her benefits, the Department retroactively credited all used personal leave benefits that were covered by Worker's Compensation. However, SCIF determined that the hours taken from the CTB were not compensable.[1] By State policy, a person subsequently found eligible for Worker's Compensation is deemed to be ineligible for CTB credits, because the person is no longer considered to have had a financial hardship by virtue of the retroactive benefits under Worker's Compensation. The Department notified Nofuentes of this determination by memorandum dated December 6, 1996.

Since Nofuentes did not have sufficient personal sick leave to cover the CTB hours, the excess time that she had taken was charged backed to the Department, through the CTB... In turn, the Department determined that Nofuentes had been overpaid by $738.00

[1]According to the State, the Department's action is merely ministerial; the determination as to which days off are compensable and which are not is determined by SCIF.

and commenced action to recoup its overpayment by reducing Nofuentes's regular pay warrants, beginning in January 1997.[2]

Nofuentes objected to the overpayment collection claiming that once granted CTB credits are irrevocable. The Department responded by stating that this was not so and that the provision of the memorandum of understanding (MOU) upon which Nofuentes relied provides only that donations to the CTB by employees are irrevocable once made.

On or about June 3, 1997, Nofuentes's supervisor, Miriam Galarza, issued a counseling memorandum to Nofuentes concerning her timesheet. Galarza claimed that due to insufficient personal leave credits, Nofuentes had not accurately cited whether certain time-off was charged to her personal leave, as opposed to industrial disability leave. When Galarza gave her the correct information and instructed Nofuentes to make the entries on the timesheet, Nofuentes objected, stating, "If I worked in another department I would not have to do this." Galarza claimed that she was not instructing Nofuentes to change her attendance, but rather the accounts to which her absences had been charged. She wanted Nofuentes to track her sick leave, and when exhausted, indicate properly to which other account she was charging her time. Galarza noted that in past instances as well when she had brought this matter up, Nofuentes's behavior and language had been "unprofessional."

In a grievance filed against the counseling memorandum, in which she claimed reprisals for her union activities, Nofuentes complained that she was counseled in the presence of a coworker. This neighboring coworker had overheard the exchange. Nofuentes also claimed that Galarza's claim that she had been "unprofessional" was too vague. She also claimed that she was the only employee required to make these types of notations as to the charging of leave balances.

Galarza responded to the grievance by asserting that she did not approach Nofuentes on June 3 with the purpose of counseling her but merely to instruct her to make certain corrections. Galarza claimed that she was instructing Nofuentes to make the notations because as a supervisor, she was responsible for submitting accurate timesheets for all her employees. She also stated that it was Nofuentes's demeanor and questioning of an order that was the basis for her charge of unprofessional behavior.

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[2]The State notes that Government Code section 19838 authorizes recoupment of overpayments in this manner.

By memorandum dated July 7, 1997, the Department's Return-To-Work Coordinator informed Nofuentes that her 120-day-per-year limit on working on restricted duty had been exhausted and she could not continue to work in that status.[3] Nofuentes had been on restricted duty from June 27, 1996 through November 12, 1996. Therefore, the Return-To-Work Coordinator informed Nofuentes that she could not be accommodated on restricted duty until November of 1997, notwithstanding her physician's work restrictions noted on June 11, 1997. Nofuentes challenged this action through the State Personnel Board on August 26, 1997. She claimed that she could continue to work with reasonable accommodations to her work station which would obviate any reason to place her on restricted duty. She also believed that the Department could have restructured her job or reassigned her.

Sometime in late 1997 or early 1998, Nofuentes notified the Department that she was no longer able to return to work as an office technician in the timekeeping office due to her medical restrictions. She requested another position that conformed to her medical restrictions, that did not require typing for more than fifteen minutes at a time. The personnel office attempted to find such a position and offered her two positions. These were not acceptable to Nofuentes. A third vacant position in the personnel services department was considered but not offered because of the typing restriction. By letter dated June 3, 1998, Nofuentes questioned why she was not offered a vacant position in the mail room.[4]

In March 1998, Nofuentes understood the personnel officer at CMF as stating that her position had been posted because it had been vacant for some period of time. She also believed that she faced possible demotion because of her time off. The personnel officer later assured Nofuentes's Association representative that the Department was merely unsure of Nofuentes's medical status, that

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[3]Nofuentes had received an earlier notice in October 1996 at the time her 120 days of restricted duty had first been exhausted. Nofuentes had returned to work on a half-time basis in June 1996. Later, she first returned to her full-time position, though her typing duties were limited to two hours per day. The Return-To-Work Coordinator had determined that the latter assignment counted as restricted duty time.

