STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA CORRECTIONAL PEACE OFFICERS ASSOCIATION, Charging Party, v. STATE OF CALIFORNIA (DEPARTMENT OF CORRECTIONS AND REHABILITATION), Respondent.	Case No. SA-CE-1696-S PERB Decision No. 2024-S May 13, 2009

Appearances: Suzanne L. Branine, Staff Counsel, for California Correctional Peace Officers Association; State of California (Department of Personnel Administration) by Todd M. Ratshin, Labor Relations Counsel, for State of California (Department of Corrections and Rehabilitation).

Before McKeag, Neuwald and Wesley, Members.

DECISION

McKEAG, Member: This case comes before the Public Employment Relations Board (Board) on appeal by the California Correctional Peace Officers Association (CCPOA) of a dismissal (attached) of an unfair practice charge. The charge alleged that the State of California violated the Ralph C. Dills Act (Dills Act)[1] when a manager for the State of California (Department of Corrections and Rehabilitation) (CDCR) distributed a document via e-mail entitled, re-bid memoranda, to all the youth correctional officers at Ventura Youth Correctional Facility. CCPOA alleged this conduct violated the Dills Act section 3519. Specifically, CDCR alleged this conduct constituted unlawful retaliation against CCPOA Chapter President, Daryl Lee, and also constituted unlawful interference.

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

We have reviewed the entire record in this matter and find the warning and dismissal letters well-reasoned, adequately supported by the record and in accordance with applicable law. Accordingly, the Board hereby adopts the warning and dismissal letters as a decision of the Board itself.

ORDER

The unfair practice charge in Case No. SA-CE-1696-S is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Neuwald and Wesley joined in this Decision.

STATE OF CALIFORNIA
ARNOLD SCHWARZENEGGER, Governor
PUBLIC EMPLOYMENT RELATIONS BOARD
Sacramento Regional Office
1031 18th Street
Sacramento, CA 95811-4124
Telephone: (916) 327-7242
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December 24, 2008

Suzanne L. Branine, Staff Legal Counsel
California Correctional Peace Officers Association
755 Riverpoint Drive, Suite 200
West Sacramento, CA 95605-1634

Re: California Correctional Peace Officers Association v. State of California (Department of Corrections and Rehabilitation)
Unfair Practice Charge No. SA-CE-1696-S
DISMISSAL LETTER

Dear Ms. Branine:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on July 17, 2008 and amended on December 3, 2008. The California Correctional Peace Officers Association (CCPOA or Charging Party) alleges that the State of California (Department of Corrections and Rehabilitation) (CDCR, State, or Respondent) violated the Ralph C. Dills Act (Dills Act or Act)[1] by: (1) retaliating against an employee for his protected conduct; and (2) interfering with employees' rights under the Act.

You were informed in the attached letter dated October 31, 2008 (Warning Letter), 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 that 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 November 12, 2008, the charge would be dismissed. On November 10, 2008, you verified to me during our telephone conversation that you had in fact received the Warning Letter. At your request, I extended at that time the deadline to file an amended charge to December 3, 2008. On December 3, 2008, a First Amended Charge was filed with PERB in this matter.

DISCUSSION

The First Amended Charge realleges that CDCR managers: (1) retaliated against CCPOA Chapter President at Ventura Youth Correctional Facility (VYCF) Daryl Lee by distributing, via electronic mail, an April 18, 2008 memorandum titled "Re-bid memoranda to all Youth Correctional Officers at VYCF" (Re-bid memo) that allegedly made false statements against Mr. Lee; (2) retaliated against Mr. Lee by failing to meet informally with him; and (3) interfered with CCPOA and employees' rights under the Dills Act by distributing the Re-bid memo. These issues are discussed in further detail below.

[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.

I. Discrimination

In the Warning Letter, I set forth the elements and the types of facts that you would need to provide to demonstrate a prima facie case of discrimination in violation of the Dills Act. These elements are revisited below. However, the amended charge does not cure the defects previously explained to you and, as described below, not all of the requisite elements have been met.

A. Protected Conduct

On or about December 3, 2007, Mr. Lee met with Major Dewayne Johnson and Lieutenant John Ojeda who both represent VYCF management. During the December 3 meeting, the parties negotiated over the division of posts into union and management shares. The parties also met on December 17 and 18, 2008, and February 14 and 15, 2008, to negotiate this matter. PERB has held that an employee engages in protected conduct by participating in negotiations. (Santa Paula School District (1985) PERB Decision No. 505.) Accordingly, Mr. Lee engaged in protected activity by participating in the aforementioned negotiation sessions.

