

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



STEVEN R. SWAN,

Charging Party,

v.

STATE OF CALIFORNIA (DEPARTMENT OF
CORRECTIONS & REHABILITATION),

Respondent.

Case No. SA-CE-1663-S

PERB Decision No. 1961-S

June 17, 2008

Appearances: Law Office of Steven B. Bassoff by Steven B. Bassoff, Attorney, for Steven R. Swan; State of California (Department of Personnel Administration) by Amir H. Ameri, Legal Counsel, for State of California (Department of Corrections & Rehabilitation).

Before Neuwald, Chair; Wesley and Dowdin Calvillo, Members.

DECISION

DOWDIN CALVILLO, Member: This case comes before the Public Employment Relations Board (PERB or Board) on appeal by Steven R. Swan (Swan) of a Board agent's dismissal (attached) of an unfair practice charge. The amended charge alleged that the State of California (Department of Corrections & Rehabilitation) (State) violated the Ralph C. Dills Act (Dills Act)¹ by denying Swan's bids for assignments at a private hospital pursuant to the post and bid procedures contained in an agreement between the State and the California Correctional Peace Officers' Association, the exclusive representative of Swan's bargaining unit. Swan alleged that the State's conduct violated section 3519(a) of the Dills Act.

The Board has reviewed the entire record in this matter, including but not limited to, the original and amended unfair practice charge, the State's position statement, the Board agent's warning and dismissal letters, Swan's appeal and the State's opposition thereto. Based on this

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

review, the Board adopts the Board agent's warning and dismissal letters as the decision of the Board itself, as supplemented by the discussion below.

On appeal, the State asserts for the first time that the charge was not timely filed because Swan knew in 2004 that Queen of the Valley Medical Center (QVMC) did not want him assigned to positions at its facility and therefore his subsequent bids for assignments at QVMC would be denied. 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.) A charging party bears the burden of demonstrating that the charge is timely filed. (State of California (Department of Insurance) (1997) PERB Decision No. 1197-S.)

Swan has met that burden. The original charge alleged that the State violated the Dills Act by denying Swan's bid requests on January 15, 2008. The charge was filed on February 28, 2008, well within six months after the State denied Swan's bid. Further, the charge alleges no facts indicating Swan knew, or should have known, before January 15, 2008, that the State would reject his bid for assignment at QVMC. Accordingly, the charge was timely filed.

ORDER

The unfair practice charge in Case No. SA-CE-1663-S is hereby DISMISSED
WITHOUT LEAVE TO AMEND.

Chair Neuwald and Member Wesley joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD

Office of the General Counsel
1031 18th Street
Sacramento, CA 95811-4124
Telephone: (916) 327-8383
Fax: (916) 327-6377



April 2, 2008

Steven B. Bassoff, Attorney
Law Office of Steven Bassoff
1220 S Street, Ste. 100
Sacramento, CA 95814-7138

Re: Steven R. Swan v. State of California (Department of Corrections & Rehabilitation)
Unfair Practice Charge No. SA-CE-1663-S
DISMISSAL LETTER

Dear Mr. Bassoff:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on February 28, 2008. Steven R. Swan (Charging Party) alleges that the State of California (Department of Corrections & Rehabilitation) (State or CDCR) violated the Ralph C. Dills Act (Dills Act or Act)¹ by denying him an assignment for which he submitted a bid.

In the attached Warning Letter dated March 17, 2008, Charging Party was informed that the above-referenced charge did not state a prima facie case. Charging Party was advised that, if there were any factual inaccuracies or additional facts that would correct the deficiencies explained in that letter, the charge could be amended. Charging Party was further advised that, unless the charge was amended to state a prima facie case or withdrawn prior to March 27, 2008, the charge would be dismissed.

On March 26, 2008, Charging Party filed a First Amended Charge with PERB.

