STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

WILLIAM F. HORSPOOL,

Charging Party,

v.

STATE OF CALIFORNIA (DEPARTMENT OF CORRECTIONS),

Respondent.

Case No. LA-CE-570-S

PERB Decision No. 1806-S

January 5, 2006

Appearance: William F. Horspool, on his own behalf.

Before Whitehead, McKeag and Neuwald, Members.

DECISION

NEUWALD, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by William F. Horspool (Horspool) to the sua sponte dismissal of his complaint for failure to prosecute by an administrative law judge (ALJ). The complaint alleged a prima facie violation of the Ralph C. Dills Act (Dills Act) for retaliation.[1] The ALJ dismissed Horspool's complaint after Horspool failed to exercise due diligence in pursuing his claim and demonstrate good cause as to why the matter should not be dismissed.

The Board has reviewed the entire record in this matter, including, but not limited to: the unfair practice charge, the State of California (Department of Corrections) (State) response to the charge, the State's letter regarding resolution through contractual arbitration, the Board agent's warning letter, the amended unfair practice charge, complaint, the Board agent's notice of partial dismissal and deferral to arbitration, answer to complaint, Horspool's appeal of

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

deferral to arbitration of grievances, the PERB decision,[2] the ALJ's letter regarding order to show cause, Horspool's reply, the ALJ's notice of dismissal and Horspool's appeal of the dismissal. In light of its review, the Board affirms the ALJ's dismissal, subject to the discussion below.

BACKGROUND

Horspool, a Correctional Officer for the State at the California Rehabilitation Center (CRC) and a job steward for the California Correctional Peace Officers Association (CCPOA), filed an unfair practice charge on September 24, 2001 alleging failure to bargain in good faith, unilateral change, and retaliation. The failure to bargain in good faith and unilateral change were ultimately dismissed and not necessary for this decision. In regards to the retaliation claim, Horspool alleged that CRC retaliated against him for his involvement in protected activities, primarily for bringing a prior unfair practice charge, LA-CE-403-S.[3] Horspool alleged that as a result of his participating in Case No. LA-CE-403-S, CRC retaliated against him. Horspool filed a total of five grievances setting forth CRC's retaliatory conduct on the following dates: December 21 and 26, 2000, March 9 and 16, 2001, and May 1, 2001.

On July 29, 2002, the Board agent issued a warning letter (deferral to arbitration). The Board agent stated that "all allegations concerning retaliation must be deferred to arbitration

[2]State of California (Department of Corrections) (2003) PERB Decision No. 1546-S (Corrections).

[3]Horspool filed unfair practice charge LA-CE-403-S on May 13, 1997. The formal hearing for LA-CE-403-S commenced on September 1, 1999 and concluded on December 1, 2000. At the conclusion of the hearing, the parties were directed to submit briefs 20 days after receiving the final volume of the transcript. Because of Horspool's illness, the ALJ granted a short continuance. Thereafter, the ALJ requested information from Horspool, who was non-responsive. On May 21, 2003, the ALJ directed both parties to brief their respective positions and mail them no later than June 10, 2003. Six days past the due date, on June 16, 2003, the ALJ received Horspool's closing brief date stamped June 10, 2003. The ALJ dismissed Horspool's charges and the accompanying complaint on July 25, 2003. Horspool did not appeal the decision.

and will be dismissed." The Board agent reached this conclusion based on the collective bargaining agreement (CBA) between CCPOA and the State which culminated in binding arbitration.

Subsequently, on August 8, 2002, Horspool filed a first amended charge arguing that he exhausted the grievance machinery because CCPOA denied arbitration of his grievances. Horspool stated that CCPOA, pursuant to the CBA, received a copy of all the grievances. When CCPOA did not pursue the grievances to arbitration within the designated timeframes, Horspool argued that CCPOA ultimately denied arbitration. Horspool also referenced a letter dated April 5, 2002, from Rudy Jansen (Jansen), CCPOA Supervising Legal Counsel, who refused to arbitrate Horspool's December 26, 2000 grievance.

On October 31, 2002, the Board agent issued a notice of partial dismissal and deferral to arbitration as well as a complaint for the conduct alleged in Horspool's December 26, 2000 grievance. Horspool appealed the Board agent's partial dismissal and deferral of his unfair practice charge to arbitration on November 18, 2002. The Board's decision in Corrections dismissed Horspool's appeal as improper on August 13, 2003. On the date of the dismissal, PERB's Appeals Assistant prepared and signed a proof of service by mail, which stated that she placed a copy of the Board's decision in "a sealed envelope, for collection and mailing in the United States Postal Service" with "postage thereon fully prepaid." The envelope was addressed to his home address. The envelope was never returned.

In February 2003, the case was scheduled for a formal hearing. It was placed in abeyance, however, pending the outcome of the earlier charge, LA-CE-403-S. A proposed decision for Case No. LA-CE-403-S was issued on July 25, 2003. Horspool did not appeal the decision.

