STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

DANNY WILSON, Charging Party, v. STATE OF CALIFORNIA (EMPLOYMENT DEVELOPMENT DEPARTMENT), Respondent.	Case No. LA-CE-705-S PERB Decision No. 2527-S May 26, 2017

Appearances: Danny Wilson, on his own behalf; California Department of Human Resources by Camille K. Binon, Legal Counsel, for State of California (Employment Development Department).

Before Gregersen, Chair; Banks and Winslow, Members.

DECISION[1]

GREGERSEN, Chair: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Danny Wilson (Wilson) of a dismissal (attached) by the Office of the General Counsel of his unfair practice charge.[2] The charge, as amended, alleges that the State of California (Employment Development Department) (EDD) violated numerous sections

[1] PERB Regulation 32320, subdivision (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 [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 dismissal letter references the Educational Employment Relations Act (EERA) at page 5. In fact, this case falls under the Ralph C. Dills Act (Dills Act). It also, at page 6, refers to the "District" as the employer, after referring to some EERA cases. No "District" is involved in this matter, as this is case brought against the EDD and the State. These typographical errors are not mentioned in Wilson's appeal and we regard them as harmless errors. (Unless otherwise noted, all statutory references are to the Government Code. EERA is codified at § 3540 et seq. and the Dills Act at § 3512 et seq.)

of the Dills Act when: (1) Wilson was yelled at by a supervisor; (2) Wilson's vehicle was vandalized; (3) California Highway Patrol (CHP) failed to take a report of the vandalism; (4) Wilson had pay, vacation and benefit deficiencies; (5) Wilson endured treatment for refusing to sign a release form; (6) CHP failed to render assistance to Wilson; (7) EDD ordered an air card device in Wilson's name; (8) EDD requested Wilson to share his Outlook calendar; (9) Wilson was unable to obtain an "employee position statement" from his manager; (10) Wilson received a torn check stub; (11) an EDD manager refused to sign a timesheet; (12) Wilson was unable to join a Leadership Mentoring Program; (13) Wilson was forced to take days off; (14) Wilson was demoted from a Disabled Veteran Outreach Program Specialist to an Employment Program Specialist; and (15) Wilson experienced an issue applying for certain positions.

The Office of the General Counsel dismissed the charge for failure to state a prima facie case, lack of standing, lack of jurisdiction, and timeliness.

The Board itself has reviewed this matter in full, including Wilson's unfair practice charge and his first amended charge, the Office of the General Counsel's warning and dismissal letters, Wilson's appeal, and EDD's opposition, in light of applicable law. Based on that review, the Board itself concludes that the warning and dismissal letters accurately summarize the charge allegations in all material respects and are well reasoned and consistent with the applicable law.

PERB Regulation 32635, subdivision (a), provides in pertinent part:

> The Appeal shall:
>
> (1) State the specific issues of procedure, fact, law or rationale to which the appeal is taken;
>
> (2) Identify the page or part of the dismissal to which each appeal is taken;

(3) State the grounds for each issue stated.

"[C]ompliance with regulations governing appeals is required to afford the respondent and the Board an adequate opportunity to address the issues raised, and noncompliance will warrant dismissal of the appeal." (*California State Employees Association, Local 1000, AFL-CIO, Service Employees International Union (Myers)* (1992) PERB Decision No. 942-S.)

An appeal that states nothing more than the charging party appeals the dismissal of the unfair practice charge have historically been dismissed by the Board for failure to comply with PERB Regulation 32635(a). For example, in *City of Brea* (2009) PERB Decision No. 2083-M, the Board dismissed an appeal that stated in its entirety: "Charging Party Derrick J. Coffman excepts to the dismissal of his charge and appeals said dismissal." (Accord *Lodi Education Association (Hudock)* (1995) PERB Decision No. 1124; *California School Employees Association and its San Juan Chapter #127 (Hare)* (1995) PERB Decision No. 1089; *United Teachers – Los Angeles (Glickberg)* (1990) PERB Decision No. 846.)

