

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

(3) State the grounds for each issue stated.

Jackson timely filed a single page "Notice of Appeal." The State filed a letter of opposition to the appeal. This appeal does not comply with PERB Regulation 32635, as it does not identify which portions of the dismissal are challenged, nor does it indicate the grounds for the appeal.

Jackson filed a "Notice of Appeal Supplemental Addendum" (Addendum) dated February 20, 1993, that was received by PERB on February 23, 1993. The Addendum was not timely filed as it should have been filed in the PERB Headquarters Office on or before February 8, 1993. Jackson did not file a request for an extension of time to file the appeal with the Board in accordance with PERB Regulation 32132(a).

PERB Regulation section 32136 provides:

A late filing may be excused in the discretion of the Board for good cause only. A late filing which has been excused becomes a timely filing under these regulations.

Jackson has not demonstrated good cause for the Board to consider his amended appeal that was filed 15 days after the due date for filing an appeal. The Board has held that compliance 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. (See Oakland Education Association (Baker) (1990) PERB Decision No. 827, p. 2; United Teachers - Los Angeles (Abboud, et

al.) (1989) PERB Decision No. 738, p. 2.) The Board, therefore, rejects the appeal.

ORDER

The unfair practice charge in Case No. LA-CE-260-S is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Caffrey and Carlyle joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD



Los Angeles Regional Office
3530 Wilshire Blvd., Suite 650
Los Angeles, CA 90010-2334
(213) 736-3127



January 14, 1993

Brent Jackson
406 N. Maryland Ave.
Glendale, California 91206-2237

Re: Brent Jackson v. State of California (Department of Developmental Services), Unfair Practice Charge No. LA-CE-260-S, DISMISSAL OF CHARGE AND REFUSAL TO ISSUE COMPLAINT

Dear Mr. Jackson:

In the above referenced charge which was filed on April 13, 1992, you allege, in part, that the State of California (Department of Developmental Services), hereafter the State, unlawfully discriminated/retaliated against you, and that the State failed to meet and confer with your union prior to implementing a unilateral policy change. This conduct is alleged to violate Government Code section 3519(c) of the Ralph C. Dills Act (Dills Act).¹ On November 12, 1992, this case was placed in abeyance over the issue of post-contract expiration deferral to the contractual grievance procedure. This case was taken out of abeyance on December 31, 1992.

I indicated to you, in my attached letter dated December 31, 1992, that the above-referenced charge did not state a prima facie case. You were advised that, if there were any factual inaccuracies or additional facts which would correct the deficiencies explained in that letter, you should amend the charge. You were further advised that, unless you amended the charge to state a prima facie case or withdrew it prior to January 7, 1993, the charge would be dismissed.

You called me on January 6, 1993 and left a message requesting a two (2) week extension. We traded several messages but finally spoke on January 7, 1993. I suggested that instead of amending the charge, you provide me verbally, at this time, with the

¹I note that your charge cites other sections of the Government Code and the Agreement between the State and your union, which you allege were violated as well. Although you have not specifically alleged that Dills Act section 3519(a) was violated, as the facts appear to allege discrimination/retaliation, I am treating this as an alleged violation of Dills Act section 3519(a).

additional information needed pursuant to my December 31, 1992 letter. You agreed with this approach and provided the following information.

During February and March 1992, your supervisors requested that you, a Painter I, sign, according to their policy, the DDS DS-40 and DS-41 forms, which you contend, would obligate you to report sexual and physical abuse at the Lanterman Developmental Center (LDC) in Pomona, California. Your first response, in early March 1992, was a refusal to sign since you did not believe you were required to report such conduct, as your job description was not a licensed level of care position, i.e., you were not a health care practitioner. Instead, you attached as exhibits to the forms, Penal Code section 11166 and Welfare and Institutions Code sections 15830, et seq., plus a two page explanatory letter.² You believed that the state statutes preempted the Institution's policy and that there was no legal ground to force you into this situation (to sign). You were willing to voluntarily (using your discretion) comply, but forcing you to agree/sign, thus requiring you to make reports, you felt was involuntary servitude, in violation of the 13th Amendment to the United States Constitution. If you later violated your agreement and failed to report such conduct, you believed you could be criminally prosecuted. You maintained this position with Arthur Parks, Chief of Plant Operations I (CPO I) and Jerry Bender, CPO III.

You then appealed to Alan Maderios, the Hospital Administrator. On or about March 17, 1992, at this level, you were given an ultimatum in writing (for the first time) to either sign the forms unconditionally (without your attachments), or be suspended for thirty (30) days.³ You then, for the first time, signed the forms as requested. Without your knowledge, Mr. Parks had begun disciplinary action against you on or about March 9, 1992, for alleged insubordination of direct order(s) to sign the forms. The documents were typed and contained the approximate date of March 16, 1992. On or about March 19, 1992, you were finally served with the disciplinary documents, which indicated your thirty (30) day suspension would commence at the conclusion of your March 23, 1992 work shift. You attended a Skelly hearing on March 23, 1992. In attendance were John Borne, Executive Director of the LDC, and Ms. Nancy Irving, Personnel Officer. Although you tried to reverse the discipline or reduce it, you were not successful. You appealed and a hearing before the State Personnel Board was scheduled for December 30, 1992. It has been rescheduled for in or about February 1993.