[4]An earlier letter dated April 28, 1998 from her physician does state that Nofuentes has difficulty with repetitive hand movements and that "sorting through mail would cause her increased pain." The physician suggested rehabilitation and training in her field of training, accounting and bookkeeping.

it was not the Department's intent to demote her, and once it knew what her medical restrictions were, it would do everything possible to accommodate her in her current classification. However, another personnel officer in a discussion told Nofuentes in response to the question, "Are you going to accommodate me?," stated she would not.

Based on the facts stated above, the charge as presently written fails to state a prima facie violation of the Dills Act for the reasons that follow.

The Association alleges that the Department has imposed reprisals against Nofuentes by (1) recouping overpayments for the CTB credits granted to her, (2) issuing her the June 3, 1997 counseling memorandum, and (3) refusing to reasonably accommodate her.

To demonstrate a violation of Dills Act section 3519(a), the charging party must show that: (1) the employee exercised rights under 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. 2 64.)

As a preliminary matter, it is noted that the charge consists almost entirely of documents and has no narrative description indexing the relevant portions of the documents. This has made analysis of the charge difficult and time-consuming. The Association has been asked on several occasions to outline the pertinent elements of the charge of discrimination but has failed to do so. Therefore, the following analysis of the charge represents simply a best effort to decipher the elements of the charge, while indulging in all inferences that reasonably can be drawn from the information contained in the charge.

With respect to the allegation that the Department recouped overpayments in retaliation for union activity, the charge as presently written fails to demonstrate the necessary "nexus" factors and therefore does not state a prima facie violation of section 3519(a). Although some evidence of timing can be inferred, it is extremely weak. Nofuentes has been a job steward and District Labor Council officer on an ongoing basis since 1993. The charge mentions no specific activities that occurred in close temporal proximity to the recoupment of overpayments. The Association's claim that the recoupment of overpayments violated the MOU and therefore departed from established procedures is unsupported. Nothing in the MOU indicates that CTB credits are irrevocable once granted to the employee in the circumstances of this particular case where a retroactive grant of Worker's Compensation benefits triggers the determination of an overpayment by SCIF. Moreover, there is nothing suggesting that SCIF had knowledge of Nofuentes's protected activity.

With respect to the allegation that the Department imposed reprisals by issuing Nofuentes the counseling memorandum, the charge also fails to demonstrate the required "nexus" factors. Again, evidence of timing is extremely weak. There appears to be a suggestion of disparate treatment. However, this element is unsupported by relevant evidence. The counseling memorandum grew out of a specific encounter that was related to Nofuentes's ongoing conflicts over her restricted work status. There is no evidence suggesting how other employees with industrial injuries, who had not engaged in protected activities, were treated more favorably. The counseling memorandum itself does not appear to be an excessive form of discipline under the circumstances nor does its justification appear vague or inconsistent.

Finally, with respect to the allegation that the Department discriminated against Nofuentes by failing to reasonably accommodate Nofuentes, the charge fails to demonstrate the required "nexus" factors. Though not until after a grievance was filed, the Department did alter Nofuentes's computer work station to incorporate ergonomic elements. Nofuentes's injury was so

limiting that the Department's inability to restructure her job or reassign her does not appear to be unusual. Then, too, the Department did offer some vacant positions to Nofuentes. The Association has not demonstrated the existence of any other vacant positions that the Department failed to offer her. The imposition of the 120-day restricted duty limitation appears to be based on standard procedure. The alleged threat to demote Nofuentes was retracted shortly after Nofuentes complained to the Association. The isolated statement by another personnel officer that the Department would not accommodate is not sufficient to demonstrate a violation. The full context of the statement is lacking; it could have been limited to that point in time when no appropriate vacant positions existed. In any event, the duty to accommodate is not absolute but is subject to a standard of reasonableness. The charge does not demonstrate why the failure to reasonably accommodate was violative of standard procedure.

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 **October 19, 1999,** I shall dismiss your charge. If you have any questions, please call me at (415) 439-6940.

Sincerely,

DONN GINOZA
Regional Attorney