The Original Charge and Warning Letter

The statement of the original charge consisted in its entirety of the following:

Steven R. Swan is employed as a correctional officer by the California Department of Corrections and Rehabilitation (CDCR) at the California Medical Facility (CMF) in Vacaville, California. Swan meets all the eligibility requirements for the personnel preferred post assignments (PPPA) procedure. Under the PPPA procedure, correctional officers bid for assignments within CMF on the basis of seniority. The assignments were to begin on February 11, 2008. Bid sheets were due on January 11, 2008 and

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.

Swan submitted bids on that day. The first 10 PPPAs for which Swan bid consisted of either being assigned to Queen of the Valley Medical Center (QVMC) at Napa, California or serving as a community hospital officer that required working at QVMC. Because of his seniority, Swan was entitled to at least one of the 10 PPPAs for which he submitted bids. However, on January 15, 2008, Swan was notified by a CMF personnel assistant lieutenant under the direction of the employment relations officer that he "may not bid for any position" at QVMC or any community hospital officer position, as these positions require staff to work at QVMC. 8 of the 10 PPPAs Swan bid on were community hospital officer positions, and no other bids were made by any other correctional officer for five of these positions that were currently vacant on January 15, 2008. Swan was advised that the reason he was not assigned to any of the PPPAs in question was because QVMC did not want him assigned to these positions. CDCR is interfering with and denying Swan employment rights guaranteed under the Dills Act by following QVMC's direction and refusing to [award] Swan one of the PPPAs for which he submitted bids and was eligible to receive. Swan seeks to be assigned to one of the positions for which he submitted his bid and also be awarded any lost overtime that he would have received from that position for the period February 11, 2008.

As discussed more fully therein, the Warning Letter concluded that the charge as written failed to state a prima facie interference violation as the charge failed to demonstrate that CDCR had interfered with any rights granted to Charging Party by the Dills Act. In addition, the Warning Letter concluded that the charge failed to demonstrate that Charging Party engaged in protected activity prior to the denial of his PPPA bids, or that CDCR had knowledge of such activity, or that CDCR took the complained-of actions because of any prior protected activity by Charging Party.

First Amended Charge

The statement of the charge, as amended, reads in its entirety as follows:

PURSUANT TO GOVERNMENT CODE SECTION 3517, THE CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION (CDCR) AT THE CALIFORNIA MEDICAL FACILITY (CMF) IN VACAVILLE, CALIFORNIA REACHED AN AGREEMENT IN MID-DECEMBER 2007 WITH THE LOCAL CHAPTER OF THE CALIFORNIA CORRECTIONAL PEACE OFFICERS ASSOCIATION (CCPOA) ON THE PROCEDURE FOR THE 2008 PERSONNEL PREFERRED POST ASSIGNMENT PROCESS

