



**STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD**

SAM WYRICK,

Charging Party,

v.

STATE OF CALIFORNIA (DEPARTMENT OF
VETERANS AFFAIRS),

Respondent.

Case No. SA-CE-2062-S

PERB Decision No. 2513-S

February 2, 2017

Appearances: Service Employees International Union Local 1000 by Anne M. Giese, Senior Staff Attorney, for Sam Wyrick; California Department of Human Resources by Frolan R. Aguilin, Chief Counsel, and Elizabeth Krehe, Labor Relations Counsel, for State of California (Department of Veterans Affairs).

Before Winslow, Banks and Gregersen, Members.

DECISION¹

BANKS, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Sam Wyrick (Wyrick) from the dismissal (attached) by PERB's Office of the General Counsel of Wyrick's unfair practice charge against the State of California (Department of Veterans Affairs) (State). The charge, as amended, alleged that the State terminated Wyrick's employment in retaliation for his protected activity, in violation of section 3519, subdivision (a), of the Ralph Dills C. Dills Act (Dills Act).²

¹ PERB Regulation 32320(d), provides in pertinent part: "Effective July 1, 2013, a majority of the Board members issuing a decision or order pursuant to an appeal filed under Section 32635 [Board Review of Dismissals] shall determine whether the decision or order, or any part thereof, shall be designated as precedential." Having met none of the criteria enumerated in the regulation, the decision herein has not been designated as precedential. (PERB Regulations are codified at Cal. Code Regs., tit. 8, sec. 31001 et seq.)

² The Dills Act is codified at Government Code section 3512 et seq.

The Board has reviewed the entire case file and has fully considered the relevant issues and contentions raised by Wyrick's appeal. The Office of the General Counsel's warning and dismissal letters accurately describe the factual allegations included in the unfair practice charge, as amended. The Office of the General Counsel's legal conclusions are well-reasoned and in accordance with applicable law. Accordingly, the Board denies Wyrick's appeal and adopts the warning and dismissal letters as a decision of the Board itself, subject to the following discussion of issues raised in Wyrick's appeal.

BACKGROUND³

Wyrick filed his unfair practice charge on December 7, 2015, alleging that the State had terminated his employment as a limited-term security officer at the Redding Veterans' Home in reprisal for Wyrick's protected activity. The original charge alleged that Wyrick had asserted his right to union representation at a meeting on May 7, 2015 at which Wyrick's supervisor gesticulated wildly and repeatedly shouted at Wyrick, "What is this shit between me and you?" The original charge also alleged that, on May 20, 2015, the State served Wyrick with a "Notice of Termination" and that, as a limited term employee, Wyrick had no appeal rights, but was entitled to a "name clearing hearing." According to the amended charge and supporting materials, at the name clearing hearing, Wyrick would have an opportunity to explain why he

³ Because this matter comes before the Board on dismissal without a hearing, we treat the charging party's factual allegations as true and consider them in the light most favorable to the charging party's case. (*Golden Plains Unified School District* (2002) PERB Decision No. 1489, p. 6.) Where the charging party offers conflicting facts, the Board accepts that version most favorable to the charging party's case and disregards others. (*California School Employees Association & its Chapter 244 (Gutierrez)* (2004) PERB Decision No. 1606, pp. 3-4.) In addition to the charging party's factual allegations, we may also consider information provided by the respondent, when such information is submitted under oath, complements without contradicting the facts alleged in the charge, and is not disputed by the charging party. (PERB Reg. 32620, subd. (c); *Hartnell Community College District* (2015) PERB Decision No. 2452 (*Hartnell*), pp. 19-20.)

disagreed with the decision to terminate his employment for cause and to request that he be terminated instead without cause but “regardless of the decision reached at the hearing [Wyrick would] not be reinstated to [his] position.” The notice further advised Wyrick that he had “at least five working days” in which to respond to the notice. However, the original charge did not provide the date of the hearing or its outcome, nor identify the effective date of Wyrick’s termination.

On April 27, 2016, the Office of the General Counsel issued a warning letter, which identified the requirements for stating a prima facie case, including the charging party’s burden to provide sufficient information to demonstrate that the material allegations in the charge are timely. The warning letter also advised Wyrick that, in the absence of a specific date when his termination took effect, the charge would be dismissed for failure to state a prima facie case. The warning letter also provided Wyrick an opportunity to cure this deficiency in the original charge by correcting or supplementing its factual allegations.

On May 10, 2016, Wyrick filed a first amended charge, which incorporated the statement of the original charge and further alleged that Wyrick had requested a union representative at the start of the May 7, 2015 meeting. The first amended charge also included the State’s “Notice of Termination of Limited-Term Appointment for Cause,” which was dated May 20, 2015.