On or about April 18, 2008, Mr. Lee wrote a draft memo informing bargaining unit employees of the status of bargaining. On or about April 20, 2008, Mr. Lee deposited copies of his memo in employee mailboxes. As stated in the Warning Letter, PERB has held that the distribution of information to bargaining unit members impacting the employer-employee relationship constitutes protected conduct. (Mt. San Antonio Community College District (1982) PERB Decision No. 224 [employee leaflets regarding a labor dispute]; Santa Monica Unified School District (1980) PERB Decision No. 147 [union officer's letter to unit members asking that they not encourage participation in a disputed environmental education project is protected conduct].) Thus, for purposes of this discussion, the amended charge demonstrates that Mr. Lee engaged in protected activity by drafting a memorandum to bargaining unit employees.

B. CDCR's Knowledge of Mr. Lee's Protected Conduct

As previously noted in the Warning Letter, there is no dispute that the State was aware of the above protected activities.

C. Adverse Action

The First Amended Charge reiterates CCPOA's conclusion that the Re-bid memo constitutes an adverse action. The First Amended Charge argues that the Re-bid memo caused: (1) Mr. Lee to be humiliated; and (2) caused CCPOA members to question Mr. Lee's motives as the Chapter President.

In the Warning Letter you were advised that the allegedly false and "libelous" statements in the Re-bid memo did not establish the requisite adverse action element of a discrimination allegation. As discussed more thoroughly in the Warning Letter, PERB uses an objective standard to determine whether a reasonable person under the same circumstances would

consider the action to have an adverse impact on the employee's employment. (Newark Unified School District (1991) PERB Decision No. 864.) The First Amended Charge has failed to allege facts demonstrating that Mr. Lee's employment at CDCR was adversely affected by the Re-bid memo.

Charging Party also alleges that VYCF Superintendent David Finley (Superintendent Finley) imposed adverse action against Mr. Lee by "changing his behavior" towards Mr. Lee in April 2008. In particular, after April 2008, Mr. Finley allegedly refused to meet informally with Mr. Lee to discuss issues affecting bargaining unit employees and cancelled all scheduled meetings with Mr. Lee. As previously noted, an employer's adverse action must cause a reasonable person in the same or similar circumstance to consider his/her employment adversely affected. (Ibid.) It is difficult to conceive how Mr. Finley's "changed behavior" negatively affected Mr. Lee's employment at CDCR. Further, PERB may not speculate that Mr. Finley's "changed behavior" impacted Mr. Lee's employment. (See Regents of the University of California (2005) PERB Decision No. 1771-H.) The First Amended Charge is devoid of any facts demonstrating, for example, how Mr. Finley's comment affected Mr. Lee's pay, work schedule, opportunity or ability to promote, or any other matter causing a reasonable person in the same or similar circumstance to consider his/her employment adversely impacted. In that regard, Charging Party has failed to establish the adverse action element.

D. Nexus

For the reasons set forth in the Warning Letter, the timing factor has been established. However, Charging Party was advised in the Warning Letter that the charge failed to raise any inference of unlawful motivation under Novato Unified School District (1982) PERB Decision No. 210.

To bolster its argument that CDCR departed from established procedures, Charging Party alleges that Superintendent Finley cancelled meetings with Mr. Lee. In particular, a few months prior to the distribution of the Re-bid memo, Mr. Lee met "regularly" with Superintendent Finley to discuss issues pertaining to Bargaining Unit 6 employees. However, after April 2008, Superintendent Finley would not accept appointments with Mr. Lee. It is also alleged that "[o]n the few occasions when [Mr.] Lee was successful in scheduling appointments, for several months immediately after the April [Re bid] memo, the superintendent canceled meetings repeatedly with [Mr.] Lee without offering justification or excuse."

In the Warning Letter, you were advised that this allegation failed to meet its pleading burden under United Teachers-Los Angeles (Ragsdale) (1992) PERB Decision No. 944 because it failed to describe, among other things: (1) the date(s) on which CDCR management met with Mr. Lee prior to April 18, 2008; (2) the date(s) Mr. Lee was scheduled to meet with CDCR management after April 18, 2008; (3) the date(s) CDCR management cancelled the meetings; (4) whether, in the past, CDCR cancelled meetings with CCPOA representatives in other matters; and (5) whether there are rules or procedures for the parties to follow prior to canceling a scheduled informal meeting. The First Amended Charge failed to address these

deficiencies. On those grounds, the allegation that CDCR departed from established procedures fails.