Wilson's appeal consists of a single statement requesting that the Board "review all the Unfair Practice Charge No: LA-CE-705-S prior information and first amended proofs sent earlier, as well as all other supporting information." Like the appeals in the cases cited above, Wilson's appeal fails to state specific issues or parts of the dismissal to which appeal is taken, or to state grounds for the appeal. Accordingly, we reject the appeal and affirm the dismissal of the unfair practice charge as amended.

ORDER

The unfair practice charge in Case No. LA-CE-705-S is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Banks and Winslow joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD

Los Angeles Regional Office
700 N. Central Ave., Suite 200
Glendale, CA 91203-3219
Telephone: (818) 551-2813
Fax: (818) 551-2820

October 25, 2016

Danny Wilson

Re: *Danny Wilson v. State of California (Employment Development Department)*
Unfair Practice Charge No. LA-CE-705-S
DISMISSAL LETTER

Dear Mr. Wilson:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on March 15, 2016. Danny Wilson (Charging Party) alleges that the State of California (Employment Development Department) (EDD or Respondent) violated sections 3514, 3514.5, 3515, 3516, 3516.5, 3517, 3517.5, 3517.7, 3517.8, 3518, 3518.5, 3519, 3519.5, 3520, 3520.7, 3520.8, 3521, 3521.5, 3521.7, and 3523 of the Ralph C. Dills Act (Dills Act)[1] by retaliating and/or discriminating against him.

Charging Party was informed in the attached Warning Letter dated September 6, 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, Charging Party should amend the charge. Charging Party was further advised that, unless Charging Party amended the charge to state a prima facie case or withdrew it on or before September 19, 2016, the charge would be dismissed. On or about September 14, 2016, the undersigned Board agent spoke with Charging Party by telephone. In that conversation, Charging Party stated that he had received the September 6, 2016, Warning Letter. On September 20, 2016, Charging Party filed a First Amended Charge (FAC). On October 6, 2016, the EDD filed a verified Position Statement in response to the FAC.

Facts Alleged in the FAC

At some time soon after the start of his employment with the EDD, Charging Party was instructed by EDD administrators to take off certain days when, in reality, taking those days off was optional for employees.

[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.

At some point during Charging Party's employment with the EDD, the EDD failed to complete his evaluations in a timely manner, which delayed Charging Party's progression through various salary ranges.[2]

In or about March of 2013, Charging Party sent his supervisor, Vivien Nguyen (Nguyen) an e-mail message stating that his pay stub had been partially torn before he received it. Charging Party requested that in the future his paystubs not be damaged and that they be sent to his home address.

In or about June of 2013, EDD representatives blocked or prevented Charging Party's participation in a Leadership Mentoring Program.

On or about July 1, 2013, Charging Party reported that eggs had been thrown at his car. The California Highway Patrol (CHP) did not allow Charging Party to give a statement regarding the egging of his car. On or about July 10, 2013, the CHP delivered a report regarding the incident to EDD management. Charging Party alleges that the CHP and/or Nguyen filled out multiple reports regarding the egging incident including an Arrest Investigation Report. Charging Party alleges that Nguyen used the Arrest Investigation Report to direct the CHP to investigate Charging Party.

Charging Party alleges that the EDD "wire tapp[ed]" his telephone. EDD administrators also required Charging Party to repeatedly "check in" with management but did not require other employees to check in. On or about March 3, 2014, EDD Manager Melodi Thompson requested that Charging Party share his Outlook calendar with her.

Charging Party reiterates that, on or about April 9, 2014, the EDD asked him, without justification, to sign a document to authorize the EDD to review Charging Party's driving records.

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[2] In assessing unfair practice charges to determine whether a charging party has stated a prima facie case, PERB must treat the charging party's factual allegations as true and consider them in the light most favorable to the charging party. (*Trustees of the California State University (Sonoma)* (2005) PERB Decision No. 1755, citing *Golden Plains Unified School District* (2002) PERB Decision No. 1489.)

Pursuant to PERB's regulations and decisional law, PERB may consider factual information produced by a 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(c); *Lake Tahoe Unified School District* (1993) PERB Decision No. 994.) Because the EDD's written response is in compliance with PERB's regulatory scheme, this summary also includes relevant, undisputed facts provided by the EDD. (PERB Reg. 32620(c); *Service Employees International Union #790 (Adza)* (2004) PERB Decision No. 1632-M.)

