STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

UNION OF AMERICAN PHYSICIANS & DENTISTS, Charging Party, v. STATE OF CALIFORNIA (DEPARTMENT OF PERSONNEL ADMINISTRATION), Respondent.	Case No. SA-CE-1803-S PERB Decision No. 2123-S July 28, 2010

Appearances: Davis, Cowell & Bowe by Andrew J. Kahn, Attorney, for Union of American Physicians & Dentists; Shaun R. Spillane, Labor Relations Counsel, for State of California (Department of Personnel Administration).

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

DECISION

DOWDIN CALVILLO, Chair: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the Union of American Physicians & Dentists (UAPD) of a Board agent's dismissal of its unfair practice charge. The charge alleged that the State of California (Department of Personnel Administration) (State) violated the Ralph C. Dills Act (Dills Act)[1] by imposing furloughs on physician employees but not on contract physicians performing services for the State. The charge alleged that this conduct constituted unlawful retaliation and discrimination against state employee union members for the exercise of their protected rights, as well as interference with protected rights. The Board agent dismissed the

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

charge, finding that it failed to state a prima facie case of retaliation, discrimination or interference under the Dills Act.

The Board has reviewed the dismissal and the record in light of UAPD's appeal, the State's response, and the relevant law. Based on this review, the Board affirms the dismissal of the unfair practice charge for the reasons discussed below.

BACKGROUND

This case stems from the Governor's issuance on December 19, 2008 of Executive Order S-16-08, which directed that represented state employees and supervisors, as well as excluded employees, be furloughed for two days per month. UAPD is the exclusive representative of physicians and dentists in State Bargaining Unit 16. The most recent agreement between the State and UAPD expired on June 30, 2008, but its provisions remain in effect pursuant to Dills Act section 3517.8.[2] The Department of Personnel Administration (DPA) and UAPD have been negotiating a successor agreement since July 2008.

On December 19, 2008, the Governor issued Executive Order S-16-08. The Executive Order directed DPA to "adopt a plan to implement a furlough of represented state employees and supervisors for two days per month, regardless of funding source...[and] for all state

[2] Dills Act section 3517.8 provides, in relevant part:

> (a) If a memorandum of understanding has expired, and the Governor and the recognized employee organization have not agreed to a new memorandum of understanding and have not reached an impasse in negotiations, subject to subdivision (b), the parties to the agreement shall continue to give effect to the provisions of the expired memorandum of understanding, including, but not limited to, all provisions that supersede existing law, any arbitration provisions, any no strike provisions, any agreements regarding matters covered in the Fair Labor Standards Act of 1938 (29 U.S.C. Sec. 201 et seq.), and any provisions covering fair share fee deduction consistent with Section 3515.7.

managers, including excluded state employees, regardless of funding source." The Executive Order mandated that furloughs would be effective February 1, 2009 through June 30, 2010.[3]

As a result of the Governor's Executive Order, DPA developed and executed a furlough plan. UAPD contends that, by furloughing only state employees and not contractor physicians, the State retaliated and discriminated against union members because of UAPD's public opposition to the Governor's 2005 initiative proposals, his 2006 reelection campaign, and his policies favoring contracting out. UAPD also contends that comments by the Governor critical of state employee unions demonstrated the State's anti-union animus. The charge also alleged that this conduct constituted unlawful interference with protected rights because it encourages physicians to quit their state civil service positions and instead obtain contractor positions with state agencies, thereby losing union representation.

The General Counsel's office dismissed the charge on the ground that the charge failed to state a prima facie case of retaliation or discrimination under the Dills Act. Specifically, the Board agent found that the charge failed to contain specific allegations of protected activity by UAPD or employer knowledge under the standards established by PERB. The Board agent further found that the charge failed to state sufficient facts to establish unlawful motivation or nexus, i.e., that the State imposed furloughs on UAPD members because of their protected activities. The Board agent also dismissed the allegation that the same conduct unlawfully interfered with protected employee rights.

On appeal, UAPD contends that its members engaged in protected activities by taking visible actions in opposition to the Governor's re-election in 2006 and to his 2005 initiative proposals. UAPD continues to contend that comments by the Governor critical of state employee unions in general demonstrate the State's anti-union animus. UAPD further

[3] On July 1, 2009, the Governor expanded the furloughs to three days per month.

contends that the decision to furlough unionized employees but not unrepresented contractors discriminates against union members by interfering with their exercise of rights under the Dills Act. UAPD asserts that this conduct constituted unlawful interference with protected rights because it discouraged physicians from becoming employees and joining public employee unions, instead choosing to obtain contractor positions rather that civil service positions.

The State argues that the Board agent correctly determined that the charge fails to establish a prima facie case of unlawful discrimination or retaliation. The State further asserts that UAPD waived its appeal of the dismissal of the interference charge on appeal.

DISCUSSION

1. Retaliation and Discrimination

To demonstrate that an employer discriminated or retaliated against an employee in violation of Dills Act section 3519, subdivision (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; (3) the employer took adverse action against the employee; and (4) the employer took the action because of the exercise of those rights. (*Novato Unified School District* (1982) PERB Decision No. 210 (*Novato*).) In determining whether evidence of adverse action is established, the Board uses an objective test and will not rely upon the subjective reactions of the employee. (*Palo Verde Unified School District* (1988) PERB Decision No. 689.) 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 Dec. No. 864; emphasis added; footnote omitted.)