Charging Party also argues that an inference of union animus can be drawn from Superintendent Finley's April 2008 statement (i.e., "Put it in a grievance. Send it to Sacramento. That's how it is now. That's how you made it.") in response to Mr. Lee's "proposal to solve a problem." Charging Party alleges that Superintendent Finley's statement did not pertain to the broken down negotiations leading to the State's implementation of the last, best, and final offer since Mr. Lee allegedly resolved issues very well with Superintendent Finley after the implementation up until the April 2008 memo was put out. Assuming Superintendent Finley's comment was made, it does not show an unlawful animus as Charging Party contends. It appears Superintendent Finley's statement was general in nature. At most, it may indicate that Superintendent Finley was less than enthusiastic about making any effort to informally resolve a "problem" in place of the grievance process. Moreover, as previously noted, the First Amended Charge has failed to present any facts that speak to any prior cancellations of informal meetings in other matters either before or after April 2008. In that regard, PERB will not speculate that VCYF management's statement to Mr. Lee was in reaction to his memo. (Regents of the University of California, supra, PERB Decision No. 1771-H.) Accordingly, the charge fails to demonstrate that Superintendent Finley's statement displays an unlawful animus against Mr. Lee for his protected conduct.

Accordingly, the charge fails to demonstrate any circumstantial evidence that the alleged adverse action here was based on Mr. Lee's protected conduct.

II. Interference

In the Warning Letter, I set forth the elements and the types of facts that you would need to provide to demonstrate a prima facie case of interference in violation of the Dills Act. However, for the reasons described below, the charge does not cure those defects and a prima facie violation has not been established.

Charging Party realleges that the Re-bid memo constitutes interference. To support this conclusion, Charging Party contends that the Re-bid memo stated:

> that [Mr.] Lee as chapter president created the shift split which the majority of employees viewed as greatly favoring management, and that he put his own interests ahead of the membership by arguing over a position in which he was personally interested in working. When a manager accuses a chapter president of siding with management and representing himself only in negotiations, a reasonable employee would certainly view these statements as interfering with [Mr.] Lee's ability to engage in protected activity, i.e.[,] as likely to chill future union activity by [Mr.] Lee.

As set forth in the Warning Letter, certain types of employer speech is protected unless it contains "threats of reprisal or force or promise of a benefit." (See, e.g., Rio Hondo Community College District (1980) PERB Decision No. 128 (Rio Hondo).)[2] Viewed against this standard, the above facts fail to demonstrate that the Re-bid memo contained a threat of reprisal or promise of benefit. Furthermore, PERB has held an employer statement construed by employees as blaming a union for a particular matter in negotiations is protected free speech. (See, e.g., Chula Vista City School District (1990) PERB Decision No. 834 [employer's statement that could be construed as putting the blame for a salary situation on the exclusive representative].)

Charging Party also fails to provide a plausible theory to establish how the Re-bid memo will chill Mr. Lee's future ability to engage in protected activity. For example, there is no evidence demonstrating that Mr. Lee will not be able to form, join, and participate in organizational activities. Accordingly, the First Amended Charge fails to demonstrate that the Re-bid memo tends to or does result in some harm to employees' rights under the Dills Act.

CONCLUSION

For the reasons set forth above, and in the October 31, 2008 Warning Letter, this charge is hereby dismissed.

Right to Appeal

Pursuant to PERB Regulations,[3] Charging Party may obtain a review of this dismissal of the charge by filing an appeal to the Board itself within twenty (20) calendar days after service of this dismissal. (Cal. Code Regs, tit. 8, sec. 32635(a).) Any document filed with the Board must contain the case name and number, and the original and five (5) copies of all documents must be provided to the Board.

A document is considered "filed" when actually received during a regular PERB business day. (Cal. Code Regs, tit. 8, secs. 32135(a) and 32130; see also Gov. Code, sec. 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 PERB 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. (Cal. Code Regs, tit. 8, secs. 32135(b), (c) and (d); see also Cal. Code Regs., tit. 8, secs. 32090 and 32130.)