On or about April 11, 2014, after Charging Party refused to sign the document, he was demoted.

In April of 2014, Charging Party wrote a letter to the State Personnel Board regarding alleged incorrect compensation from the EDD. Also in or about April of 2014, Charging Party filed a complaint with the United States Department of Justice regarding the EDD's alleged conduct.

On or about December 2, 2014, Nguyen refused to allow Charging Party to participate in a "State of California Merit Employee Suggestion Program." On December 23, 2014, Staff Service Manager Barbara Apel requested that Charging Party send her his "position statement" regarding his "Employee Suggestion."

Charging Party corresponded with a representative of the Department of Fair Employment and Housing (DFEH) regarding his case in or about December of 2014.[3] The DFEH conducted an investigation in or around December 29, 2014.

Charging Party alleges that the EDD and/or the CHP had "unlawful motives" in engaging in their alleged conduct. Charging Party also alleges that EDD created "bad working conditions," fostered a "hostile [working] environment" for him, and hindered his attempts to attain a position as an Associated Analyst and/or an Environmental Planner.

In or about September of 2016, the EDD ordered a piece of electronic equipment, an "air card", assigned it to another employee, and then "pinn[ed]" the equipment on Charging Party. Charging Party appears to allege that the EDD assigned him a piece of equipment but never actually provided that equipment to him. Charging Party alleges that this conduct by the EDD constituted a misrepresentation.

In addition, EDD Administrators "guided" CHP Officer Efferson's conduct and were in secret communication with the CHP during Efferson's investigation of the incident involving a combative client that took place in December of 2015.

Charging Party requests a hearing wherein he may question witnesses regarding the allegations raised in his initial charge and the FAC.

Discussion

I. Statute of Limitations

As discussed in the Warning Letter dated September 6, 2016 (Warning Letter), the statute of limitations in this case extends back six months from March 15, 2016, to September 15, 2015. Accordingly, all of the following allegations are subject to dismissal because they are outside the 6-month statute of limitations: (1) the removal of compensation from Charging Party's paycheck in 2010; (2) the egging of Charging Party's car in 2013 and the CHP's response to the egging; (3) Nguyen's conduct in yelling at Charging Party in 2014; and (4) the EDD's

[3] Charging Party's DFEH case is Case No. 377821-127898.

alleged adverse treatment of Charging Party, including his demotion, following his refusal to sign the DMV form in 2014. In addition, the following new allegations from the FAC are also outside the statute of limitations and are subject to dismissal on that basis: (5) when hired, Charging Party was instructed to take specified days off work even though he was not required to do so; (6) in or about March of 2013, Charging Party received a damaged paystub; (7) in or about June of 2013, EDD personnel prevented Charging Party from participating in the Leadership Mentoring Program; (8) in or about July of 2013, the EDD and/or CHP filled out incorrect reports regarding the egging incident; (9) in or about July of 2013, EDD personnel directed the CHP to investigate Charging Party; (10) on or about March 3, 2014, EDD personnel required Charging Party to "check in" with management; and (11) on or about December 2, 2014, Nguyen prevented Charging Party from participating in a "State of California Merit Employee Suggestion Program." Because all of the above-listed alleged conduct is outside the statute of limitations, it is subject to dismissal.

Charging Party did not allege when the following conduct took place: the EDD and/or CHP "tapped" Charging Party's telephone; the EDD and/or CHP violated Charging Party's right to privacy; and the EDD hindered Charging Party's attempts to attain a promotion. By failing to allege when these incidents occurred, Charging Party has failed to meet his burden to allege timeliness and such allegations are subject to dismissal. (*City of Santa Barbara* (2004) PERB Decision No. 1628-M.)