(PPPA). GENERALLY, THE PROCESS AWARDS JOB ASSIGNMENTS BASED ON SENIORITY. ALL CORRECTIONAL OFFICERS WERE REQUIRED TO SUBMIT COMPLETED PPPA FORMS (BID SHEETS) TO THE CMF PERSONNEL ASSIGNMENT OFFICE BY JANUARY 11, 2008. OFFICER SWAN HAS A RIGHT GUARANTEED UNDER THE DILLS ACT TO PARTICIPATE IN ALL AGREEMENTS BETWEEN CMF AND CCPOA, INCLUDING THE 2008 PPPA PROCESS, WITHOUT DISCRIMINATION FROM CMF AND WITHOUT INTERFERENCE FROM CMF. SWAN ALSO HAS THE RIGHT TO HAVE HIS BID SHEET CONSIDERED IN THE SAME MANNER AS ALL [OTHER] CORRECTIONAL OFFICERS UNDER THE AGREED UPON PPPA PROCESS. SWAN SUBMITTED HIS BID SHEET ON JANUARY 11, 2008. CMF HAD FULL KNOWLEDGE OF SWAN'S PARTICIPATION IN THE PPPA PROCESS AS OF THAT DAY. ON JANUARY 15, 2008, SWAN WAS NOTIFIED BY A CMF PERSONNEL [ASSISTANT] LIEUTENANT UNDER THE DIRECTION OF THE CMF EMPLOYMENT RELATIONS OFFICER THAT HE "MAY NOT BID FOR ANY POSITION" AT THE QUEEN OF THE VALLEY MEDICAL CENTER (QVMC) AT NAPA, CALIFORNIA OR ANY COMMUNITY HOSPITAL OFFICER POSITIONS. BY PROHIBITING SWAN FROM BIDDING FOR ANY POSITION AT QVMC OR ANY COMMUNITY HOSPITAL OFFICER POSITION, CMF DISCRIMINATED AGAINST SWAN AND INTERFERED WITH HIS RIGHT TO PARTICIPATE IN THE AGREED UPON PPPA PROCESS. CMF ENGAGED IN THIS CONDUCT BECAUSE SWAN EXERCISED HIS RIGHTS UNDER THE DILLS ACT BY SUBMITTING A BID [SHEET] WITH ASSIGNMENTS THAT HE WAS ELIGIBLE FOR UNDER THE AGREED UPON PPPA PROCESS. SWAN SEEKS TO [HAVE HIS] BID [SHEET] REVIEWED AND BE ASSIGNED TO ONE OF THE POSITIONS AT QVMC OR A COMMUNITY HOSPITAL OFFICER POSITION FOR [WHICH] HE IS ELIGIBLE AND ALSO BE AWARDED ANY LOST OVERTIME THAT HE WOULD HAVE RECEIVED FROM THOSE POSITIONS FOR THE PERIOD [BEGINNING] FEBRUARY 11, 2008.

(Emphasis in original.)

Discussion

Though Charging Party attempts to plead his charge as an interference and/or discrimination case, the gravamen of the charge is explicitly a contention that CDCR violated a provision of an agreement between the State and Charging Party's exclusive representative, the California Correctional Peace Officers Association. The Board, however, does not have authority, under Government Code section 3514.5(b), "to enforce agreements between the parties, and shall not issue a complaint on any charge based on alleged violation of such an agreement that would not also constitute an unfair practice" under the Dills Act. Artful pleading cannot overcome this limitation on PERB's jurisdiction.

In this case, the amended charge still fails to state an independent unfair practice under either an interference or discrimination theory. The interference theory is grounded in the unsupported legal conclusion that the Dills Act protects an employee's right to "participate in all agreements" between the State employer and an exclusive representative.² Given that the charge fails to allege sufficient facts or legal authority for the alleged interference violation, the allegation must be dismissed. (See, e.g., State of California (Department of Forestry & Fire Protection) (2004) PERB Decision No. 1690-S.)

The allegation of a discrimination violation is grounded in the circular reasoning that Charging Party was denied assignments under the PPPA process because he bid on such assignments. In addition to the logical problems with this theory, the charge fails to support the assertion that submitting a bid on work assignments is itself protected activity under the Dills Act. Thus, this allegation also fails to state a *prima facie* violation. (State of California (Department of Forestry & Fire Protection), *supra*, PERB Decision No. 1690-S; Charter Oak Unified School District (1991) PERB Decision No. 873.)

Conclusion

Therefore, the charge is dismissed based on the facts and reasons set forth above and in the March 17, 2008 Warning 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.

² The Board has held that factually unsupported legal conclusions in a charge need not be accepted as true. (Charter Oak Unified School District (1991) PERB Decision No. 873.)

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

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 95811-4124
(916) 322-8231
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 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.)

April 2, 2008

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Final Date

If no appeal is filed within the specified time limits, the dismissal will become final when the time limits have expired.

