

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



JENNIFER XU,

Charging Party,

v.

STATE OF CALIFORNIA (DEPARTMENT OF
MENTAL HEALTH, DEPARTMENT OF
DEVELOPMENTAL SERVICES),

Respondent.

Case No. SA-CE-1937-S

PERB Decision No. 2305-S

December 31, 2012

Appearances: Jennifer Xu, on her own behalf; Department of Human Resources, Legal Division, by Barrett W. McInerney, Labor Relations Counsel, for State of California (Department of Mental Health, Department of Developmental Services).

Before Martinez, Chair; Dowdin Calvillo and Huguenin, Members.

DECISION

MARTINEZ, Chair: This case comes before the Public Employment Relations Board (PERB or Board) on appeal by Jennifer Xu (Xu) from the dismissal of her unfair practice charge. The charge alleges that the State of California (Department of Mental Health, Department of Developmental Services) (State) violated the Ralph C. Dills Act (Dills Act).¹ The statement of facts attached to the unfair practice charge form contains a description of various documents sent by Xu to the California State Auditor's Office and the Governor's Office on June 23 and August 2, 2012. It does not contain a clear and concise statement of conduct alleged to constitute an unfair practice within PERB's jurisdiction as required by PERB Regulation 32615(a)(5).² The Office of the General Counsel issued a warning letter in

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

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

response to the initial charge, stating that it is Xu's burden to allege facts sufficient to constitute an unfair practice and that the allegations of the charge do not relate to any conduct that is within PERB's jurisdiction. The warning letter invited Xu to amend the charge in the event there were factual inaccuracies contained in the warning letter or additional facts that would correct the deficiencies in the charge. The warning letter instructed Xu to submit the amended charge on a standard PERB unfair practice charge form, with the required declaration attesting to the veracity of the allegations in the amended charge.³ An amended charge was filed but did not, however, cure the deficiencies of the charge as stated in the warning letter. Nor did it contain the requisite declaration. The Office of the General Counsel dismissed the charge for failure to state a prima facie violation of the Dills Act. Xu filed a timely appeal.

The Board has reviewed the record in its entirety and fully considered the appeal. Based on this review, the Board finds the warning letter to be well-reasoned, adequately supported by the record and in accordance with the applicable law. Accordingly, the Board adopts the warning letter (attached) in dismissing the charge and incorporates it as part of the decision of the Board itself, as supplemented by the discussion below.⁴

DISCUSSION

Pursuant to PERB Regulation 32635(a), an appeal from dismissal must:

- (1) State the specific issues of procedure, fact, law or rationale to which the appeal is taken;

³ PERB Regulation 32615(a) requires that the charge be signed under penalty of perjury by the party or the party's agent with the declaration that the charge is true, and complete to the best of the charging party's knowledge and belief.

⁴ Because the amended charge was not filed in accordance with PERB regulations, we affirm the dismissal of the charge for the reasons stated in the warning letter, i.e., that it is Xu's burden to set forth facts constituting an unfair practice charge under the applicable labor relations statutes and that the conduct set forth in the charge does not relate to conduct that is within PERB's jurisdiction. For this reason, only the warning letter is adopted as part of the decision of the Board itself.

(2) Identify the page or part of the dismissal to which each appeal is taken;

(3) State the grounds for each issue stated.

To satisfy the requirements of PERB Regulation 32635(a), the appeal must sufficiently place the Board and the respondent “on notice of the issues raised on appeal.” (*State Employees Trade Council United (Ventura, et al.)* (2009) PERB Decision No. 2069-H (*State Employees Trade Council*); *City & County of San Francisco* (2009) PERB Decision No. 2075-M.) An appeal that does not reference the substance of the Board agent’s dismissal fails to comply with PERB Regulation 32635(a). (*United Teachers of Los Angeles (Pratt)* (2009) PERB Order No. Ad-381 (*Pratt*); *Lodi Education Association (Hudock)* (1995) PERB Decision No. 1124; *United Teachers – Los Angeles (Glickberg)* (1990) PERB Decision No. 846.) Likewise an appeal that merely reiterates facts alleged in the unfair practice charge does not comply with PERB Regulation 32635(a). (*Pratt; State Employees Trade Council; Contra Costa County Health Services Department* (2005) PERB Decision No. 1598-M.)