II. Jurisdiction

As stated in the Warning Letter, PERB's jurisdiction is limited to the determination of unfair labor practice claims arising under public sector labor statutes. (*Compton Unified School Dist.* (2006) PERB Decision No. 1805.) PERB lacks jurisdiction over Charging Party's allegations that the District retaliated and/or discriminated against him because of his race, national origin, or veteran status. (See *Alum Rock Union Elementary School Dist.* (2005) PERB Decision No. 1748.) Moreover, PERB lacks jurisdiction over alleged violations of the Labor Code. (*State of California (Dept. of Personnel Admin.)* (2009) PERB Decision No. 2018-S.) Accordingly, to the extent that Charging Party alleges that the District retaliated and/or discriminated against him because of his race, national origin, or veteran status, or violated the Labor Code, such allegations are subject to dismissal for lack of jurisdiction.

III. Interference

In order to establish a prima facie case of unlawful interference, the charging party must establish that the respondent's conduct tends to or does result in some harm to employee rights granted under the applicable statute. (*State of Cal. (Dept. of Developmental Services)* (1983) PERB Decision No. 344-S.) Under the above-described test, a violation may only be found if the Dills Act provides the claimed rights. (*Clovis Unified School Dist.* (1984) PERB Decision No. 389.) It does not appear that the Dills Act affords Charging Party the right to have copies of incident reports or to participate in employment programs such as the Leadership Mentoring Program.

Charging Party alleges that *County of Riverside* (2010) PERB Decision No. 2119-M (*Riverside*) supports his charge. In *Riverside*, the Board found that statements by the employer's Bound of Supervisors that discussed the possible elimination of an entire program in response to efforts to unionize that program's employees, as well as statements to union organizers that employees would get a union when the employer's officials died, retired, or the employer went out of business, constituted interference with the employee organization's rights. (*Ibid*.) The Board found that the statement regarding the possibility of a union being recognized as against an official's death or retirement tended to discourage the union from continuing its efforts to organize unrepresented employees and thus interfered with the right of the union to organize employees. (*Ibid*. at p. 23.) Another employer representative's statement that he would be dead or the employer would be out of business before the employees secured union representation also tended, according to the Board, to discourage the union from continuing its effort to organize unrepresented employees and thus constituted interference with the union's right to organize employees. (*Ibid.* at p. 21.) At a County Board of Supervisors meeting a Supervisor stated that if the employees continued to attempt to organize, that the employer should consider contracting out those employees' work to private contractors. The Board found that the Supervisor's statements interfered with both employees' rights and the rights of the union itself.

In the instant case, Charging Party does not appear to allege that statements by the EDD tended to discourage him from exercising any *rights protected under EERA*, as was the case in *Riverside*. In addition, as an individual, Charging Party lacks standing to allege that statements by EDD officials interfered with the rights of an exclusive representative. (*State of California (Department of Corrections)* (1993) PERB Decision No. 972-S [individuals do not have standing to pursue violations of the rights of an employee organization].) Thus, *Riverside* is distinguishable and does not support Charging Party's allegation that the EDD interfered with his exercise of protected rights. Accordingly, Charging Party's interference allegations, if any, are subject to dismissal.

IV. Retaliation and Discrimination

Charging Party alleges that the following conduct by the District constituted retaliation/discrimination under EERA section 3519, subdivision (a): (1) conduct related to the December 2015 incident involving a combative client; and (2) the EDD's conduct in assigning an air card to Charging Party while actually providing the air card to another employee.

As discussed in the Warning Letter, to demonstrate that an employer discriminated or retaliated against an employee in violation of Government Code section 3519, subdivision (a), Charging Party must show that: (1) he exercised rights under the Dills Act; (2) the EDD had knowledge of the exercise of those rights; (3) the EDD took adverse action against him; and (4) the EDD took the action <u>because of</u> the exercise of those rights. (*Novato Unified School District* (1982) PERB Decision No. 210 (*Novato*).)

Adverse Action

As discussed in the Warning Letter, 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 Dist.* (1988) PERB Decision No. 689.) 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 Dist.* (1991) PERB Decision No. 864.)