PERB’s Office of the General Counsel dismissed the amended charge on June 20, 2015. The present appeal followed on August 1, 2016, and the State filed its opposition to the appeal on August 12, 2016. The appeal includes a sworn declaration from Wyrick and additional correspondence of June 12, 2015 from the State advising Wyrick of his appeal rights and, in addition to reiterating the allegation that Wyrick was terminated in retaliation for protected activity, further alleges that Wyrick’s supervisor interfered with representational rights by

repeatedly questioning Wyrick on May 7, 2015, even after he had requested union representation. The State's opposition argues that the appeal and supporting materials should be rejected for procedural deficiencies, that, even if considered, the charge fails to state a prima facie violation of any unfair practice and that, accordingly, the dismissal of Wyrick's charge should be affirmed.

DISCUSSION

Consideration of Newly-Presented Information and Allegations on Appeal

PERB Regulation 32635, subdivision (b), states that “[u]nless good cause is shown, a charging party may not present on appeal new charge allegations or new supporting evidence.” The purpose of the regulation is to require the charging party to present its allegations and supporting evidence in the first instance so that the Board agent can fully investigate the charge before deciding whether to issue a complaint or dismiss the case. (*Regents of the University of California* (2006) PERB Decision No. 1851-H, p. 2.) When a party has the opportunity to cure defects in a prima facie case at earlier stages and does not do so, the Board is reluctant to consider such facts or evidence later. (*Ibid.*) PERB has generally found good cause to consider new allegations or supporting evidence presented in an appeal when the events giving rise to the new evidence did not occur until after the charge was dismissed or the newly-submitted information was unknown or unavailable to the charging party through the exercise of reasonable diligence. (*Claremont Unified School District* (2014) PERB Decision No. 2357, p. 5; *American Federation of State, County, and Municipal Employees, Local 2620 (McGuire)* (2012) PERB Decision No. 2286-S, p. 3; cf. *Hartnell, supra*, PERB Decision No. 2452, pp. 27-28.)

Although Wyrick asserts that the newly-submitted information would lead to a different outcome, his appeal fails to show good cause under PERB Regulation 32635, subdivision (b), for the Board to consider this information or the new allegations. Unlike, for example, in *Hartnell*, where the charging party's termination was not effective until after his charge had been dismissed, the present appeal and supporting materials, including a June 12, 2015 letter from the State, demonstrate that Wyrick's termination was effective on or about May 26, 2015. Because the newly-submitted information included with Wyrick's appeal was readily available to Wyrick before he filed his amended charge, no good cause exists for the Board to consider it now on appeal.⁴

Merits of the Appeal

Wyrick's appeal acknowledges that, notwithstanding the Office of the General Counsel's warning letter advising Wyrick that an amended charge must include pertinent date(s), including the date of Wyrick's termination, to demonstrate the timeliness of the charge, this information was not included in the amended charge. Wyrick's sworn declaration offers no explanation for his failure to do so, other than his inexperience representing himself in PERB proceedings, which resulted in a "rookie" error of failing to state the specific dates of the events described in Wyrick's original and amended charges.

⁴ Even if we were to consider the new information and allegations, they would not alter the outcome in this case, as they pertain to events allegedly occurring on or about May 7, 2015, more than six months before Wyrick filed his original charge on December 7, 2015. In the absence of some basis for tolling, which is not identified in the appeal, PERB is prohibited from issuing a complaint alleging unfair practices occurring more than six months before the filing of the charge. (*Coachella Valley Mosquito and Vector Control District v. Public Employment Relations Board* (2005) 35 Cal.4th 1072, 1090.) As such, Wyrick's "new" allegations would be dismissed as untimely, even if they were properly before the Board.

We are sensitive to the fact that PERB is not a court, but an administrative agency, and that the formalities of practice and procedure in the judicial system are not always appropriate for fulfillment of PERB's mission, which includes assisting parties and representatives who are laypersons. (PERB Regs. 32175, 32176, 32180, 32620, subd. (b)(1); *Reed District Teachers Association, CTA/NEA (Reyes)* (1983) PERB Decision No. 332, p. 6; *California State University, Hayward* (1987) PERB Decision No. 607-H, p. 21; *Los Angeles Community College District* (1994) PERB Decision No. 1060, p. 9; *Los Baños Unified School District* (2007) PERB Decision No. 1935, adopting warning letter at p. 2.) However, "ignorance of the law is no excuse and, therefore, insufficient to warrant a finding of good cause." (*United Faculty of Grossmont-Cuyamaca Community College District (Tarvin)* (2010) PERB Decision No. 2133, p. 3; see also *State of California (Department of Corrections)* (1999) PERB Decision No. 1366-S, adopting dismissal letter at p. 1; *County of Santa Clara* (2014) PERB Order No. Ad-411-M, p. 9.)

