STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

KARIN Y. CHEN, Charging Party,	)	Case No. LA-CE-287-S
v.	)	PERB Decision No. 1037-S
STATE OF CALIFORNIA, DEPARTMENT OF GENERAL SERVICES, Respondent.	)	February 11, 1994

Appearance: Karin Y. Chen, on her own behalf.

Before Caffrey, Carlyle and Garcia, Members.

DECISION

GARCIA, Member: This case is before the Public Employment Relations Board (Board) on appeal by Karin Y. Chen (Chen) to a Board agent's dismissal (attached hereto) of her unfair practice charge. Chen alleged that the State of California, Department of General Services violated " . . . Article 5.6 Ralph C. Dills Act, Government Code 19869 - 19877.1" by refusing to process her Temporary Disability Benefit Workers' Compensation Award according to the contract between the California State Employees Association and the State of California.

Chen appealed the dismissal alleging improper processing of the complaint and inadequate explanation of the dismissal.

The Board has reviewed the entire record in this case, including the regional attorney's warning and dismissal letters, the unfair practice charge and Chen's appeal. The Board finds the regional attorney's dismissal of the charge to be free of

prejudicial error and therefore adopts it as the decision of the Board itself.

ORDER

The unfair practice charge in Case No. LA-CE-287-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

October 13, 1993

Karin Y. Chen

Re: DISMISSAL OF CHARGE AND REFUSAL TO ISSUE COMPLAINT, Unfair Practice Charge No. LA-CE-287-S, Karin Y. Chen v. State of California. Department of General Services

Dear Ms. Chen:

In the above-referenced charge filed September 22, 1993, you allege that the State of California, Department of General Services (State or DGS) violated Article 5.6 (Supersession), subsection a. (Government Code Sections), 6 (Industrial Disability Leave), 19869 through 19877.1 of the Ralph C. Dills Act (Dills Act).[1]

I indicated to you, in my attached letter dated October 5, 1993, 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 October 12, 1993, the charge would be dismissed.

[1]The Dills Act is found at Government Code section 3512 et seq. Article 5.6 of the 1992-1995 Agreement between the State and the California State Employees Association (CSEA) for Unit 4 (Office and Allied) states in part,

> The following enumerated Government Code Sections and all existing rules, regulations, standards, practices and policies which implement the enumerated Government Code Sections are hereby incorporated into this Contract. However, if any other provision of this Contract alters or is in conflict with any of the Government Code Sections enumerated below, the Contract shall be controlling and supersede said Government Code Sections or parts thereof and any rule, regulation, standard, practice or policy implementing such provisions". The Government Code Sections listed below are cited in Section 3517.6 of the Ralph C. Dills Act.

I called you on October 12, 1993 to determine if you were amending or withdrawing the charge. You advised me, in part, that you had not seen my October 5, 1993 letter, but would go to your post office box to see if it was there now. I agreed to hold off dismissing the case until 10:00 a.m. on October 13, 1993, in order to give you a chance to review my letter and call me back.

You called me back later on October 12, 1993, after reviewing my letter. After discussing this matter, including my letter, you indicated, in part, that you were not going to withdraw or amend the charge. You understood that I would have to dismiss the charge. Around 10:00 a.m. on October 13, 1993, I received a telefax dated October 12, 1993 from you. In it, you indicated, in part, that you never considered this a discrimination or retaliation case, and that if I wanted to dismiss your case, I may do so. Therefore, I am dismissing the charge based on the facts and reasons contained above and in my October 5, 1993 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" 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

Marc S. Hurwitz
Regional Attorney

Attachment

cc: Warren Curtis Stracener, Esq., Department of Personnel Administration, Legal Office, Sacramento, California

PUBLIC EMPLOYMENT RELATIONS BOARD

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

October 5, 1993

Karin Y. Chen

Re: WARNING LETTER, Unfair Practice Charge No. LA-CE-287-S, Karen Y. Chen v. State of California, Department of General Services

Dear Ms. Chen:

In the above-referenced charge filed September 22, 1993, you allege that the State of California, Department of General Services (State or DGS) violated Article 5.6 (Supersession), subsection a. (Government Code Sections), 6 (Industrial Disability Leave), 19869 through 19877.1, of the Ralph C. Dills Act (Dills Act).[1] As this appears to be a reprisal/discrimination case, I am considering this case as

[1]The Dills Act is found at Government Code section 3512 et seq. Article 5.6 of the 1992-1995 Agreement between the State and the California State Employees Association (CSEA) for Unit 4 (Office and Allied) states in part,

> The following enumerated Government Code Sections and all existing rules, regulations, standards, practices and policies which implement the enumerated Government Code Sections are hereby incorporated into this Contract. However, if any other provision of this Contract alters or is in conflict with any of the Government Code Sections enumerated below, the Contract shall be controlling and supersede said Government Code Sections or parts thereof and any rule, regulation, standard, practice or policy implementing such provisions. The Government Code Sections listed below are cited in Section 3517.6 of the Ralph C. Dills Act.

alleging a violation of Dills Act section 3519(a)[2] of the California Government Code.