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 (*North Sacramento*)), 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 (*City of Torrance* (2008) PERB Decision No. 1971-M; *Coast Community College District* (2003) PERB Decision No. 1560); (5) the employer's failure to offer the employee justification at the time it took action (*Oakland Unified School District* (2003) PERB Decision No. 1529) or the offering of exaggerated, vague, or ambiguous reasons (*McFarland Unified School District* (1990) PERB Decision No. 786); (6) employer animosity towards union activists (*Jurupa Community Services District* (2007) PERB Decision No. 1920-M; *Cupertino Union Elementary School District* (1986) PERB Decision No. 572); or (7) any other facts that might demonstrate the employer's unlawful motive. (*North Sacramento*, *supra*, PERB Decision No. 264; *Novato*, *supra*, PERB Decision No. 210.)

a. Protected Activity and Employer Knowledge

PERB Regulation[4] 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." Although a charging party's facts will be taken as true at the initial stage, a charge must still contain a "clear and concise statement of the facts and conduct alleged to constitute an unfair practice." (*Ibid.*; *San Mateo County Office of Education* (2008) PERB Decision No. 1946; *San Juan Unified School District* (1977) EERB[5] Decision No. 12.) Mere legal conclusions are not sufficient to state a prima facie case. (*State of California (Department of Food and Agriculture)* (1994) PERB Decision No. 1071-S (*Department of Food and Agriculture*), citing *United Teachers-Los Angeles (Ragsdale)* (1992) PERB Decision No. 944; *Charter Oak Unified School District* (1991) PERB Decision No. 873.)

The charge and supporting documents do not indicate that UAPD members engaged in any specific protected activity other than their union membership.[6] The allegations that public employee unions generally opposed the Governor's reelection and initiative campaigns do not provide the required specificity necessary to state a prima facie case. (*Department of Food and Agriculture.*) The charge contains broad statements asserting that UAPD was among many public employee labor organizations that engaged in "visible actions in opposition to [the Governor's] election and [engaged in] visible actions to support his opponents in the

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

[5] Prior to January 1, 1978, PERB was known as the Educational Employment Relations Board or EERB.

[6] While joining a union is protected activity (*State of California (Department of Personnel Administration)* (2010) PERB Decision No. 2106-S), simply maintaining union membership is not. (*Chula Vista Elementary School District* (1997) PERB Decision No. 1232.)

Legislature, including campaign donations, precinct walking and demonstrating at the Governor's public appearances, and holding other demonstrations and press conferences." While UAPD submitted various press articles describing union opposition to some of the Governor's proposed ballot initiatives, none of the information submitted by UAPD identifies or describes any specific protected activity taken by UAPD members.[7] Thus, the charge fails to establish that UAPD engaged in any identifiable protected activity or that the state employer had knowledge of any such activity by UAPD. Accordingly, the charge fails to establish the first two elements of the *Novato* test.

b. Adverse Action

The imposition of furloughs was a form of involuntary leave resulting in a reduction in hours and therefore an adverse action. (*Oakland Unified School District* (2003) PERB Decision No. 1529 (*Oakland*).)

c. Nexus

Even if we were to find that UAPD engaged in some protected activity, we would nonetheless conclude that the charge fails to state a prima facie case of discrimination or retaliation. As indicated above, the timing of the employer's adverse action in close temporal proximity to the employee's protected conduct is an important factor in determining whether a nexus exists between the protected activity and the adverse action. (*North Sacramento*.) In this case, the alleged protected activity occurred in 2005 and 2006, more than two years before the Governor's issuance of the December 2008 Executive Order. Any connection between UAPD's involvement in the Governor's reelection campaign and the issuance of the Executive

[7] In its brief, UAPD asserts that it "participated in a united Democratic public union alliance that raised about $100 million to defeat Schwarzenegger's proposals in the November 2005 election." While documents submitted in support of the charge reference such an alliance, the charge does not allege UAPD's involvement in the alliance, nor has any evidence been provided concerning the nature or amount of UAPD's specific participation.

Order more than two years later is simply too attenuated to establish nexus under the *Novato* standard. (*Garden Grove Unified School District* (2009) PERB Decision No. 2086; *Oakland Unified School District* (2003) PERB Decision No. 1512.)

To support a prima facie finding of nexus between the alleged protected activity and the adverse action, UAPD must allege facts showing that the timing of the adverse action occurred in close temporal proximity to the protected conduct, *plus* facts establishing one or more of the additional factors listed above. (*Oakland*; *North Sacramento*).) Because we find the timing element not established in this case, we do not address whether any of the additional nexus factors exist.[8]

2. Interference

In its charge, UAPD alleged that the State's conduct constituted unlawful interference with employee rights. In response to UAPD's appeal, the State asserts that UAPD waived this issue by failing to raise it on appeal. We disagree. In its appeal, UAPD continues to assert that the furlough of state employees but not contract physicians interferes with the exercise of rights under the Dills Act. These assertions are sufficient to put the State on notice of its appeal of the dismissal of the interference allegation.

Nonetheless, we affirm the dismissal of the interference charge. UAPD's assertion that physicians would prefer to be utilized as non-furloughed contractors rather than furloughed employees is insufficient to establish that the State's decision to furlough its employees has

[8] In its responsive brief, the State asserts that UAPD failed to appeal the Board agent's determination on the timing issue. We find that, by challenging the Board agent's nexus determination, the appeal adequately preserved all elements of the nexus issue on appeal.

interfered with the exercise of any protected activities.[9] Thus, the charge fails to establish a prima facie case of interference.

ORDER

The unfair practice charge in Case No. SA-CE-1803-S is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members McKeag and Wesley joined in this Decision.

[9] As noted by the State, on June 8, 2009, the Governor issued Executive Order S-09-09, ordering State departments to reduce their contract expenditures by 15 percent. Thus, it is far from clear that physicians who wish to work for the State would have the option of electing to serve as contractors rather than employees. Moreover, state law imposes strict limits on the use of personal services contracts to perform work that is customarily performed by civil service employees. (Gov. Code, § 19130 et seq.)