The appeal in this case consists of a one and half page cover letter⁵; a version of the Office of the General Counsel’s dismissal letter with interlineations in bolded text containing

⁵ In the cover letter, Xu requested the Board’s review of the dismissal “because the case has not settled yet,” which presumably refers to any one of a number of cases filed by Xu since 2006 in the superior courts and in administrative tribunals (State Personnel Board (SPB), Equal Employment Opportunity Commission (EEOC), Department of Fair Employment and Housing, California Unemployment Insurance Appeals Board). As alleged, Xu was separated from employment with the State at or around the end of 2007, and a number of the cases appear to have been filed in connection with that event and/or earlier events. According to the amended charge, Xu received documents from the EEOC on June 15, 2012, which prompted Xu to visit SPB. For reasons unexplained by the charge, SPB referred Xu to PERB. After Xu’s visit to SPB, Xu filed cases with “the office of the state audit,” “the Governor’s office” and PERB. As stated in the warning letter, the allegations of the charge do not relate to conduct constituting an unfair practice under the Dills Act.

factual clarifications, mainly concerning dates of various events described in the dismissal letter; and a 14 page re-statement of the amended charge. The appeal, in large part, restates facts alleged in the charge, as amended. It does not reference any portion of the Office of the General Counsel's dismissal or otherwise identify the specific issues of procedure, fact, law or rationale to which the appeal is taken, the page or part of the dismissal to which the appeal is taken, or the grounds for each issue. Thus, it is subject to dismissal on that basis alone. (*City of Brea* (2009) PERB Decision No. 2083-M.)⁶

ORDER

The unfair practice charge in Case No. SA-CE-1937-S is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Dowdin Calvillo and Huguenin joined in this Decision.

⁶ Given the outcome reached, it is unnecessary to decide on the State's request for relief to file late response to appeal or any of the "procedural fatalities" of Xu's appeal complained of therein except as discussed herein.

PUBLIC EMPLOYMENT RELATIONS BOARD



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September 7, 2012

Jennifer Xu

Re: *Jennifer Xu v. State of California (Department of Mental Health, Department of Developmental Services)*
Unfair Practice Charge No. SA-CE-1937-S
WARNING LETTER

Dear Ms. Xu:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on August 20, 2012. Jennifer Xu (Xu or Charging Party) alleges that the State of California (Department of Mental Health, Department of Developmental Services) (State) violated the Ralph C. Dills Act (Dills Act).¹

PERB's Jurisdiction

PERB is a quasi-judicial administrative agency charged with administering the collective bargaining statutes covering public employees. Charging Party alleges that the State's conduct violates the Dills Act. However, the Dills Act is limited in scope, regulating only certain conduct by employers and exclusive representatives and not every aspect of an employer's conduct. (*Los Angeles Community College District* (1979) PERB Order No. Ad-64.)

Charging Party's Burden

PERB Regulation 32615(a)(5)² 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 should endeavor to include those facts 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.)

¹ The Dills Act is codified at Government Code section 3512 et seq. The text of the Dills Act and PERB Regulations may be found at www.perb.ca.gov.

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

The charging party's burden also includes alleging facts showing that the unfair practice charge was timely filed; i.e., that the alleged unfair practice occurred no more than six months prior to the filing of the charge. (*Los Angeles Unified School District* (2007) PERB Decision No. 1929; *City of Santa Barbara* (2004) PERB Decision No. 1628-M.) 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. (*Coachella Valley Mosquito and Vector Control District v. Public Employment Relations Board* (2005) 35 Cal.4th 1072.) 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.)

Discussion

Here, the charge, in its entirety, consists of a handwritten document from Charging Party indicating that on June 23, 2012 and August 2, 2012, Charging Party sent documents to the California State Auditor's Office and the Governor's Office. The charge then lists the documents in question that she purports to have sent to those offices. However, none of the listed documents appear to relate to conduct that is within PERB's jurisdiction. As such, Charging Party has failed to provide any facts for PERB to make a prima facie determination as to whether the State has violated Charging Party's rights under the Dills Act.³

For these reasons the charge, as presently written, does not state a prima facie case.⁴ If there are any factual inaccuracies in this letter or additional facts that would correct the deficiencies explained above, Charging Party may 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 an authorized agent of 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

³ On August 29, 2012, Charging Party sent, by facsimile, a 36-page document that appears to be a collection of several personnel items that relate to Charging Party's employment application process with the State. It is unclear whether Charging Party intended this facsimile to constitute an amended charge or a supplement to her original charge. Nonetheless, a charge does not satisfy PERB Regulation 32615(a)(5) when facts contained in documents attached to the charge are not referenced in the charge itself. (*Sacramento City Teachers Association (Franz)* (2008) PERB Decision No. 1959.)

⁴ In *Eastside Union School District* (1984) PERB Decision No. 466, the Board explained that a prima facie case is established where the Board agent is able to make "a determination that the facts as alleged in the charge state a legal cause of action and that the charging party is capable of providing admissible evidence in support of the allegations. Consequently, where the investigation results in receipt of conflicting allegations of fact or contrary theories of law, fair proceedings, if not due process, demand that a complaint be issued and the matter be sent to formal hearing." (*Ibid.*)

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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 filed on or before September 17, 2012,⁵ PERB will dismiss the charge. If you have any questions, please call me at the above telephone number.

Sincerely,

James Coffey
Regional Attorney

JC

⁵ A document is "filed" on the date the document is actually received by PERB, including if transmitted via facsimile. (PERB Regulation 32135.)