In the FAC, Charging Party cites *Lake Tahoe Unified School District* (1993) PERB Decision No. 994 (*Lake Tahoe*). *Lake Tahoe* is distinguishable. In that case, it was undisputed that the district's alleged conduct—issuing an employee two derogatory disciplinary memorandums and an evaluation with a rating of "performance needs improvement"—was adverse to an employee's employment. Charging Party also cites *Oakland Unified School District* (2003) PERB Decision No. 1529 (*Oakland*), in which the Board affirmed that placing an employee on involuntary leave is adverse to his or her employment. Charging Party also cites *Coast Community College District* (2003) PERB Decision No. 1560 (*Coast CCD*), where the Board found that an employer took adverse action against an employee by placing him on administrative leave and issuing him a "Notice of Unprofessional Conduct."

Despite the additional allegations contained in the FAC, it remains unclear whether and how the EDD took any action following the December 2015 incident *that harmed Charging Party's employment*. Charging Party does not allege that he received any kind of verbal or written warning related to that incident. He was not placed on administrative leave. Instead, Charging Party alleges, among other things, that he was not interviewed following the egging of his car and the incident with the belligerent client, and that he was not provided copies of the applicable reports despite asking for them. Unlike in *Lake Tahoe*, *Oakland*, and *Coast CCD*, in the instant case Charging Party has alleged insufficient facts to demonstrate that any conduct by the District that is within the statute of limitations was adverse to his employment. Accordingly, these allegations are subject to dismissal.

Charging Party alleges further that he was assigned an "air card" but not actually provided with one. Charging Party alleges in the FAC that he had no need for an "air card." Again, it is unclear how assigning the "air card" to Charging Party but not actually providing it to him when he did not need it was adverse to Charging Party's employment. For this reason, this allegation is also subject to dismissal.

V. Other Dills Act Alleged Violations

Charging Party has also alleged a number of Dills Act violations that concern generally: Board agents and charge processing (Government Code sections 3514, 3514.5);[4] employee organizational rights and employee self-representation (section 3515); scope of representation

[4] All further code references are to the Government Code unless otherwise specified.

and meet and confer rights and obligations (sections 3516, 3516.5, 3517, 3518.5); memorandum of understanding (sections 3517.7, 3517.8); mediation (section 3518); unlawful acts by employee organizations (section 3519.5); unit determination (sections 3520, 3521, 3521.7); right of employee organization representatives to release time to meet and confer with an employer (section 3518.5); registering employee organizations (section 3520.7); appeals of certification or recognition; (section 3520.8); presentation of bargaining proposals (section 3523); and the definition of the term "professional employee" (section 3521.5).

The issue of "standing," or jurisdiction over the parties, is separate and distinguishable from the issue of whether the elements of a prima facie case exist. (*Los Angeles Community College Dist.* (1994) PERB Decision No. 1060.) The Dills Act requires PERB to dismiss a charge for lack of Board jurisdiction if a party has no standing to file a charge. (See *City of Santa Monica* (2012) PERB Decision No. 2246-M.)

The Board has held that individuals do not have standing to pursue violations of the rights of employee organizations. (*State of California (Dept. of Corrections)* (1993) PERB Decision No. 972-S.) Charging Party also cites a number of cases in support of the charge, each of which deals with the right of an employee organization under one of the statutes administered by PERB: *City of Sacramento* (2013) PERB Decision No. 2351-M (alleged violation of employer's duty to bargain in good faith);[5] *City of Pinole* (2012) PERB Decision No. 2288-M (same); and *Sonoma County Office of Education* (1997) PERB Decision No. 1225 (same). Because a number of cited statutory sections protect the rights of employee organizations rather than those of individual employees, Charging Party lacks standing to raise these allegations and they are subject to dismissal.[6]

Moreover, even if Charging Party did have standing to raise violations of some of the Dills Act sections alleged above, Charging Party fails to allege any facts to establish a prima facie case.[7] For this reason, any such allegations are subject to dismissal.

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[5] Charging Party also alleged in the FAC that the District violated PERB Regulation 32644, subdivision (c), which states that a respondent's failure to file a timely Answer in response to the issuance of a Complaint by the Office of the General Counsel may constitute an admission of the facts contained in that Complaint. No Complaint has yet issued in this case. Accordingly, the District has no obligation to file an Answer at this stage of the proceedings. 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.

