

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



EVA M. KEISER,

Charging Party,

v.

LAKE COUNTY SUPERIOR COURT,

Respondent.

Case No. SF-CE-1-C

PERB Decision No. 1782-C

November 1, 2005

Appearance: Eva M. Keiser, on her own behalf.

Before Whitehead, McKeag and Neuwald, Members.

DECISION

McKEAG, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Eva M. Keiser (Keiser) of a Board agent's dismissal of her unfair practice charge. The charge alleged that the Lake County Superior Court (Superior Court) violated the Trial Court Employment Protection and Governance Act (Trial Court Act)¹ by discriminating against her and violating her due process rights. Keiser alleged that this conduct constituted a violation of sections 71631, 71635.1 and 71636(c) of the Trial Court Act.

We have reviewed the entire record in this matter, including the unfair practice charge, the amended unfair practice charge, the Superior Court's position statement, the Board agent's warning and dismissal letters, and Keiser's appeal. We conclude that the Board agent's

¹The Trial Court Act is codified at Government Code section 71600, et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

dismissal letter (attached) is free from prejudicial error and, subject to the discussion set forth below, adopt it as a decision of the Board itself.²

BACKGROUND

In May 2004, Keiser received a notice of termination from her Lead Judicial Secretary position with the Superior Court. The notice, which outlined over one-hundred instances of work-related neglect, was sustained by the Superior Court on July 28, 2004. In response to her termination, Keiser filed the instant unfair practice charge alleging, among other things, that she was denied procedural due process under Article 5 of the Trial Court Act. Specifically, Keiser alleged that she was (1) denied union representation;³ (2) placed on administrative leave before an informal hearing; (3) denied discovery; (4) required to submit a second answer to the Superior Court's notice of intent to terminate; (5) terminated for unsatisfactory performance; (6) not given the adopted procedure regarding the selection of an impartial hearing officer; and (7) denied an evidentiary due process hearing at the pre-deprivation stage of the disciplinary process. Additionally, Keiser alleged that her unit placement as a confidential employee also denied her rights under Article 5.

²Although the dismissal letter references the attached warning letter, this decision only incorporates the dismissal letter.

³This allegation appears to encompass two different charges. First, Keiser contends that she was denied union representation when the Superior Court failed to recognize the Lake County Employee Organization (LCEO) as her exclusive representative. Second, Keiser appears to contend that the Superior Court's failure to provide adequate notice regarding her status with LCEO deprived her of her right to representation. Neither allegation is properly characterized as a procedural due process violation under Article 5 (Employment Protection System). Rather, these allegations, which are adequately addressed in the Board agent's dismissal letter, are more appropriately characterized as violations under Article 3 (Labor Relations).

DISCUSSION

Denial of Due Process

Article 5 (Employment Protection System) of the Trial Court Act governs the discipline and layoffs of court employees. At the heart of her complaint, Keiser argues that the Superior Court's alleged violations of Article 5 denied her procedural due process.

There is no provision in Article 5 granting the Board jurisdiction over due process violations in connection with the disciplinary actions taken by the trial courts. Rather, Section 71655(a) provides that challenges to a disciplinary decision by a trial court are conducted pursuant to a petition for writ of mandate under Code of Civil Procedure section 1094.5. In addition, Section 71655(b) provides:

The denial of due process or the imposition of a disciplinary decision that by law requires a due process hearing without holding the required hearing may be challenged by a petition for a writ of mandate. [Emphasis added.]

Based on the clear language of Section 71655, the courts, and not the Board, are vested with the power to review alleged due process violations in connection with disciplinary decisions. Thus, since the Board lacks jurisdiction over Keiser's alleged procedural due process violations under Article 5, these allegations must be dismissed.

