STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

WILLIAM F. HORSPOOL, Charging Party, v. STATE OF CALIFORNIA (DEPARTMENT OF CORRECTIONS & REHABILITATION), Respondent.	Case No. LA-CE-634-S PERB Decision No. 1923-S September 27, 2007

Appearances: William F. Horspool, on his own behalf; State of California (Department of Personnel Administration) by Lori A. Green, Legal Counsel, for State of California (Department of Corrections & Rehabilitation).

Before Neuwald, Chair; Shek and McKeag, Members.

DECISION

NEUWALD, Chair: This case is before the Public Employment Relations Board (PERB or Board) on appeal by William F. Horspool (Horspool) of a Board agent's dismissal (attached) of an unfair practice charge. The charge alleged that the State of California (Department of Corrections & Rehabilitation) (State) violated the Ralph C. Dills Act (Dills Act)[1] by retaliating against Horspool for his protected activities, interfering with his right to engage in protected activities and by engaging in bad faith and surface bargaining. Horspool alleged that this conduct constituted a violation of Dills Act sections 3517.61 and 3519.

The Board has reviewed the unfair practice charge, the amended unfair practice charge and attached documents, the warning and dismissal letters, Horspool's appeal of the dismissal,

[1]The Dills Act is codified at Government Code section 3512, et seq.

and the State's opposition to the appeal. The Board finds the Board agent's dismissal to be free of prejudicial error and adopts it as a decision of the Board itself.

On appeal, Horspool presents new charge allegations and new supporting evidence that were not previously presented and that were known to Horspool when he filed his unfair practice charge and amended unfair practice charge. PERB Regulation 32635(b)[2] precludes a charging party from raising new allegations or new supporting evidence on appeal without good cause. Horspool has failed to demonstrate good cause for the presentation of new allegations and/or supporting evidence on appeal, and nothing in the documents filed related to the appeal indicates good cause.

ORDER

The unfair practice charge in Case No. LA-CE-634-S is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Shek and McKeag joined in this Decision.

[2]PERB regulations are codified at California Code of Regulations, title 8, section 31001, et seq.

STATE OF CALIFORNIA
ARNOLD SCHWARZENEGGER, Governor
PUBLIC EMPLOYMENT RELATIONS BOARD

Los Angeles Regional Office
3530 Wilshire Blvd., Suite 1435
Los Angeles, CA 90010-2334
Telephone: (213) 736-3008
Fax: (213) 736-4901

May 17, 2006

William F. Horspool

Re: William F. Horspool v. State of California (Department of Corrections & Rehabilitation)
Unfair Practice Charge No. LA-CE-634-S
DISMISSAL LETTER

Dear Mr. Horspool:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on October 11, 2005. You allege that the State of California (Department of Corrections & Rehabilitation) (CRC) violated the Ralph C. Dills Act (Dills Act)[1] by retaliating against you for your protected activities, interfering with your right to engage in protected activities and by engaging in bad faith and surface bargaining.

I indicated to you in my attached letter dated April 17, 2006, 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 April 27, 2006, the charge would be dismissed. You contacted me on or about April 27, 2006 and I granted you an extension to May 10, 2006, to file an amended charge. You contacted me again on or about May 10, 2006 and I told you I would accept your amended charge after May 10, 2006 if you placed it in the mail on May 10, 2006. I received your amended charge on May 12, 2006.

In your amended charge you provided the following information:

On September 24, 2001, you originally filed unfair practice charge LA-CE-570-S wherein you discussed the same incidents and charges you discuss in this charge, that is, five grievances you filed against the CRC between December 21, 2000 and May 1, 2001: 1) miscalculation of Industrial Disability Leave (IDL) benefits; 2) denied request for reclassification; 3) Letter of Instruction (LOI); 4) denial of paid status after medical clearance; and 5) LOIs you filed on behalf of Officer Buchanan. In LA-CE-570-S, you alleged that the CRC's actions that formed the basis of your five grievances were also violations of the Dills Act in that the CRC failed to bargain in good faith, made unilateral changes and retaliated against you.