[6] Charging Party also cites *City of Santa Barbara* (2004) PERB Decision No. 1628-M, in which the charging party alleged that an employer violated an employee's right to union representation. Charging Party has not alleged that he was denied such representation.

[7] Charging Party does allege that EDD violated Dills Act section 3515, which addresses employee organizational rights and employee self-representation. However, Charging Party fails to allege any facts describing how EDD interfered with his rights to participate in the activities of employee organizations or self-representation.

The charge is hereby dismissed in its entirety based on the facts and reasons set forth above and in the September 6, 2016, Warning Letter.

Right to Appeal

Pursuant to PERB Regulations, 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 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 _____
Blaire Baily
Regional Attorney

Attachment

cc: Camille K. Binon, 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) 551-2813
Fax: (818) 551-2820

September 6, 2016

Danny Wilson

Re: *Danny Wilson v. State of California (Employment Development Department)*
Unfair Practice Charge No. LA-CE-705-S
WARNING LETTER

Dear Mr. Wilson:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on March 15, 2016. Danny Wilson (Charging Party) alleges that the State of California (Employment Development Department) (EDD or Respondent) violated sections 3514, 3514.5, 3515, 3516, 3516.5, 3517, 3517.5, 3517.7, 3517.8, 3518, 3518.5, 3519, 3519.5, 3520, 3520.7, 3520.8, 3521, 3521.5, 3521.7, and 3523[1] of the Ralph C. Dills Act (Dills Act)[2] by retaliating and/or discriminating against him.

Facts as Alleged[3]

When Charging Party first began his employment with the EDD in 2010, the EDD removed an unknown amount of compensation from Charging Party's paycheck. This incident is part of a series of "pay issues, vacation issues and benefits issues" that Charging Party has raised with the EDD.[4] Charging Party has sent "messages" regarding these issues to Melissa Brandon, whose position with the EDD is unknown.

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[1] All further code references contained here are to the Government Code unless otherwise specified.

[2] 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.

[3] In assessing unfair practice charges to determine whether a charging party has stated a prima facie case, PERB must treat the charging party's factual allegations as true and consider them in the light most favorable to the charging party. (*Trustees of the California State University (Sonoma)* (2005) PERB Decision No. 1755, citing *Golden Plains Unified School District* (2002) PERB Decision No. 1489.)

[4] It is unclear when Charging Party raised these issues with the EDD.

At some time in 2013, Charging Party's car was egged while sitting in a "State of California parking lot" across from the EDD's Torrance Career Center. Prior to the egging of Charging Party's car, Charging Party had "written about pay and benefits." Charging Party alleges that he has repeatedly been retaliated against since 2013.

After Charging Party's car was egged, a California Highway Patrol (CHP) officer investigated the incident but did not interview Charging Party. The CHP officer did interview Vivien Nguyen (Nguyen), an Employment Program Representative 1, who "tr[ied] to distort the situation to [make it] appear [Charging Party] was the cause of a disruption in the workplace."

Charging Party alleges that the egging of his car and the difficulty he faced in acquiring a copy of the egging incident report constituted "systemic retaliation."

At some time prior to December 29, 2014, Charging Party refused to sign a "DMV paper related to employees that used state cars." Following Charging Party's refusal, he was "treated harshly" and demoted from a Disabled Veteran Outreach Program Specialist position to an Employment Program Specialist position.[5] Charging Party then filed a complaint with the Department of Fair Employment and Housing (DFEH), alleging that that he was discriminated against due to "one or more Fair Employment and Housing Act protected bases: Military or Veteran status.".[6] Charging Party's DFEH complaint was "refused."

Charging Party alleges that, during an unknown time period, the EDD has interfered with and delayed the delivery of his U.S. mail.

In 2014, Nguyen yelled at Charging Party while he was acting as a "veteran['s] representative" at the Torrance Career Center. Charging Party called his manager, Carolyn Anderson (Anderson), and asked her to intercede.[7]
Charging Party alleges that due to conduct by the EDD, he has experienced emotional distress, his career has been negatively affected, and he has "lost thousands of dollars in maintenance and punitive damages."