This jurisdictional ruling is expressly limited to procedural due process violations under Article 5 of the Trial Court Act. In its response to the charge, the Superior Court argued that the Board's jurisdiction over the Trial Court Act is limited to Article 3. In light of this ruling, however, that issue is not squarely before the Board. Since the Board does not issue advisory opinions (Santa Clarita Community College District (College of the Canyons) (2003) PERB Decision No. 1506, pp. 27-28), the issue regarding the Board's jurisdiction, if any, over the remaining provisions of Article 5 need not be decided at this time.

Unit Placement

In 1999, the County of Lake added provisions to the County Code separating Superior Court employees into three different employee units, one of which was entitled "Court Employees, Confidential." This unit was comprised of two classifications: Judicial Secretary and Lead Judicial Secretary.

In her appeal, Keiser disputes the propriety of her designation as a confidential employee. However, Keiser was hired as a Judicial Secretary in 2000 and was aware that her current position was within the confidential bargaining unit at that time.

Section 71639.1(c) provides that the Board "shall not issue a complaint in respect to any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge." In the instant case, the original charge was filed on August 30, 2004. Since Keiser was aware of her unit placement as a confidential employee in 2000, this allegation was not timely filed and must be dismissed.

ORDER

The unfair practice charge in Case No. SF-CE-1-C is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Whitehead and Neuwald joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD



San Francisco Regional Office
1330 Broadway, Suite 1532
Oakland, CA 94612-2514
Telephone: (510) 622-1022
Fax: (510) 622-1027



November 17, 2004

Eva M. Keiser
6335 Scotts Valley Road
Lakeport, CA 95453

Re: Eva M. Keiser v. Lake County Superior Court
Unfair Practice Charge No. SF-CE-1-C; First Amended Charge
DISMISSAL LETTER

Dear Ms. Keiser:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on August 30, 2004. Eva Keiser alleges that the Lake County Superior Court violated the Trial Court Employees Act (TCEPGA) by discriminating against her and by denying her due process rights.

I indicated to you in my attached letter dated October 20, 2004, 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 27, 2004, the charge would be dismissed. On October 25, 2004, I extended this deadline to November 8, 2004. I later extended this deadline a second time to November 12, 2004.

On November 12, 2004, Charging Party filed a first amended charge. Although the charge does not present any new facts, I will summarize the relevant facts and address Charging Party's new legal theories.

The Lake County Superior Court is a trial court pursuant to Trial Court Employment Protection and Governance Act (TCEPGA) which took effect of January 1, 2001. Prior to January 2001, the County of Lake and the Superior Court entered into a memorandum of understanding under which the County continued to provide all personal services to the Court until (1) Court employees were placed in bargaining units other than existing County bargaining units; and (2) the Court adopted a set of Personnel Rules for Court employees. A copy of the memorandum of understanding, dated May 25, 1999, was provided with the Court's initial response to the unfair practice charge.

With regard to Unit Determinations, Section 14-57 provides as follows regarding unit modification:

57.1: Requests by employee organizations for modifications or redefinition of established units may be considered by the Employee Relations Officer only during the period specified in Section 14-55 of this division....

57.2: The Employee Relations Officer may, on his own motion, propose that an established unit be modified or redefined. The Employee Relations Officer shall give written notice of the proposed modification(s) to any affected employee organization during the period specified in Section 14-55 of this division and shall hold a consultation concerning the proposed modifications, at which time all affected employee organizations shall be heard if they so desire.

In August 1999, the County of Lake took the first step in separating Court employees by adding provisions to the County Code that established three (3) bargaining units for Court employees: (1) Court Employees, Non-Management; (2) Court Employees, Management; and (3) Court Employees, Confidential. The last unit is defined as follows:

Comprised of all employees, who, in the course of their duties, have access to information relating to the Court's administration of employer-employee relations.