[1] The Dills Act is codified at Government Code section 3512 et seq. The text of the Dills Act and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

On July 26, 2002, CRC sent PERB a letter waiving all contract based procedural defenses and agreed to resolve LA-CE-570-S through contractual arbitration.

On October 31, 2002, the Board Agent in LA-CE-570-S dismissed your charge. The Board Agent explained that you lacked standing to raise charges of bad faith bargaining and unilateral change. The Board Agent also explained that in so far as your charge alleged the CRC retaliated against you by miscalculating IDL benefits and denying paid status following medical clearance, the allegations involved interpretation of the MOU and would be dismissed and deferred to arbitration. The Board Agent issued a complaint regarding your allegation that the CRC retaliated against you by denying your request for reclassification to full time employment.[2]

On April 12, 2005, the California Correctional Peace Officers Association (Association) refused to proceed to arbitration on your IDL grievance because MOU article 13.06(G) bars arbitration of disputes relating to an employee's denial of benefits. Also on April 12, 2005, the Association refused to proceed to arbitration on your grievance regarding the denial of paid status following medical clearance grievance because CRC was allowed, under the MOU, to inquire and request clarification of the medical clearance, which is what CRC did.

On May 4, 2005, you sent a letter to the Department of Personnel Administration (DPA) to appeal the decision to refuse to proceed to arbitration over the denial of paid status following medical clearance.

On May 12, 2005, you sent a letter to the DPA to appeal the decision to refuse to proceed to arbitration over the IDL benefit dispute.

On August 23, 2005, Linda A. Mayhew, Administrative Law Judge at the DPA Statutory Appeals Unit, wrote to inform you DPA had no jurisdiction over issues subject to resolution through arbitration provided in the collective bargaining agreement. She also stated she was forwarding your correspondence to Ed Takach, the Labor Relations Officer for Bargaining Unit 6. She also stated she was forwarding your appeal of the IDL benefit calculation to Keith Mentzer, Manager, DPA Benefits Division, for review under DPA Rule 599.768, if applicable.

On October 11, 2005, you filed this unfair practice charge and you claim the arbitration proceedings are futile and you seek PERB's help in resolving your disputes with CRC.

Futility

In State of California (Department of Personnel Administration) (1986) PERB Decision No. 600-S, the Board concluded that a lengthy grievance and arbitration machinery, in this case estimated at 4 to 14 months, does not demonstrate futility. However, PERB has found that deferral would be futile when the integrity of the arbitration process itself is at issue

[2] This culminated in State of California (Department of Corrections) (2006) PERB Decision No. 1806-S.

(California State University (1984) PERB Decision No. 392 -H) and when a union is unwilling to take an individual grievant's dispute to arbitration (State of California (Department of Parks and Recreation) (1995) PERB Decision No. 1125-S).

Here, on July 22, 2002, CRC agreed to arbitrate LA-CE-570-S but on April 12, 2005, the Association refused to take the grievances regarding IDL benefits and denied paid status after medical clearance to arbitration. Therefore, you have demonstrated continued attempts to use the arbitration process for these two allegations is futile.

You alleged in your IDL grievance that the CRC failed to pay IDL benefits in July and August, 1999 and failed to make calculations that reflected the full net pay or gross pay concerning your February 11, 1997 and March 22, 1997 injuries. You filed your grievance on December 21, 2000. You alleged in your grievance over the denial of paid status following medical clearance that the CRC improperly refused to place you on paid status on January 5, 2001. You filed your grievance on March 16, 2001. On April 12, 2005, the Association refused to proceed to arbitration on both grievances. You filed this unfair practice charge on October 11, 2005.

As stated in my April 17, 2006, letter, PERB is prohibited from issuing a complaint with respect to "any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge." Government Code section 3514.5(a) provides: "...The board shall, in determining whether the charge was timely filed, consider the six-month limitation set forth in this subdivision to have been tolled during the time it took the charging party to exhaust the grievance machinery."