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[2] Charging Party argues without any supporting authority that Rio Hondo, supra, PERB Decision No. 128 was wrongly decided and should be overturned by the current Board. The Board's decision in Rio Hondo is binding precedent at this time and must be followed by this Board Agent in charge processing.

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

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. (Cal. Code Regs, tit. 8, sec. 32635(b).)

Service

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding, and a "proof of service" must accompany each copy of a document served upon a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, sec. 32140 for the required contents.) 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. (Cal. Code Regs, tit. 8, sec. 32135(c).)

Extension of Time

A request for an extension of time, in which to file a document with the Board itself, must be in writing and filed with the Board at the previously noted address. A request for an extension must be filed at least three (3) calendar days before the expiration of the time required for filing the document. The request must indicate good cause for and, if known, the position of each other party regarding the extension, and shall be accompanied by proof of service of the request upon each party. (Cal. Code Regs, tit. 8, sec. 32132.)

Final Date

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

Sincerely,

TAMI R. BOGERT
General Counsel

By _____
Yaron Partovi
Regional Attorney

Attachment

cc: Todd Ratshin

STATE OF CALIFORNIA
ARNOLD SCHWARZENEGGER, Governor
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October 31, 2008

Suzanne Branine, Staff Attorney
California Correctional Peace Officers Association
755 Riverpoint Drive, Suite 200
West Sacramento, CA 95605

Re: California Correctional Peace Officers Association v. State of California
Unfair Practice Charge No. SA-CE-1696-S
WARNING LETTER

Dear Ms. Branine:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on July 17, 2008. The California Correctional Peace Officers Association (CCPOA or Charging Party) alleges that the State of California (Department of Corrections and Rehabilitation) (CDCR, State, or Respondent) violated the Ralph C. Dills Act (Dills Act or Act)[1] by: (1) retaliating against an employee for his protected conduct; and (2) interfering with employees' rights under the Act.

Investigation of the charge revealed the following relevant information. CCPOA is the exclusive representative of State Bargaining Unit 6 (BU 6) employees of the State. CCPOA and CDCR were parties to a Memorandum of Understanding (MOU) that expired by its terms on June 30, 2006. On September 12, 2007, the State presented its last, best, and final offer (LBFO) to CCPOA. CCPOA did not accept the State's LBFO. On September 18, 2007, the State notified CCPOA that, "[p]ursuant to the Ralph C. Dills Act, Government Code Section 3517.8, the State is exercising its right to implement. . . its last, best, and final offer. . . ."

At all times relevant herein, Daryl Lee was the CCPOA Chapter President at Ventura Youth Correctional Facility (VYCF). At some unspecified date, CCPOA representatives met with VYCF management to discuss matters regarding section 24.05 (Preferred Watch/Regular Days Off by Seniority [RDO bid]) of the Implemented Terms of the LBFO. Mr. Lee participated in this meeting.

On April 18, 2008, Mr. Lee drafted a letter that stated, in pertinent part,

> The Youth Correctional Officer [YCO] positions are listed on the wall in the old visiting room.

[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.

> CCPOA attempted to negotiate in good faith to reach a fair 70%/30% RDO split each watch for YCO positions. As you may be aware[,] CCPOA ended negotiations on 02/15/08 with CDCR and local VYCF management on all program changes at Ventura due to bad faith negotiations by management.
>
> YCO positions listed are management regular day off patterns and seniority/management post picks.
>
> All individual posts descriptions and restrictions are management language. Management refused to allow mutual selection of 70%/30% RDO and watch breakdown. Management owns the majority of transportation weekend off selections. CCPOA notified VYCF management of theses errors and attempted to correct the 70%/30% watch and RDO breakdowns. Management refused to redistribute any YCO positions. CCPOA contends since CDCR management eliminated YCO sliding six RDO's [sic] and implemented YCO 5 and 2 work week, the YCO 70%/30% breakdown should reflect each watch and RDO's [sic]. Their answer to CCPOA was "we have to have these positions[.]" CCPOA believes any YCO can perform the duties [of] any YCO position with appropriate specialized training.
>
> CDCR and local management violated their own "Last[,] Best[, and] Final Offer" post and bid policy when YCO shifts are available for viewing by BU6 staff only 4 full days prior to bidding.
>
> CCPOA believes the YCO bid scheduled for Monday, April 21, 2008 is premature. Management has not yet activated all living units. BU6 staff again will not have the opportunity to view and select all available YCO dates.