The Confidential bargaining unit is comprised of only two classifications; (1) Lead Judicial Secretary; and (2) Judicial Secretary. As there are only four Superior Court judges, there are only four employees in this unit. The County placed the Judicial Secretary positions in the Confidential unit because of their duties, supporting the Court's four judges. As all four judges sit on the Court's Executive Committee, which sets Court policy and makes decisions regarding grievances, discipline and bargaining unit proposals, Judicial Secretaries are privy to the judge's confidential communications on these matters.¹

The County placed the Court Reporters in the Non-Management unit. As the Court Reporters had been exclusively represented by the Lake County Employees Association for over a decade they remained in the LCEA bargaining unit.² The LCEA made no attempt to seek representation of the Confidential employee unit, and as such, that unit remained unrepresented.

In 2000, Charging Party applied for and received the position of Judicial Secretary. At the time Charging Party assumed the position of Judicial Secretary, the position was included in the Confidential bargaining unit, which remained unrepresented.

¹ Charging Party refutes this statement arguing she was not involved in privy to confidential information.

² The Superior Court and the Lake County Employees' Association are parties to a series of collective bargaining agreements, the most recent of which expired on June 30, 2003.

On September 23, 2003, the Court issued Ms. Keiser a Notice of Proposed Disciplinary Action demoting Ms. Keiser from Lead Judicial Secretary to Judicial Secretary for refusing to be fingerprinted. Ms. Keiser appealed this disciplinary action, in the form of a grievance, to the County's Board of Supervisors, which reversed the demotion and issued Ms. Keiser a letter of reprimand instead. At the time of this discipline, the discipline of confidential Court employees was governed by the County's Personnel Rules.

In January 2004, the DOJ notified the County that Ms. Keiser had been convicted of two misdemeanors; (1) custodial child abduction and (2) passing bad checks. This information conflicted with Ms. Keiser's job applications. On February 6, 2004, the Court issued Ms. Keiser a Proposed Notice of Disciplinary Action. Thereafter, Ms. Keiser participated in a Skelley hearing regarding the discipline. On February 26, 2004, the Court issued Ms. Keiser a Notice of Termination for fraud in securing employment. Ms. Keiser was placed on immediate administrative leave pending her appeal. Ms. Keiser appealed this decision, and a hearing was held before the County's Board of Supervisors. Ms. Keiser asserted during her appeal that she believed both misdemeanors to be cleared from her record and that she had been a good employee. Ms. Keiser did not allege discrimination at any point during the terminations hearings. Among the papers presented to the Board of Supervisors by the County was Ms. Keiser's application for a concealed weapons permit which indicted she had been convicted of one misdemeanor.

On April 1, 2004, the Court issued a resolution pertaining to Court employees. This resolution noted that while the Court had adopted the County's Personnel Rules, recent passage of the Trial Court Act required the Court to alter the grievance and discipline policies for regular Court employees.³ As such, the Court issued its own ordinances pertaining to confidential and management employees as well as regular Court employees, noting that ordinance applying to regular Court employees were subject to the meet and confer requirement. Ordinance 1350, issued on that date, pertained to discipline for confidential and management employees. Ordinance 1350 provides for a disciplinary hearing before the Court Executive Committee, whose decision is not subject to appeal.

On April 27, 2004, the County issued a written decision overturning the termination and issuing Ms. Keiser a sixty (60) day suspension. The decision did find, however, that Ms. Keiser had secured her employment through "fraud." The termination was reduced largely because of Ms. Keiser's ten year performance record.

During Ms. Keiser's sixty day suspension, from February 27, 2004 through May 24, 2004, the Court discovered over a hundred instances of work-related neglect and violations of Court policy. Among the most significant was Charging Party's failure to recall a bench warrant, as ordered by the judge, which resulted in the defendant's arrest on the warrant.

³ The Trial Court Act requires an evidentiary hearing by an impartial hearing officer. However, Government Code section 71653 requiring such a hearing does not apply to confidential or management employees.