IDL grievance

You knew or should have known about the conduct underlying the IDL grievance by August 30, 1999 since part of that grievance alleges you were not paid IDL benefits for July and August, 1999. You filed this unfair practice charge 6 years, 1 month and 11 days later on October 11, 2005. The statute of limitations is tolled while the grievance is pursued so the period from December 21, 2000, until April 12, 2005, 4 years, 3 months and 22 days, is subtracted from the 6 years, 1 month and 11 days. Therefore, considering section 3514.5(a) tolling, approximately 1 year, 9 months and 20 days have elapsed since the date you knew or should have known about the conduct underlying your IDL grievance. Since this is more than six months, the allegation is time barred.

Grievance over denied paid status after medical clearance

You knew about the conduct underlying the denial of paid status grievance on January 5, 2001, when Ms. Mallory, CRC Return to Work Coordinator, refused to return you to work. You filed this unfair practice charge 4 years, 9 months and 6 days later on October 11, 2005. The statute of limitations is tolled while the grievance is pursued so the period from March 16, 2001 until April 12, 2005, 4 years and 28 days, is subtracted from the 4 years, 9 months and 6 days. Therefore, considering section 3514.5(a) tolling, approximately 8 months and 8 days

have elapsed since the date you knew about the conduct underlying your denial of paid status grievance. Since this is more than six months, the allegation is time barred.

Therefore, I am dismissing the charge based on the facts and reasons contained here and in my April 17, 2006 letter.

Right to Appeal

Pursuant to PERB Regulations,[3] 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 during a regular PERB business day. (Regulations 32135(a) and 32130; see also Government Code section 11020(a).) A document is also considered "filed" when received by facsimile transmission before the close of business 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.) The document will be considered properly "served" when personally delivered or deposited in the mail or deposited with a delivery service and properly addressed. A document may also be

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

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
Mary Creith
Regional Attorney

Attachment

cc: Lori A. Green, Legal Counsel

STATE OF CALIFORNIA ARNOLD SCHWARZENEGGER, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD

Los Angeles Regional Office
3530 Wilshire Blvd., Suite 1435
Los Angeles, CA 90010-2334
Telephone: (213) 736-3008
Fax: (213) 736-4901

April 17, 2006

William F. Horspool

Re: William F. Horspool v. State of California (Department of Corrections & Rehabilitation)
Unfair Practice Charge No. LA-CE-634-S
WARNING LETTER

Dear Mr. Horspool:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on October 11, 2005. You allege that the State of California (Department of Corrections & Rehabilitation) (CRC) violated the Ralph C. Dills Act (Dills Act)[1] by retaliating against you for your protected activities, interfering with your right to engage in protected activities and by engaging in bad faith and surface bargaining.

On December 21, 2000, you filed a grievance regarding incorrect payments and calculations of Industrial Disability Leave (IDL) benefits. The CRC responded by performing an audit and they determined you were overpaid and docked your pay. You discovered errors in the audit and brought this to CRC's attention during a grievance conference. You filed this grievance at the third and fourth levels. You contend CRC's responses to your grievance at all four levels were vague, ambiguous and unrelated to the grievance. You made a request for arbitration that was denied on April 12, 2005. Since the grievance involved IDL, you were able to appeal the denial of your request for arbitration to the Department of Personnel Administration (DPA). You pursued the appeal at DPA but you state it has stalled and you are unable to get a response from DPA.

On December 26, 2000, you filed a grievance questioning why you were not granted a change in base time. You were eligible to go from permanent intermittent status to full time status and you were first on the list. You filed an unfair practice charge, LA-CE-570-S, and PERB issued a complaint. The case proceeded to the Administrative Law Division of PERB for hearing and you state that on January 19, 2005, the Administrative Law Judge assigned to the case dismissed it because he determined you abandoned the case. You also state that the charge is currently on appeal before the Board.