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[5] Pursuant to PERB's regulations and decisional law, PERB may consider factual information produced by a 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(c); *Lake Tahoe Unified School District* (1993) PERB Decision No. 994.) Because the EDD's written response is in compliance with PERB's regulatory scheme, this summary also includes relevant, undisputed facts provided by the EDD. (PERB Reg. 32620(c); *Service Employees International Union #790 (Adza)* (2004) PERB Decision No. 1632-M.)

[6] Charging Party's DFEH Complaint is Case No. 377821-127898. The DFEH Complaint also lists Equal Employment Opportunity Commission (EEOC) Case No. 37A-2015-00866-C.

[7] It is unclear what happened immediately after Charging Party sought assistance from Anderson.

At some point during Charging Party's employment, the EDD directed Charging Party to do extra "workshops", which Charging Party alleges is a possible effort by the EDD to prevent him from contacting PERB. Charging Party alleges that other employees of EDD are not required to do extra duties like workshops.

Charging Party has repeatedly provided "ideas" to the EDD but has never been compensated for his "ideas."

On December 2, 2015, when Charging Party informed a client, who was a veteran, that he would have to fill out paperwork before he could receive assistance, the client became angry and combative. An unknown individual stated to Charging Party that, because the Harbor Work Source Office was not a state building, Charging Party needed to call the CHP if he needed assistance. Charging Party, who was working at the Harbor Work Source Office, contacted the CHP and requested assistance. Although most of the clients present did not assist Charging Party, one client wrote Charging Party a handwritten note stating that Charging Party's behavior during the interaction with the client had been appropriate. No one from the CHP came to the Harbor Work Source Office to assist Charging Party that day. After the client left, Charging Party made a report to the CHP.

Charging Party alleges that, in February of 2016, the EDD "kept [Charging Party] busy" with work in order to keep Charging Party from "keeping up with times and dates" of workplace incidents.

At some time in or after February of 2016, CHP Lieutenant David Efferson (Efferson) and another CHP officer arrived at Charging Party's workplace and requested to meet with him. Charging Party described the December 2, 2015, incident to Efferson and stated further his belief that the CHP should have assisted Charging Party with the client. After meeting with Charging Party, Efferson sent Charging Party a letter regarding the December 2, 2015, incident, which stated that Charging Party had disagreed with the client. Charging Party wrote a letter of complaint to the American Civil Liberties Union and the CHP regarding the CHP's handling of the December 2, 2015, incident. Charging Party alleges that his manager has attempted to make Charging Party appear to have been at fault regarding the incident.

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 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.)

A prima facie case is established if the factual allegations set out in the charge are sufficient to satisfy the legal elements of the alleged violation. In the initial processing of an unfair practice charge, PERB will assume that the facts set out in the charge are true. (*Golden Plains*, *supra*, PERB Decision No. 1489.) If these alleged facts establish the legal elements of a violation, so as to set out a prima facie case, PERB will issue a complaint, thereby allowing the charge to proceed to an evidentiary hearing. (PERB Regulation 32640; *Eastside Union School District* (1984) PERB Decision No. 466.) However, if the alleged facts are not sufficient to establish a prima facie case, PERB will notify the Charging Party of any deficiencies in the allegations, so as to give the Charging Party an opportunity to cure the deficiency by filing an amended charge. (PERB Regulation 32620(c).) If the Charging Party still fails to establish a prima facie case, the charge will be dismissed by PERB without the issuance of a complaint. (PERB Regulations 32620, 32621, 32630.)

I. Statute of Limitations

Dills Act section 3514.5(a)(1) prohibits PERB from issuing a complaint with respect to "any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge." The limitations period begins to run once the charging party knows, or should have known, of the conduct underlying the charge. (*Gavilan Joint Community College District* (1996) PERB Decision No. 1177.) A charging party bears the burden of demonstrating that the charge is timely filed. (*Tehachapi Unified School District* (1993) PERB Decision No. 1024; *State of California (Department of Insurance)* (1997) PERB Decision No. 1197-S.)

