

STATE OF CALIFORNIA  
DECISION OF THE  
PUBLIC EMPLOYMENT RELATIONS BOARD



KARIN Y. CHEN, )  
 )  
 Charging Party, ) Case No. LA-CE-196-S  
 )  
 v. ) PERB Decision No. 812-S  
 )  
 STATE OF CALIFORNIA (SECRETARY ) June 7, 1990  
 OF STATE), )  
 )  
 Respondent. )  
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Appearances: Karin Chen, on her own behalf; Department of Personnel Administration by Linda M. Nelson, Labor Relations Counsel, for State of California (Secretary of State).

Before Craib, Shank and Camilli, Members.

DECISION

CAMILLI, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the charging party, Karin Chen (Chen), and the State of California (Secretary of State) (State), to a proposed decision of an administrative law judge (ALJ). The ALJ found that the State violated section 3519(a) of the Ralph C. Dills Act (Dills Act)<sup>1</sup> by interfering with, restraining and coercing Chen in the

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<sup>1</sup>Ralph C. Dills Act is codified at Government Code section 3512 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code. Section 3519(a) states:

It shall be unlawful for the state to:

- (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.

exercise of her protected rights. Specifically, the ALJ found statements made by Chen's supervisors, Mabel Lee (Lee) and Janice Long (Long), at a March 12, 1987 performance evaluation meeting, i.e., that she should seek employment elsewhere, interfered with her protected right to protest work assignments she believed were outside her job description, improper, and unlawful.<sup>2</sup>

The ALJ dismissed Chen's allegation that the State discriminated against her by issuing a proposed negative probationary report, on the grounds Chen could not show an "adverse consequence" resulting from the proposed evaluation. Similarly, Chen's constructive discharge allegation was dismissed because she was unable to show the State imposed new or more burdensome duties on her because of her self-representational activities. The ALJ also denied Chen's requests for punitive damages and damages for emotional distress and psychological injuries, since such remedies are not authorized in unfair practice cases.

Chen excepts to the ALJ's dismissal of her: (1) discrimination and constructive discharge claims; (2) request for punitive damages; and (3) request for damages for emotional and psychological injuries.

The State excepts to the ALJ's finding of an interference violation and opposes Chen's appeal to the Board on the grounds

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<sup>2</sup>The issuance of the report was neither plead nor litigated as an interference allegation, but rather, as a discrimination claim.

she failed to state any specific errors of procedure, fact, law, or rationale, as required by PERB Regulation 32300(a).<sup>3</sup>

We have carefully reviewed the entire record, including the proposed decision, transcript, exceptions and responses, and affirm the ALJ's dismissal of Chen's constructive discharge claim, request for punitive damages, and request for damages for emotional and psychological injuries. We further find Chen's interference and reprisal claims were not timely filed and, therefore, reverse the ALJ on the finding of interference and affirm the dismissal of Chen's reprisal claim, consistent with the discussion below.

FACTUAL SUMMARY

Chen was hired on November 6, 1986, as an Office Assistant II - Bilingual at the Los Angeles office of the State. Her probationary period of employment ran for six months, during

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<sup>3</sup>PERB Regulations are codified at California Administrative Code, title 8, section 31001 et seq. Regulation 32300(a) provides, in pertinent part:

. . . . .

The statement of exceptions or brief shall:

- (1) State the specific issues of procedure, fact, law or rationale to which each exception is taken;
- (2) Identify the page or part of the decision to which each exception is taken;
- (3) Designate by page citation or exhibit number the portion of the record, if any, relied upon for each exception;
- (4) State the grounds for each exception.

which time she received three evaluations, one occurring every two months. Chen's first probationary report was issued on January 9, 1987, and was generally considered favorable. In the months that followed, Chen was requested to run numerous errands, most of which she believed were not related to official state business. Accordingly, she protested such assignments on the grounds, they were outside her job description, improper, and unlawful.

On March 12, 1987, Chen received a second probationary report, which was not favorable and did not recommend her for permanent civil service status. Although conflicting testimony existed on these issues, the ALJ concluded that her protests were a substantial factor in receiving the poor evaluation and that she was told by her supervisors at the performance review meeting she should consider finding another position within two weeks. Immediately thereafter, Chen contacted her union representative for assistance in appealing the negative evaluation.

On March 13, 1987, a meeting was held between Chen, Florence Francis (Francis), Chen's CSEA representative, and Lee, Chen's supervisor, to discuss the evaluation. At this meeting, Lee agreed to destroy the evaluation if Chen improved over the next 30 days. Lee would, however, revert to the original report if improvement was not shown. Chen was subsequently told by her supervisors during this 30-day period her job performance was acceptable, a revised report with all the standard ratings would be issued, and she could continue her employment. In spite of

this improvement, Chen tendered her two-week notice during this reevaluation period, informing Lee she was transferring to another civil service position. The notice was given, according to Chen, because she feared her supervisors would again attempt to discharge her if she challenged the job assignments. At the request of the State's staff, however, Chen remained with the office until April 30, 1987.