²You executed the forms with "signed under duress" next to your signature and added some additional language onto the forms which you noted in the charge.

³You had refused to sign unconditionally up to this point.

One year earlier, around March 1991, your supervisors requested that you sign a different form mandating that you submit to drug testing. You refused to sign and appealed the matter three (3) levels (which includes your Headquarters Office in Sacramento). You were unable to prevail and were required to sign. You did sign, but you added attachments to the form, and you added words generally to the effect that you were signing under duress. The State did not take any adverse action against you for your conduct at that time. You contend that the 1991 incident was held against you when the more recent incident, above, occurred. I asked you if you had any support for your assertion, but you had none. You indicated that for both instances, all the other painters signed the forms as requested, even though you believe they were not happy to do so.

On January 7, 1993, you advised me that you were going to withdraw the above charge. On January 13, 1993, I received your letter indicating, in part, that you had advised me on January 7, 1993 that you were amenable to a withdrawal of the charge. Your letter went on to ask/raise questions about a possible tolling of the statute of limitations should you wish to file a charge regarding this matter (containing the necessary "nexus" elements) later. I called you on January 13, 1993 and indicated, in part, that your letter did not appear to be a withdrawal. I provided you with some information regarding Dills Act section 3514.5(a). You then indicated that you would not be withdrawing this charge and understood that I would be issuing a dismissal letter instead.

Based on the above, the charge does not state a prima facie case. As indicated at page two of my letter dated December 31, 1992, the allegation that the State violated Dills Act section 3519(c) by failing to meet and confer with your union prior to implementing a unilateral change, fails to state a prima facie case. An individual does not have standing to raise this type of violation. Oxnard School District (Gorcey and Tripp) (1988) PERB Decision No. 667. Thus, this allegation is being dismissed.

Next, as explained on page two of my letter dated December 31, 1992, to show a reprisal/discrimination violation (Dills Act section 3519(a)), you must show that you exercised rights under the Dills Act, that the employer had knowledge of the exercise of those rights, that the employer imposed or threatened to impose reprisals, and that the employer took the adverse action because of your exercise of those rights (nexus). Although complaining to management is arguably protected activity, it does not appear that you were suspended for complaining. See Pleasant Valley School District (1988) PERB Decision No. 708 where an employee engaged in protected activity by raising a safety complaint with his immediate supervisor. You were suspended for your refusal to sign the forms as directed, i.e. for your alleged insubordination of direct order(s) to sign the forms. As indicated on page three

of my letter dated December 31, 1992, you have failed to clearly and concisely demonstrate nexus (that you were suspended in retaliation for your protected activity). Even considering the above additional information that you recently provided to me, you have not demonstrated any of the factors which evidence nexus or the employer's unlawful motive. Thus, the charge does not state a prima facie violation of Dills Act section 3519(a).⁴

I am therefore dismissing the charge based on the facts and reasons contained above and in my attached December 31, 1992 letter.

Right to Appeal

Pursuant to Public Employment Relations Board regulations, you 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 of Regs., tit. 8, sec. 32635(a).) To be timely filed, the original and five copies of such appeal must be actually received by the Board itself before the close of business (5 p.m.) or sent by telegraph, certified or Express United States mail postmarked no later than the last date set for filing. (Cal. Code of Regs., tit. 8, sec. 32135.) Code of Civil Procedure section 1013 shall apply. The Board's address is:

Public Employment Relations Board
1031 18th Street
Sacramento, CA 95814

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 of Regs., tit. 8, sec. 32635(b).)

Service

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding, and a "proof of service"

⁴I note that you have not alleged in this case that you requested, and were denied the right to consult with a union representative, prior to signing the documents presented to you by your superior. In Placer Hills Union School District (1984) PERB Decision No. 377, the Board held that an employee was entitled to union counsel and direction on the occasions when the employee was asked to sign for receipt of documents. Such conduct was found to violate Government Code 3543.5(a) by interfering with the employee's statutory right.

must accompany each copy of a document served upon a party or filed with the Board itself. (See Cal. Code of Regs., tit. 8, sec. 32140 for the required contents and a sample form.) The document will be considered properly "served" when personally delivered or deposited in the first-class mail, postage paid and properly addressed.