Here, the warning letter clearly stated that the original charge failed to meet Wyrick's burden "of alleging the specific date of his effective termination from the State," and that, without this information, the charge must be dismissed for failure to demonstrate the timeliness of the material allegations. (Warning letter, p. 3.) The warning letter also invited Wyrick to correct any factual inaccuracies and/or to provide additional facts that would correct this deficiency in the original charge. (*Ibid.*) In response, Wyrick's amended charge included a copy of the State's notice of termination, which indicated that the effective date of Wyrick's termination was May 20, 2015, and that he had until May 27, 2015 to respond. However, the only issue to be considered at the hearing was whether the termination would be "for cause" or

“without cause.” According to the notice, “regardless of the decision reached at the hearing you will not be reinstated to your position.”

In the absence of any contrary factual allegations, we may consider the information included in the State’s notice as true. (*Lake Tahoe Unified School District* (1993) PERB Decision No. 994, p. 12.) In that event, Wyrick’s termination was effective May 20, 2015 and the Office of the General Counsel correctly determined that any allegations stemming from Wyrick’s termination would be untimely, as they occurred more than six months before Wyrick filed his original charge.

Alternatively, to the extent Wyrick alleges that his termination was not effective May 20, 2015 and still subject to appeal, as explained in the warning letter, he has not provided the specific date of the termination. Wyrick’s asserted lack of knowledge of PERB and its procedures and his decision to represent himself are not grounds to excuse his failure to amend his charge by including the information identified in the warning letter.

In either event, we must affirm the Office of the General Counsel’s dismissal of any allegations involving Wyrick’s termination. We therefore deny Wyrick’s appeal.

ORDER

The unfair practice charge in Case No SA-CE-2062-S is hereby DISMISSED
WITHOUT LEAVE TO AMEND.

Members Winslow and Gregersen joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD

Los Angeles Regional Office
700 N. Central Ave., Suite 200
Glendale, CA 91203-3219
Telephone: (818) 551-2806
Fax: (818) 551-2820



June 20, 2016

Sam Wyrick

Re: *Sam Wyrick v. State of California (Department of Veterans Affairs)*
Unfair Practice Charge No. SA-CE-2062-S
DISMISSAL LETTER

Dear Mr. Wyrick:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on December 7, 2015 (original charge) and amended on May 10, 2016 (First Amended Charge). Sam Wyrick (Charging Party) alleges that the State of California (Department of Veterans Affairs) (State or Respondent) violated section 3519(a) of the Ralph C. Dills Act (Dills Act)¹ by terminating him in retaliation for his protected conduct.

Charging Party was informed in the attached Warning Letter dated April 27, 2016, 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, he should amend the charge. Charging Party was further advised that, unless he amended the charge to state a prima facie case or withdrew it on or before May 6, 2016, the charge would be dismissed. At Charging Party's request, the deadline to file an amended charge was extended to May 10, 2016. On May 10, 2016, this office received an amended charge.²

In the Warning Letter, Charging Party was advised that since the charge was filed on December 7, 2015, any alleged adverse actions occurring prior to June 7, 2015 are outside the statute of limitations. Charging Party was further advised that since the original charge did not specify the effective date of his termination, the charge fails to meet its burden of showing that the instant charge was timely filed within the Act's six month statute of limitations. The amended charge fails to describe the date of his actual termination and reiterates that Charging Party received his "notice" of termination on May 20, 2015. Again, the amended charge fails

¹ The Dills Act is codified at Government Code section 3512 et seq. PERB's Regulations are codified at California Code of Regulations, title 8, section 31001 et seq. The text of the Dills Act and PERB Regulations may be found at www.perb.ca.gov.

² The proof of service attached to the charge was not signed by the declarant as required by PERB Regulation 32140(a). Respondent acknowledged that it received the amended charge on May 17, 2016.

to specify that the charge was timely filed within the Act's six month statute of limitations (i.e., that his termination occurred on or after June 7, 2015). Accordingly, the charge is hereby dismissed for the reasons described above and those in the Warning Letter.