On May 24, 2004, the Court issued Ms. Keiser a 10 page single-spaced Notice of Termination. The notice included each and every instance of work-related neglect, including the failure to process 21 criminal complaints, failure to maintain court records, failure to respond to Court billings, improper use of Court equipment, improper use of trademark, and failure to follow judicial instructions in processing other matters.

On July 8, 2004, Ms. Keiser responded to the County's May 25, 2004, notice of termination. In her 18-page response to the Court, Ms. Keiser responded point-by-point to each of the 100 errors and omissions. In summary, she contended she was the victim of a Court conspiracy, the errors resulted from other employee's omissions and that she was not adequately trained for her position. Nowhere in the 18 page response does Ms. Keiser assert the reason for her termination was because of her protected activity. On July 28, 2004, the Court issued its decision to sustain the proposed termination.

On August 24, 2004, the Courts offered to provide Ms. Keiser with an evidentiary hearing in front of an independent hearing officer, despite the fact that Local Rule 1350 does not provide such review for confidential employees. In making this offer, the Court specifically noted that Ms. Keiser's classification was clearly confidential and that such an offer did not alter that classification. It does not appear Ms. Keiser responded to this offer. Instead, on August 30, 2004, Ms. Keiser filed this unfair practice charge. In investigating this charge, I was able to facilitate the scheduling of an impartial hearing of this matter before arbitrator Gerald McCay. However, the status of that hearing is unclear.

Based on the facts provided in the original and amended charges, as well as those presented during the injunctive relief investigation, the charge still fails to state a prima facie violation of the Trial Court Act, for the reasons provided below. Charging Party presents a number of new legal theories which will each be addressed in turn.

I. Duty to Meet and Confer (Gov. Code section 71634)

Charging Party contends the Court failed to meet and confer with her over a variety of negotiable subjects, including inclusion in the confidential unit and changes in disciplinary provisions, in violation of Government Code sections 71634, 71634.1, and 71634.2. However, as explained to Charging Party prior to the filing of the amended charge, Government Code section 71634, 71634.1 and 71634.2 require the Court to give notice and an opportunity to bargain to recognized employee organizations. For example, Government Code section 71634.2 provides as follows:

- (a) The trial court, or those representatives as it may designate, shall meet and confer in good faith regarding wages, hours and other terms and conditions of employment within the scope of representation, as defined in section 71634, with representatives of the recognized employee organization, as defined in section 71611...

Nothing in Government Code section 71634 or any other provision requires a trial court to meet and confer with individual employees. As the Court is not obligated to negotiate with its employees directly nor obligated to bargain such changes if no recognized employee organization is present, these allegations must be dismissed.

Charging Party also appears to be alleging the Court failed to meet and confer with LCEA over changes in her terms and conditions of employment. However, individual employees do not have standing to pursue employee organization rights to represent employee or be free from employer interference. (Oxnard School District (Gorcey) (1988) PERB Decision No. 667; California Department of Corrections (1993) PERB Decision No. 972-S.) Moreover, as explained above, LCEA is not Charging Party's exclusive representative and never has been. While Charging Party may choose to join LCEA for other benefits, LCEA does not represent Charging Party with regard to the terms and conditions of her employment. As such, the Court did not violate the Government Code by unilaterally changing the terms and conditions of Charging Party's employment.

II. Representation of Confidential Employees (Gov. Code sec. 71639)

Charging Party contends that because the LCEA was the exclusive representative of some Court employees prior to 1999, it should be found to be the exclusive representative of all Court employees, including confidential and management employees after passage of the Trial Court Act. In support of this contention, Charging Party cites Government Code section 71639. Government Code section 71639 states in relevant part as follows:

- (a) As of the implementation date of this chapter, an employee organization that is recognized as a representative of a group of trial court employees or the exclusive representative of an established bargaining unit of trial court employees, either by the county or the trial court, shall continue to be recognized by the trial court as a representative or the exclusive representative of the same trial court employees.