According to the charge, the letter was initially shown to VYFC Superintendent David Finley on April 18, 2008. Mr. Lee informed Mr. Finley that he intended to distribute the memo to members later that day in the afternoon. However, before Mr. Lee could distribute his memo to unit members, VYCF Major Dwayne Johnson wrote and distributed via e-mail a document titled "Re-bid memoranda to all Youth Correctional Officers at VYCF" (Re-bid memo), which stated:

> Youth Correctional Officers,
>
> I would like to express my concerns regarding the Memoranda that CCPOA Chapter President Daryl Lee passed out on April 18, 2008. The aforementioned documentation is filled with half-

> truths and duplicity. First, Daryl Lee and Kathy Torres developed the 70/30 split not management. Let me clarify, it was Kathy Torres who did an excellent job in creating this document and submitted it to the Master Scheduler and myself to review. Daryl Lee also, asserted that management refused to allow mutual selection of the shifts, once again this is a partial truth. During our meeting two months ago, he only objected to one shift that management had designated as a part of our 30%. It is interesting to note that this shift was of personal interest to just one individual. In addition, why did the CCPOA Chapter President wait so long, 3 days before the bid to voice his consternation. I am willing to answer any questions you may have regarding the re-bid. Thank you.

The charge alleges that after the Re-bid memo was "disseminated . . . management had canceled meetings repeatedly with [Mr.] Lee." It is further alleged that "[Mr.] Finley has refused to resolve ay [sic] issue of concern informally." Charging Party contends that during a conversation with Mr. Lee in April of 2008, Mr. Finley informed Mr. Lee in regards to Mr. Lee's proposal (to resolve a "problem") that he "[p]ut it in a grievance. Send it to Sacramento. That's how it is now. That's how you made it."

DISCUSSION

The charge specifically alleges that Respondent's Re-bid memo constitutes both discrimination and interference in violation of the Dills Act. For the reasons described below, the charge fails to demonstrate a prima facie case under both theories.

I. Discrimination

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 that might demonstrate the employer's unlawful motive. (Novato, supra, PERB Decision No. 210; North Sacramento School District, supra, PERB Decision No. 264.)

Evidence of adverse action is also required to support a claim of discrimination or reprisal under the Novato standard. (Palo Verde Unified School District (1988) PERB Decision No. 689.) In determining whether such evidence is established, the Board uses an objective test and will not rely upon the subjective reactions of the employee. (Ibid.) In a later decision, the Board further explained that:

> The test which must be satisfied is not whether the employee found the employer's action to be adverse, but whether a reasonable person under the same circumstances would consider the action to have an adverse impact on the employee's employment. [Newark Unified School District (1991) PERB Decision No. 864; emphasis added; footnote omitted.]

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.)

A. Protected Conduct

It is alleged that Mr. Lee engaged in protected conduct by: (1) participating in negotiations over, among other things, the RDO bid system; and (2) drafting a memo to bargaining unit employees.

Participating in negotiations is protected conduct. (Santa Paula School District (1985) PERB Decision No. 505.) Moreover, PERB has held that the distribution of information to bargaining unit members impacting the employer-employee relationship constitutes protected conduct. (Mt. San Antonio Community College District (1982) PERB Decision No. 224 [employee leaflets regarding a labor dispute]; Santa Monica Unified School District (1980) PERB Decision No. 147 [union officer's letter to unit members asking that they not encourage participation in a disputed environmental education project is protected conduct].)

But the charge presently fails to meet its burden under United Teachers-Los Angeles (Ragsdale), supra, PERB Decision No. 944 because it fails to describe, for example, the date(s) Mr. Lee engaged in bargaining with the State over the RDO bid and whether Mr. Lee actually distributed the memo to bargaining unit employees (and if so, when and by what means).

B. CDCR's Knowledge of Mr. Lee's Protected Conduct

Assuming the charge is cured to meet its Ragsdale burden, there is no dispute that CDCR was aware of Mr. Lee's protected conduct since Mr. Johnson admits in the Re-bid memo that he "would like to express [his] concerns regarding the Memoranda that. . . [Mr.] Lee passed out on April 18, 2008. There is also no dispute that the State was aware of Mr. Lee's participation in the negotiation process.