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, § 32635, subd. (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, §§ 32135, subd. (a) and 32130; see also Gov. Code, § 11020, subd. (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, § 32135, subds. (b), (c) and (d); see also Cal. Code Regs., tit. 8, §§ 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. (Cal. Code Regs., tit. 8, § 32635, subd. (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, § 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

³ PERB's Regulations are codified at California Code of Regulations, title 8, section 31001 et seq. The text of PERB's Regulations may be found at www.perb.ca.gov.

may also be concurrently served via facsimile transmission on all parties to the proceeding. (Cal. Code Regs., tit. 8, § 32135, subd. (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, § 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,

J. FELIX DE LA TORRE
General Counsel

By _____
Yaron Partovi
Regional Attorney

Attachment

cc: Elizabeth P. Krehe, Legal Counsel, California Department of Human Resources

PUBLIC EMPLOYMENT RELATIONS BOARD

Los Angeles Regional Office
700 N. Central Ave., Suite 200
Glendale, CA 91203-3219
Telephone: (818) 551-2806
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April 27, 2016

Sam Wyrick

Re: *Sam Wyrick v. State of California (Department of Veterans Affairs)*
Unfair Practice Charge No. SA-CE-2062-S
WARNING LETTER

Dear Mr. Wyrick:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on December 7, 2015. Sam Wyrick (Charging Party) alleges that the State of California (Department of Veterans Affairs) (State or Respondent) violated section 3519(a) of the Ralph C. Dills Act (Dills Act)¹ by terminating him in retaliation for his protected conduct.

Charging Party, a limited term security officer at Respondent's Redding Veteran's Home was called into his supervisor's office on May 7, 2015. During the meeting, his supervisor asked "What is this shit between me and you?" Charging Party, believing that disciplinary action would occur, "elected to exercise [his] rights to union representation." When his supervisor admonished him to answer the question again, Charging Party left the supervisor's office and sent the supervisor an e-mail message "asking for [his] representative to be present should [the supervisor] want to meet with [Charging Party] again." On May 20, 2015, Charging Party was served with a "Notice of Termination." Following a "name clearing hearing," Charging Party was "terminated for cause."

Discussion

PERB Regulation 32615(a)(5) requires that an unfair practice charge include a "clear and concise statement of the facts and conduct alleged to constitute an unfair practice." In doing so, a charging party should allege with specificity the particular facts giving rise to a violation. (*National Union of Healthcare Workers* (2012) PERB Decision No. 2249a-M.) The charging party may do this by alleging sufficient facts describing 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 (*Dept. of Food and Agriculture*), citing *United Teachers-Los Angeles (Ragsdale)* (1992) PERB Decision No. 944.) Such allegations should focus on the

¹ The Dills Act is codified at Government Code section 3512 et seq. PERB's Regulations are codified at California Code of Regulations, title 8, section 31001 et seq. The text of the Dills Act and PERB Regulations may be found at www.perb.ca.gov.

elements of the prima facie case. Mere legal conclusions are not sufficient to state a prima facie case. (*Ibid.*; *Charter Oak Unified School District* (1991) PERB Decision No. 873.)

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.)

To demonstrate that an employer discriminated or retaliated against an employee in violation of Government Code 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; (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 Decision 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), 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 School District, supra*, PERB Decision No. 264; *Novato, supra*, PERB Decision No. 210).

In the present case, since the charge was filed on December 7, 2015, any alleged adverse actions occurring prior to June 7, 2015 are outside the statute of limitations. However, as in the present case, the limitations period for a termination of employment commences on the date the termination becomes *effective*, not on the earlier date on which an employer may provide an employee notice of its intention to terminate. (*Monterey Peninsula Unified School District* (2014) PERB Decision No. 2381; see also, *Regents of the University of California* (2004) PERB Decision No. 1585-H [when the alleged unlawful act is termination in retaliation for protected activity, the statute of limitations begins to run from the time of the actual termination].)

Here, Charging Party was notified of his termination on or about May 20, 2015; however, his termination did not become effective until after his "name clearing hearing." However, Charging Party fails to meet his pleading burden of alleging the specific date of his effective termination from the State. (*United Teachers of Los Angeles (Seliga)* (1998) PERB Decision No. 1289 [charging party bears the burden of proving that charge is timely filed; specific dates of violation must be alleged to meet burden]; *California State Employees Association (Rubin)* (1994) PERB Decision No. 1042-S [charging party failed to meet its burden of alleging dates to show that the alleged unlawful conduct occurred within the six-month limitations period].) As a result, the charge fails to specify that charge was timely filed within the Act's six month statute of limitations.

For these reasons the charge, as presently written, does not state a prima facie case.² 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 served on the respondent's representative and the original proof of service must be filed with

² 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.*)

SA-CE-2062-S

April 27, 2016

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PERB. If an amended charge or withdrawal is not filed on or before May 6, 2016³ PERB will dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Yaron Partovi
Regional Attorney

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³ A document is “filed” on the date the document is **actually received** by PERB, including if transmitted via facsimile or electronic mail. (PERB Regulation 32135.)