This provision does not, however, support Charging Party's allegation. Nothing herein demonstrates the Court failed to continue to recognize LCEA as the exclusive representative of the Court Reporters. Additionally, as I have explained numerous times, the LCEA was not Charging Party's exclusive bargaining representative at any time during her employment, and certainly not after she became a confidential employee in 2000. As such, there can be no violation of this provision and this allegation must also be dismissed.

Additionally, Charging Party contends this provision requires employers to provide notice to employees that they are not being represented by an employee organization. However, nothing in the Trial Court requires such notification. Moreover, Charging Party certainly had constructive knowledge that she was unrepresented as the LCEA contract specifically excluded her position. As such, this allegation is also dismissed.

III. Unlawful Discrimination (Gov. Code sec. 71635.1)

To establish a prima facie case of discrimination in violation of Government Code section 71635.1, the charging party must show that: (1) the employee exercised rights under the Trial Court 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 employee because of the exercise of those rights. (Campbell Municipal Employees Association v. City of Campbell (1982) 131 Cal.App.3d 416 (Campbell); San Leandro Police Officers Association v. City of San Leandro (1976) 55 Cal.App.3d 553.)⁴

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 in protected conduct. (Moreland Elementary School District (1982) PERB Decision No. 227.) Facts establishing one or more of the following nexus factors should be present: (1) the employer's disparate treatment of the employee (Campbell, supra); (2) the employer's departure from established procedures and standards when dealing with the employee (San Leandro Police Officers Association, supra.); (3) the employer's inconsistent or contradictory justifications for its actions (San Leandro Police Officers Association, supra.); (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) employer animosity towards union activists (San Leandro Police Officers Association, supra; Los Angeles County Employees Association v. County of Los Angeles (1985) 168 Cal.App.3d 683.).

Charging Party contends the Court discriminated against her because of her protected activity of speaking with Court Reporters about the wages and working conditions, and complaining about her unit placement. Initially, it is unclear whether Ms. Keiser engaged in any protected activity. While Ms. Keiser alleges she spoke with Court Reporters about their working conditions, she does not name these employees or provide declarations regarding their discussions. Moreover, the charge fails to provide any facts demonstrating the Court was aware of these conversations. With regard to her confidential unit placement, Ms. Keiser did not begin to complain about her unit placement until **after** she received notice of her termination. Ms. Keiser was well aware of her placement prior to the appeals of her termination and well aware she was an unrepresented employee, as the Lake County Employees Association did not seek to represent the confidential unit. Additionally, Ms. Keiser was aware the Association did not want to assist her with her employment matters.

Even assuming Charging Party engaged in some protected activity that was known to the courts, the charge fails to provide any facts demonstrating nexus. The Court followed the

⁴ When interpreting the Trial Court Act, it is appropriate to take guidance from cases interpreting the National Labor Relations Act and California labor relations statutes with parallel provisions. (Government Code section 71639.3; Firefighters Union v. City of Vallejo (1974)12 Cal.3d 608.)

applicable procedures in disciplining and terminating Ms. Keiser and cited relevant provisions of Ordinance 1350 in disciplining her. In fact, the Court appears to have gone beyond its own procedures in offering Ms. Keiser an evidentiary hearing. Additionally, the Court provided Ms. Keiser with the reasons for her termination and never shifted or wavered from those reasons. In fact, Ms. Reiser's work related problems began only after she refused to submit her fingerprints to the DOJ. Such insubordination is not protected activity. As such, this allegation is dismissed.

Right to Appeal

Pursuant to PERB Regulations,⁵ 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. (Regulation 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. (Regulations 32135(a) and 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 Regulation 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. (Regulations 32135(b), (c) and (d); see also Regulations 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. (Regulation 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 Regulation 32140 for the required contents and a sample form.) The document will be considered properly "served" when personally delivered

⁵ PERB's Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

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. (Regulation 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. (Regulation 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
General Counsel

By _____
Kristin L. Rosi
Regional Attorney

Attachment

cc: Joseph Wiley