C. Adverse Action

Although not clear, it appears Charging Party is claiming that the adverse action in this matter relates to allegedly false statements in the Re-bid memo; i.e., that Mr. Lee: (1) developed the 70/30 split; and (2) made less-than-truthful statements that "management did not allow mutual selection of shifts"; and (3) only objected to one shift as being unfairly part of management's 30%." The charge also alleges that "the memo went on to infer that [Mr.] Lee objected to this shift only because he was personally interested in obtaining rights to this shift." The charge concludes by alleging that these statements were libelous and leave an impression that Mr. Lee did not act in the best interest of the chapter membership, but instead acted in his own personal interests.

While the element of "adverse action" is typically identifiable in cases of alleged discrimination, in this case it is not; the facts fail to demonstrate that this threshold element exists. To the extent CCPOA may be asserting that CDCR libeled Mr. Lee in this matter—and that such constitutes adverse action for purposes of this discussion—such is not supported by PERB or National Labor Relations Board (NLRB) authorities. And notably, the California Supreme Court has recognized that different standards should apply with respect to statements made in the context of labor disputes because in passing the Labor Management Relations Act, 29 U.S.C. 141, et seq., Congress wanted to encourage free debate on issues dividing labor and management. (Gregory v. McDonnell Douglas Corp. (1976) 17 Cal.3d 596.) Further, as previously noted, the test for an adverse action requires that a reasonable person under the same circumstances would consider the action to have an adverse impact on the employee's employment. (Newark Unified School District, supra, PERB Decision No. 864.) In the instant case, it is difficult to conceive how CDCR's statements in the Re-bid memo would have any negative impact on Mr. Lee's employment at CDCR. For example, the charge does not establish that the Re-bid memo affected Mr. Lee's pay, work schedule, opportunity or ability to promote, or any other matter causing a reasonable person in the same or similar circumstance to consider his/her employment adversely affected. There is also nothing in the current record to demonstrate that CDCR pursued any separate action against Mr. Lee for his participation in negotiations over the RDO bid. Any argument that Mr. Lee's subjective view of the

statements in the Re-bid memo constituted an adverse action fails under the applicable standard.

D. Nexus

Assuming for the sake of this discussion that the "adverse action" in this case is the allegedly libelous e-mail from Mr. Johnson, such action occurred on the same day Mr. Lee drafted his memo. Although timing is an important factor in this case, it does not without more demonstrate nexus between the alleged adverse action and Mr. Lee's protected conduct. (See North Sacramento School District, supra, PERB Decision No. 264; Moreland Elementary School District, supra, PERB Decision No. 227.)

Even if one were to assume that Mr. Johnson's Re-bid memo constitutes an adverse action, and all the above-stated deficiencies in the matter had been cured, the charge nevertheless fails to raise any inference of unlawful motivation under Novato Unified School District, supra, PERB Decision No. 210.

Likewise, although Charging Party alleges that Mr. Finley's cancellation of meetings with Mr. Lee demonstrates a departure from past practice, this allegation fails to meet its burden under United Teachers-Los Angeles (Ragsdale), supra, PERB Decision No. 944 because it fails, for example, to describe: (1) the date(s) on which CDCR management met with Mr. Lee; (2) the nature of the discussion(s) involved in the cancelled meetings; (3) the name(s) of the management employee(s) that met with Mr. Lee before April 18, 2008; (4) the date(s) Mr. Lee was scheduled to meet with CDCR management after April 18, 2008; (5) the date(s) CDCR management cancelled the meetings; (6) the name(s) of the manager(s) that cancelled the meetings after April 18, 2008; (7) whether CDCR managers provided a justification for canceling meeting, and if so to whom; (8) whether, in the past, CDCR has cancelled meetings with CCPOA representatives in other matters; and (9) whether there are rules or procedures for the parties to follow prior to canceling a scheduled informal meeting.

Charging Party further alleges that Mr. Finley's statement to Mr. Lee demonstrates that the alleged adverse action was motivated by "anti-union animus." In pertinent part, Mr. Finley's statement, "[t]hat's how you made it," presumably refers to the broken down negotiations leading to the State's implementation of the LBFO. However, the allegation fails to meet its burden under United Teachers-Los Angeles (Ragsdale), supra, PERB Decision No. 944 because it fails, for example, to describe when Mr. Finely made the this statement to Mr. Lee. The charge fails to demonstrate that the alleged adverse action (false statements in the Re-bid memo) was motivated by any union animus since the context of the conversation was over resolution of a "problem" that appears separate and apart from either the RDO bid issues or Mr. Lee's memo. Although Mr. Finley's statement may have been impolite, there is nothing in the record to demonstrate that this statement discouraged Mr. Lee from distributing his memo or dissuaded him from filing a grievance to resolve the "problem." There is also no evidence in the charge that this statement was in reaction to Mr. Lee's memo.