#### PROCEDURAL BACKGROUND

Chen filed an unfair practice charge with PERB on September 10, 1987, against her exclusive representative, the California State Employees Association (CSEA), alleging CSEA incorrectly advised her that the duties she was requested to perform were within her job description and/or did not violate the contract. Chen submitted the same document as a charge against the State, which the PERB regional attorney treated as alleging a violation of section 3519(a) of the Dills Act. Both charges were dismissed by the regional attorney on December 11, 1987. The charge against CSEA was dismissed for failure to show its conduct was arbitrary, discriminatory, or in bad faith. The charge against the State was dismissed under the deferral to arbitration doctrine articulated in Dry Creek Joint Elementary School District (1980) PERB Order No. Ad-81a, which requires the charging party to exhaust the binding arbitration provision of

the collective bargaining agreement before filing a charge with PERB.<sup>4</sup>

Chen subsequently initiated a formal grievance on January 7, 1988, which CSEA declined to pursue to arbitration as arguably untimely and not involving a violation of the contract. Exhaustion of the grievance/arbitration provisions of the contract appears to have been final on August 18, 1988. On August 25, 1988, Chen resubmitted her original unfair practice charge against the State. It is not disputed that Chen's resubmitted charge arises out of the same factual setting as her original charge filed against the State.

#### DISCUSSION

##### Interference and Reprisal Claims

Section 3514.5(a),<sup>5</sup> sets forth a jurisdictional prerequisite which, if not met, requires the dismissal of a charge based upon an alleged unfair practice occurring more than six months prior

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<sup>4</sup>Subsequent to this action by the regional attorney, the Board, in Lake Elsinore School District (1987) PERB Decision No. 646, overruled Dry Creek, supra. to the extent it required application of the National Labor Relations Board's Collyer Insulated Wire (1971) 192 NLRB 837, 842 [77 LRRM 1931] standard for prearbitration deferral.

<sup>5</sup>Section 3514.5 provides, in relevant part:

- (a) Any employee, employee organization, or employer shall have the right to file an unfair practice charge, except that the board shall not do either of the following: (1-) issue a complaint in respect of any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge; . . .  
(Emphasis added.)

to the filing of the charge. (Calexico Unified School District (1989) PERB Decision No. 754, pp. 5-7; see, also, California State University (San Diego) (1989) PERB Decision No. 718-H, pp. 8-14.)<sup>6</sup>

Further, where the Board is without jurisdiction with respect to a matter before it, the Board must dismiss the matter on its own motion, regardless of whether the jurisdictional issue has been raised by the parties. (Lake Elsinore School District, supra, p. 18.)

Chen filed her original charge on September 10, 1987, which, based upon the facts she relayed to the regional attorney, was treated as alleging a violation of section 3519(a).<sup>7</sup>

There is no dispute the alleged acts of reprisal and interference specifically complained about by Chen are the negative evaluation and comments, respectively, she received at the March 12, 1987 meeting. Assuming the March 13 meeting between Chen, Francis, and Lee was an informal grievance meeting

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<sup>6</sup>Although these decisions arise under the Educational Employment Relations Act (EERA) and the Higher Education Employer-Employee Relations Act (HEERA), the language contained in those statutes requiring that a charge must be filed within six months of the alleged unfair practice is identical to section 3514.5(a)(1) of the Dills Act. (See HEERA section 3563.2(a), EERA section 3541.5(a).) Accordingly, we hold the same rules of statutory construction and decisions of the Board are applicable to section 3514.5(a).

<sup>7</sup>It is unclear from the charge itself what specific violations she intended to allege. However, based upon the regional attorney's investigation, it was determined she alleged that the employer gave her a negative evaluation and recommended she seek other employment in retaliation for protesting the assignment of certain duties.

under her collective bargaining agreement, the processing of which tolled the running of the six-month filing period, the final filing date for Chen's unfair practice charge would have been September 13, 1987.<sup>8</sup> (See Saddleback Valley Unified School District (1985) PERB Decision No. 558 in which the Board established a formula for calculating the six-month period.)<sup>9</sup> Thus, when Chen filed her charge on September 10, 1987, she had three days remaining of the six-month statutory period in which to file her claim. On December 11, 1987, PERB dismissed the charge and deferred the matter to binding arbitration.

Chen did not file a formal grievance with CSEA until January 7, 1988. However, assuming arguendo that the six-month statute of limitations period was tolled, (1) between December 11, 1987 and January 7, 1988, on the theory Chen was preparing to file a grievance during that period,<sup>10</sup> and (2)

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<sup>8</sup>Lee's agreement at the March 13 meeting to withdraw the negative evaluation that same day resolved the contractual issues and the statutory period would commence to run on March 14. (Los Angeles Unified School District (Siamis) (1983) PERB Decision No. 311.)