[1] The Dills Act is codified at Government Code section 3512 et seq. The text of the Dills Act and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

On March 9, 2001, you filed a grievance challenging a Letter of Instruction (LOI) given to you on March 8, 2001. The LOI was dated July 15, 1998 and involved an incident that occurred on April 11, 1997. Before the grievance conference, CRC, through its agent Lt. Halberg, inadvertently provided you a copy of CRC's predetermined response to your grievance. You believe this is proof that the CRC engaged in surface bargaining. You refused to return the document to Halberg. Officer Agundez, your California Correctional Peace Officers Association (CCPOA) Job Steward, was present during the incident. CRC threatened to charge you with insubordination if you did not comply with Lt. Halberg's orders that you return the CRC's response to the grievance. On March 28, 2001, Sgt. Huskstep gave you a memo warning you that you were insubordinate and it would not be tolerated. On April 2, 2001, you wrote a memo to the CCPOA documenting the incident. In April 2001, CRC questioned Agundez about the incident and you believe CRC's questioning of Agundez constituted unlawful intervention into a protected activity. You state that the grievance was partially granted but none of the remedies have been granted.

On March 16, 2001, you filed a grievance regarding a dispute about your return to work. You pursued the grievance through all four levels and the CRC's response at each level was, you state, vague, ambiguous, non-responsive and unrelated to the grievance. The CRC denied your request for arbitration on April 12, 2005. You state that since this dispute involved Industrial Disability Leave, you were able to appeal to the DPA. You state this appeal has stalled and you are unable to get a response from DPA.

On May 1, 2001 a grievance was filed after you prepared it on behalf of another employee, Officer Buchanan. You were listed as the representative but you were unable to attend the grievance conference. You state that Officer Buchanan told you that CRC admitted there was a problem but they denied the grievance. However, you state the grievance was later granted in a "mini arb."

You contend that the above-described conduct demonstrates arbitration is futile and you also appear to contend that CRC failed to meet in good faith, engaged in surface bargaining, retaliated against you and interfered with your right to engage in protected activities.

Discussion

PERB Regulation 32615(a)(5) requires, inter alia, that an unfair practice charge include a "clear and concise statement of the facts and conduct alleged to constitute an unfair practice." Thus, the charging party's burden includes alleging the "who, what, when, where and how" of an unfair practice. (State of California (Department of Food and Agriculture) (1994) PERB Decision No. 1071-S, citing United Teachers-Los Angeles (Ragsdale) (1992) PERB Decision No. 944.) Mere legal conclusions are not sufficient to state a prima facie case. (Ibid.; Charter Oak Unified School District (1991) PERB Decision No. 873.) In Regents of the University of California (2004) PERB Decision No. 1592-H, the Board held that a conclusory statement alleging violations of HEERA followed by 300 pages of documents failed to provide a clear and concise statement of the facts as required by PERB Regulation 32615(a)(5).

You discuss five grievances in this unfair practice charge and you attached more than 200 pages of documents.[2] Your charge fails to meet your obligation under PERB Regulation 32615(a)(5) to provide a clear and concise statement of the facts and will be dismissed.

Statute of Limitations

Dills Act section 3514.5(a)(1) prohibits PERB from issuing a complaint with respect to "any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge." The limitations period begins to run once the charging party knows, or should have known, of the conduct underlying the charge. (Gavilan Joint Community College District (1996) PERB Decision No. 1177.) The statute of limitations is an affirmative defense which has been raised by the respondent in this case. (Long Beach Community College District (2003) PERB Decision No. 1564.) Therefore, charging party now bears the burden of demonstrating that the charge is timely filed. (cf. Tehachapi Unified School District (1993) PERB Decision No. 1024; State of California (Department of Insurance) (1997) PERB Decision No. 1197-S.)