Charging Party filed the instant charge on March 15, 2016. The statute of limitations extends back six months from the filing date to September 15, 2015. Thus, unless an exception applies, all of Charging Party's allegations regarding conduct that occurred before September 15, 2015, are untimely. Accordingly, the following allegations appear untimely and are subject to dismissal on that basis: (1) the removal of compensation from Charging Party's paycheck in 2010; (2) the egging of Charging Party's car in 2013 and the CHP's response to the egging; (3) Nguyen's conduct in yelling at Charging Party in 2014; and (4) the EDD's alleged adverse treatment of Charging Party, including his demotion, following his refusal to sign the DMV form in 2014.

II. Jurisdiction

To the extent Charging Party attempts to allege wrongful conduct toward him because of his race or national origin, such alleged violations are beyond PERB's jurisdiction and are subject to dismissal. (*Alum Rock Union Elementary School District (2005) PERB Decision No. 1748.*) PERB's jurisdiction is limited to the determination of unfair labor practice claims arising under public sector labor statutes. (*Compton Unified School District* (2006) PERB Decision No. 1805.) Thus, PERB has no jurisdiction over claims of discrimination or retaliation based on other statutory frameworks. (*State of California (Department of Personnel Administration)* (2009) PERB Decision No. 2018-S [PERB's jurisdiction is limited and does not include the enforcement of other independent statutory schemes]; *Alum Rock Union Elementary School District*, *supra*, PERB Decision No. 1748.)

Accordingly, to the extent that Charging Party alleges that he was retaliated and/or discriminated against because of his race or his status as a veteran, those allegations are subject to dismissal because they are outside PERB's limited jurisdiction.

III. Retaliation and/or Discrimination

To demonstrate that an employer discriminated or retaliated against an employee in violation of Government Code section 3519, subdivision (a), Charging Party must show that: (1) he exercised rights under the Dills Act; (2) the EDD had knowledge of the exercise of those rights; (3) the EDD took adverse action against him; and (4) the EDD took the action because of the exercise of those rights. (*Novato Unified School District* (1982) PERB Decision No. 210 (*Novato*).)

A. Protected Activity

Charging Party alleges that he wrote "messages" to an EDD representative regarding "pay [], vacation [], and benefits issues" but provides no additional details regarding this conduct. Charging Party's allegations lack any specificity and are insufficient to demonstrate that he engaged in activity protected by the Dills Act. (See, e.g., *National Union of Healthcare Workers* (2012) PERB Decision No. 2249a-M [a charging party should allege with specificity the particular facts giving rise to a violation].) Charging Party has also alleged that he had a conversation with a combative client and unsuccessfully sought assistance from the CHP. Charging Party has alleged no authority to demonstrate that this conduct is protected under the Dills Act.

B. Adverse Action

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.) 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.) It is unclear whether Charging Party suffered any action that harmed his employment as a result of the December 2, 2015, incident. Charging Party does not allege that he received a verbal or written reprimand or any other kind of action regarding his employment following the December 2, 2015, incident. Charging Party does allege that the CHP sent Charging Party a letter stating that Charging Party may have angered a client, but it is unclear how this letter harms Charging Party's *employment*. Charging Party has not alleged sufficient allegations to demonstrate that the EDD took any action following the December 2, 2015, incident which could be construed as adverse to his employment.

IV. Alleged Violations of Other Sections

Charging Party alleges violations of approximately 20 different statutory sections, but, other than retaliation and discrimination allegations under section 3519, subdivision (a), Charging

Party does not allege how the EDD's conduct violated any other statutory sections. While factual charge allegations are deemed to be true at the charge processing and investigation stage of PERB proceedings, factually unsupported conclusory allegations enjoy no such advantage. (*County of Trinity (United Public Employees of California, Local 792)* (2016) PERB Decision No. 2480-M, citing *Charter Oak Unified School District* (1991) PERB Decision No. 873, p. 13.) Accordingly, the allegations regarding the EDD's alleged violations of other statutory sections are conclusory and are subject to dismissal on that basis.

For these reasons the charge, as presently written, does not state a prima facie case.[8] 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 PERB. If an amended charge or withdrawal is not filed on or before September 19, 2016,[9] PERB will dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Blaire Baily
Regional Attorney

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[8] 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.*)

[9] 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.)