<sup>9</sup>The Board in Saddleback, supra, at p. 3 held:

Consistent with section 12 of the Code of Civil Procedure, we hold that the six-month period is to be computed by excluding the day the alleged misconduct took place and including the last day, unless the last day is a holiday, and then it is also excluded.

<sup>10</sup>Except for the March 13 meeting, there is no evidence Chen initiated the grievance procedure of the collective bargaining agreement formally or informally with CSEA until January 7, 1988. To the contrary, considerable evidence exists that CSEA advised Chen her complaints were not covered by the contract and therefore not grievable. Accordingly, the statute was not tolled



between January 7, 1988 to August 18, 1988, the period from her filing of the grievance to its final denial, Chen's resubmission of the unfair practice charge to PERB on August 25, 1988, was untimely. As noted above, at the time Chen filed her original unfair practice charge, she had three days remaining of the six-month limitation period. Having let seven days lapse between the denial of her grievance and the refileing of her charge, Chen's filing was untimely by four days.

Accordingly, we find Chen's interference and reprisal claims are timebarred and that PERB lacks jurisdiction to issue a complaint on either allegation. We, therefore, reverse the ALJ on the finding of an interference violation by the State and, while we agree with the ALJ that Chen's reprisal claim must be dismissed, we do so on the grounds it was not timely filed.

#### Constructive Discharge Claim

With respect to Chen's constructive discharge claim, we find the charge is timely filed, but affirm the ALJ's dismissal.

Chen alleges she was constructively discharged out of fear the State would issue a negative evaluation in retaliation for her continued protests of job assignments.

On April 9, 1987, Chen submitted a letter notifying the State she would be transferring to another position in two weeks.

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during the period between March 14, 1987 and September 10, 1987, on a theory she was preparing to file a grievance. (See California School Employees Association (Spiegelman) (1984) PERB Decision No. 400, where the Board noted that tolling did not occur where the grievant knew the union was not pursuing his grievance.)

Nevertheless, Chen remained in her position, at the State's request, until April 30, 1987. Assuming arguendo Chen's constructive discharge claim accrued April 30, 1987, she had until October 30, 1987 to file her charge. Thus, the filing of her original charge on September 10, 1987, left 50 days on the limitations period. Chen's constructive discharge claim, therefore, is arguably timely filed.

In order to establish constructive discharge based upon protected activity, the Board has held the charging party must show: (1) that the burden imposed must cause and be intended to cause a change in working conditions so difficult or unpleasant as to force the employee to resign; and (2) the burden was imposed because of the employee's union activities. (Hacienda La Puente Unified School District (1988) PERB Decision No. 685; Marin Community College District (1980) PERB Decision No. 145.)<sup>11</sup>

Chen fails to provide any evidence that the State imposed the objectionable duties with the intent to retaliate against her for engaging in protected activities. The letter from her supervisor, Lee, to her CSEA representative, Francis, which Chen offers as evidence of a threat, is nothing more than a confirmation of the agreement reached at their March 13, 1987 meeting that the negative evaluation would be withdrawn.

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<sup>11</sup>Although these decisions arise under EERA, we hold the test for constructive discharge established by those decisions are equally applicable to cases arising under the Dills Act. (See State of California (Franchise Tax Board) (1982) PERB Decision No. 229-S in which the Board held EERA's standard for evaluating reprisal claims is applicable to cases arising under the Dills Act.)

Finally, there is no evidence that the negative evaluation, or any other conduct by the State, imposed a change in working conditions so burdensome as to cause Chen to transfer.<sup>12</sup>

Accordingly, Chen's constructive discharge claim is dismissed.

Punitive Damage. Emotional and Psychological Injury Claim

We affirm the ALJ's decision that PERB is without authority to award punitive damages or damages for emotional or psychological injuries in unfair practice cases. PERB also lacks jurisdiction to issue a complaint or provide a remedy based upon alleged violations of Government Code section 19990 and Penal Code section 424.<sup>13</sup> Accordingly, Chen's requests for such relief are dismissed.<sup>14</sup>

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<sup>12</sup>It is not the job assignments themselves but, rather, only reprisals taken in response to protesting those assignments that could form the basis of a violation of the Dills Act in this case.

<sup>13</sup>PERB's authority is limited to enforcing the three collective bargaining statutes it is charged with administering. In this case, the applicable statute is the Dills Act and the fact that Government Code section 19900 and Penal Code section 424 are incorporated into Chen's collective bargaining agreement does not confer any additional authority upon the Board. (Grant Joint Union High School District (1982) PERB Decision No. 196.)

<sup>14</sup>Chen also requests reimbursement for an outstanding travel voucher. The Board is without authority to order reimbursement of the travel claim, unless nonpayment occurred in retaliation for Chen's protected activity. Since such facts are not alleged in this case, Chen's request for reimbursement is also dismissed.

ORDER

The complaint in Case No. LA-CE-196-S is hereby DISMISSED.

Members Craib and Shank joined in this Decision.