Extension of Time

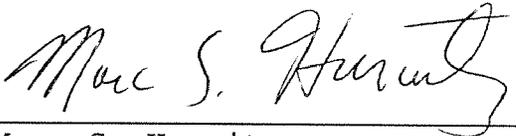
A request for an extension of time, in which to file a document with the Board itself, must be in writing and filed with the Board at the previously noted address. A request for an extension must be filed at least three (3) calendar days before the expiration of the time required for filing the document. 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 of Regs., tit. 8, sec. 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,

ROBERT THOMPSON
Deputy General Counsel

By 

Marc S. Hurwitz
Regional Attorney

Attachment

cc: Paul M. Starkey, Esq., Legal Office, Dept. of Personnel
Administration

PUBLIC EMPLOYMENT RELATIONS BOARD



Los Angeles Regional Office
3530 Wilshire Blvd., Suite 650
Los Angeles, CA 90010-2334
(213) 736-3127



December 31, 1992

Brent Jackson
406 N. Maryland Ave.
Glendale, California 91206-2237

Re: WARNING LETTER, Unfair Practice Charge No. LA-CE-260-S,
Brent Jackson v. State of California (Department of
Developmental Services)

Dear Mr. Jackson:

In the above referenced charge which was filed on April 13, 1992, you allege, in part, that the State of California (Department of Developmental Services), hereafter the State, unlawfully discriminated/retaliated against you, and that the State failed to meet and confer with your union prior to implementing a unilateral policy change. This conduct is alleged to violate Government Code section 3519(c)¹ On November 12, 1992, this case was placed in abeyance over the issue of post-contract expiration deferral to the contractual grievance procedure. This case is now being taken out of abeyance.

My investigation of the charge reveals the following facts. You pointed out to your supervisors that your Painter I classification was not a licensed level of care job description. You did not wish to sign the DDS DS-40 and DS-41 forms which you contend, would obligate you to report sexual and physical abuse. You signed the forms and put "signed under duress" next to your signature. You also added some additional language onto the forms which you noted in the charge. You were then suspended for thirty (30) days from your position "for alleged insubordination of direct order(s) to sign said forms."

Based on the facts stated above, the charge does not state a prima facie case for the reasons that follow. Government Code section 3541.5(a)(1) of the EERA states that PERB shall not "[i]ssue 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." It is unclear when you became aware of the alleged unfair practice (unlawful retaliation/suspension). In fact, you have not alleged any dates for the unlawful conduct.

¹I note that your charge cites other sections of the Government Code and the Agreement between the State and your union, which you allege were violated as well.

It is the charging party's burden, as part of the prima facie case, to demonstrate that the charge is timely. The Regents of the University of California (1990) PERB Decision No. 826-H. Without facts meeting this burden, we must assume the charge is untimely.

Next, the allegation that the State violated Dills Act section 3519(c) by failing to meet and confer with your union prior to implementing a unilateral policy change, fails to state a prima facie case. This section involves the State's refusal or failure to meet and confer in good faith with the exclusive representative. There are few facts in this charge to indicate a violation of this type. For that reason, this allegation will not be treated in detail. Furthermore, an individual does not have standing to raise this type of violation. Oxnard School District (Gorcey and Tripp) (1988) PERB Decision No. 667. Thus, this allegation is being dismissed.

Next, to demonstrate a reprisal/discrimination violation of EERA section 3543.5(a), the charging party must show that: (1) the employee exercised rights under EERA; (2) the employer had knowledge of the exercise of those rights; and (3) the employer imposed or threatened to impose reprisals, discriminated or threatened to discriminate, or otherwise interfered with, restrained or coerced the employees because of the exercise of those rights. (Novato Unified School District (1982) PERB Decision No. 210; Carlsbad Unified School District (1979) PERB Decision No. 89; Department of Developmental Services (1982) PERB Decision No. 228-S; California State University (Sacramento) (1982) PERB Decision No. 211-H.)

Although the timing of the employer's adverse action in close temporal proximity to the employee's protected conduct is an important factor, 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; (2) the employer's departure from established procedures and standards when dealing with the employee; (3) the employer's inconsistent or contradictory justifications for its actions; (4) the employer's cursory investigation of the employee's misconduct; (5) the employer's failure to offer the employee justification at the time it took action or the offering of exaggerated, vague, or ambiguous reasons; or (6) any other facts which might demonstrate the employer's unlawful motive. (Novato Unified School District, supra; North Sacramento School District (1982) PERB Decision No. 264.) As presently written, this charge fails to demonstrate

any of these factors. Although the charge arguably alleges your protected activity (complaining to management) and an adverse action, it does not clearly and concisely demonstrate nexus (that you were suspended in retaliation for your protected activity). Thus, the charge does not state a prima facie violation of EERA section 3543.5(a).

For these reasons the charge, as presently written, does not state a prima facie case. If there are any factual inaccuracies in this letter or additional facts which would correct the deficiencies explained above, please 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 the charging party. The amended charge must be served on the respondent² and the original proof of service must be filed with PERB. If I do not receive an amended charge or withdrawal from you before January 7, 1993, I shall dismiss your charge. If you have any questions, please call me at (213) 736-3127.

Sincerely,

Marc S. Hurwitz
Regional Attorney

²Paul M. Starkey, Esq., Dept. of Personnel Administration, Legal Office, 1515 "S" Street, N. Bldg., Ste. 400, Sacramento, CA 95814-7243.