From what I can gather, all the incidents you discuss occurred in 2000-2001 and as such, the charge is not timely and will be dismissed. And, even if you were to clarify the issues and demonstrate the charge is timely, you lack standing to demonstrate a prima facie case of bad faith bargaining or surface bargaining and you have not demonstrated a prima facie case of retaliation or interference, as explained below.

Bad Faith Bargaining

The Board has held that an individual employee does not have standing to pursue violations of the rights of an employee organization. (State of California (Department of Corrections) (1993) PERB Decision No. 972-S.) In addition, individual employees lack standing to allege that an employer has failed to bargain in good faith. (Oxnard School District (1988) PERB Decision No. 667.)

Since you are an individual employee and not an employee organization, you do not have standing to allege that the CRC failed to meet and confer in good faith.

Surface Bargaining

The charge alleges that the employer violated Dills Act section 3519(c) by engaging in bad faith or "surface" bargaining. It is the essence of surface bargaining that a party goes through the motions of negotiations, but in fact is weaving otherwise unobjectionable conduct into an entangling fabric to delay or prevent agreement. (Muroc Unified School District (1978) PERB Decision No. 80.)

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[2] You did not identify which documents among the attachments are relevant to which charge nor did you provide an index or any other device to assist in navigating the voluminous attachments.

Here, you allege the CRC engaged in surface bargaining when it predetermined its response to your grievance. However surface bargaining refers to unlawful bargaining that occurs in the context of negotiations between an employer and exclusive representative. While the CRC and CCPOA have standing to allege surface bargaining, individual employees, such as yourself, do not have such standing.

Retaliation

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 (Novato); Carlsbad Unified School District (1979) PERB Decision No. 89.)

Although the timing of the employer's adverse action in close temporal proximity to the employee's protected conduct is an important factor (North Sacramento School District (1982) PERB Decision No. 264), 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 (State of California (Department of Transportation) (1984) PERB Decision No. 459-S); (2) the employer's departure from established procedures and standards when dealing with the employee (Santa Clara Unified School District (1979) PERB Decision No. 104.); (3) the employer's inconsistent or contradictory justifications for its actions (State of California (Department of Parks and Recreation) (1983) PERB Decision No. 328-S; (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; (6) employer animosity towards union activists (Cupertino Union Elementary School District) (1986) PERB Decision No. 572.); or (7) any other facts which might demonstrate the employer's unlawful motive. (Novato; North Sacramento School District, supra, PERB Decision No. 264.)

You contend that the CRC retaliated against you for engaging in protected activities. Apparently you are alleging that the outcomes of your grievances were determined in retaliation against you. None of the information you provided demonstrates a nexus between your protected activities and the CRC's conduct with regard to your grievances.

Interference

To demonstrate a prima facie case of interference, the charging party must show that the respondent's conduct tends to or does result in some harm to employee rights guaranteed by the Dills Act. (Carlsbad Unified School District (1979) PERB Decision No. 89, State of

California, Department of Developmental Services (1982) PERB Decision No. 228-S.) The charging party must show that the employer's communications would tend to coerce or interfere with a reasonable employee in the exercise of protected rights. The fact, that employees may interpret statements, which are otherwise protected, as coercive does not necessarily render those statements unlawful. (Regents of the University of California (1983) PERB Decision No. 366-H, fn. 9, pp. 15-16; BMC Manufacturing Corporation (1955) 113 NLRB 823 [36 LRRM 1397].) The Board has also held that statements made by an employer are to be viewed in their overall context (i.e., in light of surrounding circumstances) to determine if they have a coercive meaning. (Los Angeles Unified School District (1988) PERB Decision No. 659, p. 9, and cases cited therein.)

You allege that CRC's questioning of Agundez was unlawful intervention into a protected activity. The information you provided does not demonstrate that CRC's inquiry into the incident wherein you refused to return the copy of CRC's response to your grievance would tend to coerce or interfere with a reasonable employee in the exercise of any protected rights.

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 that 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 April 27, 2006, I shall dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Mary Creith
Regional Attorney

MC