After receiving the decision in Case No. LA-CE-403-S, Horspool did not take any action pertaining to the present case. He did not make any attempt to reactivate the case and move it to formal hearing or contact the ALJ to ask for a continuance. Additionally, all attempts by the ALJ to reach Horspool in 2003 and 2004 were unsuccessful. Finally, on December 13, 2004, the ALJ wrote a letter to Horspool directing him to demonstrate good cause by December 31, 2004 for the delay in prosecuting this matter.

Two days later, December 15, 2004, Horspool contacted the ALJ. On December 26, 2004, Horspool followed up with a letter originating from the same address that PERB's Appeals Assistant sent the Board's denial. Horspool offered the following reasons for his delay:

1. He did not receive a copy of the Board's decision dismissing his appeal.

2. CCPOA had yet to make a determination regarding his request for CCPOA to arbitrate his grievances and represent him in the present matter. Horspool stated that two years ago he submitted a request to CCPOA regarding arbitrating his grievances. He tried several times over the course of the two years to contact CCPOA regarding the status of his request and was unsuccessful. He did not receive a response from CCPOA until he contacted CCPOA headquarters.

Additionally, Horspool restated the facts alleged in the complaint and requested that the ALJ help to resolve this matter informally. Horspool concluded stating "[h]owever, if I have not demonstrated 'good cause' and you are unwilling or unable to resolve this at an informal level, then I request to move to a formal hearing." Horspool conditioned a hearing on his availability. Horspool stated that he was not available for a hearing until August 2005 because he was temporarily totally disabled. Specifically, Horspool stated that he was to begin

physical therapy in January and surgery was scheduled for June 29, 2005. Horspool did not provide any documentation regarding his medical condition.

On January 19, 2005, the ALJ dismissed Horspool's complaint for lack of prosecution. Horspool excepts to the dismissal of the complaint.

DISCUSSION

I. An ALJ's Authority to Dismiss a Complaint Sua Sponte for Failure to Prosecute

A prior PERB regulation automatically dismissed complaints where a request for hearing was not filed within six months from the date of the issuance of the complaint.[4] That PERB regulation, however, was repealed effective January 28, 1989. Thus, the issue of whether an ALJ can dismiss a complaint sua sponte for lack of prosecution is a matter of first impression. The Board holds, notwithstanding the repeal and based on the following analysis, that ALJs have discretionary authority to dismiss a complaint sua sponte for failure to prosecute absent a showing of good cause.

In Los Angeles Unified School District (1984) PERB Decision No. 464, PERB recognized the inherent right of the ALJ to control the proceedings before him or her. Such power is also vested by PERB's regulations. PERB Regulation 32170 provides, in part:

> The Board agent conducting a hearing shall have the power and duties to:
>
> (d) Regulate the course and conduct of the hearing, including the power to exclude a witness from the hearing room;

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[4]PERB regulations are codified at California Code of Regulations, title 8, section 31001, et seq. PERB Regulation 32652 provided, in relevant part:

> If the informal conference procedure fails to result in a voluntary settlement, any party thereafter may file with the Board a request for hearing or the Board may order a hearing. If a request for hearing is not filed within six months from the date of the issuance of the complaint, the complaint will be dismissed.

> (m) Carry out the duties of administrative law judge as provided or otherwise authorized by these regulations or by the applicable Act.

Similarly, courts have found "the power of a trial court to dismiss an action for failure on the part of the plaintiff to prosecute it with diligence is an **inherent power** [emphasis added] which exists independent of statutory provisions and that the provisions of section 583 of the Code of Civil Procedure [now 583.410] and other related sections must be read in light of the existence of such inherent power."[5] (Netzley v. Hillstrom (1954) 122 Cal.App.2d 417 [265 P.2d 57].) An ALJ, therefore, has discretionary authority to dismiss a complaint sua sponte for lack of prosecution absent a showing of good cause. As a consequence, charging parties have the responsibility to exercise due diligence in prosecuting their claims.

II. Due Diligence

A review of the facts in this case clearly indicates that Horspool failed to exercise due diligence in prosecuting this matter. The hearing, originally scheduled for February 2003, was postponed because Horspool requested the matter be placed in abeyance pending the outcome of his other alleged unfair practice charge, LA-CE-403-S. On June 25, 2003, the ALJ issued the proposed decision in Case No. LA-CE-403-S. From June 25, 2003 until December 15, 2004, Horspool did not take any action regarding the present action. He neither contacted the ALJ nor returned the ALJ's phone calls. Only when threatened with dismissal did Horspool make an effort to communicate with the ALJ. Failure to take any action for eighteen months is not due diligence. The ALJ, therefore, had discretion to dismiss the complaint unless Horspool demonstrated good cause.

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[5]Code of Civil Procedure section 583.410(a) provides, in relevant part:

> '[t]he court may in its discretion dismiss an action for delay in prosecution pursuant to this article on its motion or on motion of the defendant it to do so appears to the court appropriate under the circumstances of the case.'