Accordingly, the charge fails to demonstrate any circumstantial evidence that the adverse action here was based on Mr. Lee's protected activity. Thus, an inference of unlawful motive is not substantiated by the facts in this case.

II. Interference

Although not clear from the charge, it appears Charging Party is alleging that the State engaged in unlawful interference by distributing its April 18, 2008 Re-bid memo.

In Rio Hondo Community College District (1980) PERB Decision No. 128 (Rio Hondo), PERB reiterated its determination that certain types of employer speech will be protected and confirmed adoption of "a standard by which such speech will be analyzed which conforms to the express protection set forth in section 8(c) of the NLRA." (Ibid.)

Like the Dills Act, the National Labor Relations Act (NLRA) imposes on private-sector employers an obligation to bargain in good faith. The NLRA also expressly guarantees employers the right of free, non-coercive speech. Section 8(c) of the NLRA provides as follows:

> The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

(29 U.S.C. 158(c).)

Looking to the NLRA and the NLRB's interpretation of section 8(c), PERB has consistently held that employers may communicate with employees about labor relations matters as long as the communication does not contain a threat of reprisal or force or promise of benefit.

In Muroc Unified School District (1979) PERB Decision No. 80, PERB construed the Educational Employment Relations Act (EERA) to allow public school employers to communicate "in a noncoercive fashion, with employees during negotiations." (Id. at p. 21, citing NLRB v. General Electric Co. (2nd Cir. 1969) 418 F.2d 736, 762, cert. den. (1970) 397 U.S. 965; Proctor & Gamble Mfg. Co. (1966) 160 NLRB 334, 340.) Whether an employer's speech is unlawful is determined by applying an objective rather than a subjective standard. (California State University (California State Employees Association, SEIU Local 1000) (1989) PERB Decision No. 777-H.) 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, and 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, pp. 15-16, fn. 10.) And statements by an employer are

viewed in their overall context to determine if they have a coercive meaning. (Los Angeles Unified School District (1988) PERB Decision No. 659.)

In the instant case, the State is entitled to express its views on any employment related matter over which it has a legitimate concern including the status of negotiations. (See Rio Hondo, supra, PERB Decision No. 128 [it is unreasonable to assume that the Legislature intended to restrict a public agency from disseminating its views regarding the employment relationship].) Furthermore, Mr. Johnson's statements in the Re-bid memo are considered protected speech since they did not contain a threat of reprisal or force or promise of benefit. In addition, the charge fails to show how Mr. Johnson's statements (i.e., that Mr. Lee developed the 70/30 split, that Mr. Lee made false statements, and that Mr. Lee's personal interest in the rights to the shift) tends to or does result in some harm to employee rights granted under the Dills Act. (See Carlsbad Unified School District (1979) PERB Decision No. 89 [it is the charging party's burden to demonstrate that the employer's communication tends to/does coerce or interfere with a reasonable employee in the exercise of protected rights].) For example, there is no evidence that the State's conduct in this matter had the effect of nullifying the ability of employees to form, join, and participate in organizational activities. Moreover, there is no basis for speculation that a threat or intimidation occurred in this case. (See, e.g., Admiral Petroleum Corp. (1979) 240 NLRB No. 122.) Thus, while it appears that there was some disagreement about which party developed the 70/30 shift, the charge fails to present evidence establishing that employees' rights to representation were interfered with under the Dills Act. Furthermore, PERB had held that false, misleading, and derogatory statements may not be unlawful if they do not contain a threat of reprisal or promise of benefit. (Rio Hondo Community College District, supra, PERB Decision No. 87.) While the charge states that the statements in the Re-bid memo were false and inaccurate, this is without a threat of reprisal or force of benefit that is sufficient to constitute an unfair labor practice. Therefore, this allegation fails to show that the State's April 18, 2008 communication tended to coerce or interfere with a reasonable employee in the exercise of Dills Act protected rights.

CONCLUSION

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 an amended charge or withdrawal is not received in this matter before November 12, 2008, your charge shall be dismissed. If you have any questions, please call me at the above telephone number.

Sincerely,

Yaron Partovi
Regional Attorney
YP