Sincerely,

TAMI R. BOGERT
General Counsel

By _____
Les Chisholm
Division Chief

Attachment

cc: Amir H. Ameri

PUBLIC EMPLOYMENT RELATIONS BOARD

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March 17, 2008

Steven B. Bassoff, Attorney
Law Office of Steven Bassoff
1220 S Street, Ste. 100
Sacramento, CA 95814-7138

Re: Steven R. Swan v. State of California (Department of Corrections & Rehabilitation)
Unfair Practice Charge No. SA-CE-1663-S
WARNING LETTER

Dear Mr. Bassoff:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on February 28, 2008. Steven R. Swan alleges that the State of California (Department of Corrections & Rehabilitation) violated the Ralph C. Dills Act (Dills Act or Act)¹ by denying him an assignment for which he submitted a bid.

The statement of the charge consists in its entirety of the following:

Steven R. Swan is employed as a correctional officer by the California Department of Corrections and Rehabilitation (CDCR) at the California Medical Facility (CMF) in Vacaville, California. Swan meets all the eligibility requirements for the personnel preferred post assignments (PPPA) procedure. Under the PPPA procedure, correctional officers bid for assignments within CMF on the basis of seniority. The assignments were to begin on February 11, 2008. Bid sheets were due on January 11, 2008 and Swan submitted bids on that day. The first 10 PPPAs for which Swan bid consisted of either being assigned to Queen of the Valley Medical Center (QVMC) at Napa, California or serving as a community hospital officer that required working at QVMC. Because of his seniority, Swan was entitled to at least one of the 10 PPPAs for which he submitted bids. However, on January 15, 2008, Swan was notified by a CMF personnel assistant lieutenant under the direction of the employment relations officer that he "may not bid for any position" at QVMC or any community hospital officer position, as these positions require staff to work at QVMC. 8 of the 10 PPPAs Swan bid on were community hospital officer positions, and no other bids were made by any

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other correctional officer for five of these positions that were currently vacant on January 15, 2008. Swan was advised that the reason he was not assigned to any of the PPPAs in question was because QVMC did not want him assigned to these positions. CDCR is interfering with and denying Swan employment rights guaranteed under the Dills Act by following QVMC's direction and refusing to [award] Swan one of the PPPAs for which he submitted bids and was eligible to receive. Swan seeks to be assigned to one of the positions for which he submitted his bid and also be awarded any lost overtime that he would have received from that position for the period February 11, 2008.

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." 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.)

The charge alleges that CDCR is interfering with and denying rights granted by the Dills Act. The test for whether a respondent has interfered with the rights of employees under the Dills Act does not require that unlawful motive be established, only that at least slight harm to employee rights results from the conduct. The Board described the standard as follows:

[I]n order to establish a prima facie case of unlawful interference, the charging party must establish that the respondent's conduct tends to or does result in some harm to employee rights granted under [the Act].

(State of California (Department of Developmental Services) (1983) PERB Decision No. 344-S, citing Carlsbad Unified School District (1979) PERB Decision No. 89; Service Employees International Union, Local 99 (Kimmitt) (1979) PERB Decision No. 106.)

Under the above-described test, a violation may only be found if the Dills Act provides the claimed rights. (See, for example, Regents of the University of California (2006) PERB Decision No. 1804-H.)

The instant charge fails to state an interference violation under the standards described above. While the charge alleges, as a conclusion, that CDCR denied Swan rights guaranteed by the Dills Act, the charge does not identify the rights at issue or where they are found in the Dills Act. My review of the Dills Act does not disclose any reference to PPPAs, nor to the making of assignments based on seniority.

Further, even considering the factual allegations under a different theory does not support the issuance of a complaint in this matter. To demonstrate a discrimination violation under 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.)

Here, the charge does not allege that Swan engaged in protected activity prior to the denial of his PPPA bids, nor that CDCR had knowledge of such activity, nor that CDCR took the complained-of actions because of any prior protected activity by Swan.

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 before March 27, 2008, I shall dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Les Chisholm
Division Chief