III. Good Cause

To determine whether good cause exists, we adopt the general standard enunciated in California State University (1984) PERB Decision No. 468-H (CSU);

> We feel the proper approach is to weigh the nature of the reasons asserted to be 'good cause' against the length of the delay and the possible prejudice to the opposing party. In general, for 'good cause' to be found, a party's request for an extension should be based on circumstances that are unanticipated or beyond the party's control.

In CSU, the Board found that Howard O. Watts' (Watts) physical problems were neither unanticipated nor insuperable. Watts' physical disabilities were apparently longstanding ailments and that, despite his physical condition, he managed to file complaints and appeals, appear at school board meetings, and participate in informal conferences. The Board continued stating that "it is clear that any problems resulting from his physical infirmities [were] neither unanticipated nor insuperable; Mr. Watts [sic] successfully managed to pursue considerable legal action in the past despite his continuing ailments."

Horspool alleges a myriad of reasons to demonstrate good cause.[6] First, Horspool alleges that his complaint should not be dismissed due to his medical condition. Similar to Watts, however, Horspool's medical condition is a longstanding ailment dating back to at least 2000. Since 2000, Horspool filed five grievances, attended step procedures for his grievances, participated in a hearing, and filed an appeal before PERB. Given his ability to engage in such

[6]On appeal, Horspool presented new charge allegations and new supporting evidence that were not previously presented and that were known to Horspool when he filed his letter to show good cause as to why his complaint should not be dismissed. Specifically, Horspool produced documentation concerning his medical condition as well as his claim that he believed the matter to be in abeyance. PERB Regulation 32635(b), however, precludes a charging party from raising new allegations or new supporting evidence on appeal without good cause. Because Horspool fails to demonstrate good cause for the presentation of new allegations and/or supporting evidence on appeal, these items were not considered.

activities, it is clear that Horspool's physical infirmities are neither unanticipated or insuperable.

Second, Horspool alleges that CCPOA's lack of response to his requests for arbitration and representation were beyond his control. While it is true that Horspool does not possess the authority to order CCPOA to make a determination, it appears that Horspool was lackadaisical in seeking a response. Horspool submitted a request to arbitrate his grievances and representation to CCPOA two years ago. He then tried unsuccessfully to contact Jansen. It was not until Horspool telephoned CCPOA headquarters that he talked with Jansen only to discover that no action was taken. Horspool should have taken a more proactive approach, especially considering his position as job steward for CCPOA. He should have telephoned or written CCPOA headquarters sooner and demanded action. Additionally, Horspool should have contacted the ALJ to inform him of the status of his grievances. Based on these facts, Horspool fails to demonstrate that CCPOA's lack of response was beyond his control.

Lastly, Horspool alleges that he never received the Board's decision dismissing his appeal of the partial dismissal of his charge. The Board's proof of service regulations are modeled after service requirements of the California Code of Civil Procedure and are designed to inform the Board that all parties to a proceeding received all documents filed before or by the Board regarding that case. (Los Angeles Community College District (1980) PERB Decision No. 153.) Furthermore, as a general rule, "[a] letter correctly addressed and properly mailed is presumed to have been received in the ordinary course of mail." (Evidence Code sec. 641; 1 Witkin, Cal. Evidence (4th ed. 2000) Burden, subsec. 78.) This presumption can be rebutted by evidence that the letter was not received. If contrary evidence is introduced, the trier of fact weighs the evidence presented and makes a determination whether the letter was

received. (Evidence Code sec. 604; Craig v. Brown & Root, Inc. (2000) 84 Cal.App.4th 416 [100 Cal.Rptr.2d 818].)

Horspool contends that he never received the Board's decision dismissing his appeal. However, contrary evidence supports another conclusion. The Board issued its decision in Corrections on August 13, 2003, dismissing Horspool's appeal. On that day, PERB's Appeals Assistant prepared and signed a proof of service by mail, which stated she placed a copy of the Board's decision in "a sealed envelope for collection and mailing in the United States Postal Service" with "postage thereon fully prepaid." The envelope was addressed to Horspool at the same address to which his December 26, 2004 letter was mailed. The envelope was not returned as undeliverable. In addition, Horspool clearly received correspondence sent to the same address by the ALJ dated December 13, 2004 and January 19, 2005 regarding the dismissal of his complaint for failure to prosecute. These factors weigh in support of the conclusion that Horspool received the Board's decision in August 2003.

Even assuming Horspool did not receive the Board's decision, he should have taken action to determine the status of his appeal. Horspool appealed the Board agent's partial dismissal and deferral on November 18, 2002. On December 26, 2004, he claims he still did not know the status. His failure to determine the status for over two years is inexcusable and not beyond his control.

Because Horspool failed to demonstrate reasons that were either unanticipated or beyond his control, it is unnecessary at this time for the Board to consider whether there was any possible prejudice to the opposing party. Therefore, Horspool's complaint is dismissed for lack of prosecution.

ORDER

The complaint in Case No. LA-CE-570-S is hereby DISMISSED.

Members Whitehead and McKeag joined in this Decision.