My investigation and the charge reveal the following information. You worked for the Secretary of State for less than six months in 1986. You worked for the Department of General Services, Office of the State Architects from May 1987 through May 1991. Since late May 1991, you have worked for the Colorado River Board of California. You are currently a Library Technical Assistant. Your charge alleges as follows,

> This is regarding Workers' Compensation case #PAS009969. Findings and Award was issued on April 22, 1993 by Workers' Compensation Appeal (sic) Board. Also Opinion and Order Denying Petition for Reconsideration was issued on July 8, 1993 by WCAB. In the Denying Petition for Reconsideration letter, the board states, '...He notes that his comments in the opinion (sic) on Decision were mere dicta and did not affect the liability of defendant...' '...Defendant was not aggrieved by the WCJ's comments in the Opinion on Decision, in that those comments did not relate to issues decided in the Findings and Award, and, in fact, concerned matters beyond WCAB jurisdiction...' ...DGS ignored my request, Doctors' reports and the fact a workers' comp. case was processing and insisted me getting NDI pay.... Now Ms. Steiger use (sic) this as an excuse not (sic) processing my Temporary Disability Benefit. I mentioned again and again I am willing to return NDI money anytime upon request. Ms. Steiger still insisted WCJ should listen to her and she still didn't process my case.

A fair reading of the charge reflects that you previously sustained an injury and filed an claim for workers' compensation. On April 22, 1993, Christopher J. Lauria, Workers' Compensation Judge made an award in your favor against the State of California involving, in part, your temporary and permanent disability. The

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[2]Section 3519(a) provides that it shall be unlawful for the State to:

> 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. For purposes of this subdivision, "employee" includes an applicant for employment or reemployment.

State filed a Petition for Reconsideration on May 17, 1993. In the July 8, 1993, Workers' Compensation Appeals Board decision denying the State's Petition for Reconsideration, the Board stated in part,

> [T]he Workers' Compensation judge (WCJ) found that applicant had sustained industrial injury during the period from May 1987 through August 29, 1990, resulting in temporary disability from August 29, 1990, to October 31, 199 0, and permanent disability of 17.5%. On the Opinion on Decision, the WCJ also commented that: "If defendant's employment benefits include a provision that applicant be paid her full salary during periods of work injury, then applicant is entitled to be reimbursed for the full amount of her lost salary." Defendant objects to this sentence and to any reference to sick leave.
>
> In his report, the WCJ recommends that we deny defendant's petition for reconsideration. He notes that his comments in the Opinion on Decision were mere dicta and did not affect the liability of the defendant. After a review of the record we concur. Labor Code section 5900 provides that any person aggrieved directly or indirectly by any final order, decision, or award made or filed by the Appeals Board may petition the Appeals Board for reconsideration in respect to any matters determined or covered by the final order. Defendant was not aggrieved by the WCJ's comments in the Opinion on Decision, in that those comments did not relate to issues decided in the Findings and Award and, in fact, concerned matters beyond WCAB jurisdiction. Accordingly, we will deny defendant's petition for reconsideration.

By letter dated August 5, 1993, Susan Steiger wrote to Judge Lauria and stated, in part, as follows:

> The DGS has been, and remains unopposed to the WCAB Findings and Award of April 22, 1993. We, however, remain unable to pay Findings of Fact (2) as written. This is because:
>
> -the language directs payment of temporary disability when applicant may be eligible for Industrial Disability Leave (IDL);
>
> -the award ignores applicant's receipt of Nonindustrial Disability Insurance benefits during the disputed period, for which

credit/reimbursement is payable to EDD, mandated under Government Code;

-the award erroneously discusses credit for sick leave paid.

At this time we request that an Amended Findings and Award be issued, omitting the current language in Findings of Fact (2) to:

-Applicant was temporarily disabled beginning August 29, 1990 to and including October 31, 1990. Rate of disability pay is to be adjusted by the parties. Defendant is entitled to Nonindustrial Disability Insurance (NDI) credits previously paid.

Please be further advised that, due to the age of the dates ordered payable in Findings of Fact (2), additional State control agencies must become involved in the payment process (State Controller and Board of Control). Such involvement is State-mandated. Please advise all parties that this may delay payment of Findings of Fact (2).

On August 30, 1993, you filed a formal grievance requesting that the State process the WCAB Award according to the Agreement between the State and CSEA. You claimed a violation of Article 5.6, Government Code 19869 through 19877.1. You allege that CSEA did not process your grievance. Edmund A. Hernandez, Labor Relations Representative, advised you that you have no right to file any grievance. I note that by letter dated September 20, 1993 to Ms. Steiger, Mr. Hernandez requested an opportunity to discuss the matter with her in order to resolve it in a timely manner.

Based on the above facts, the charge fails to state a prima facie violation of the Dills Act for the reasons that follow:

To demonstrate a violation of Dills Act section 3519(a), you must show that: (1) you exercised rights under the Dills Act; (2) your employer had knowledge of the exercise of those rights; and (3) your employer imposed or threatened to impose reprisals, discriminated or threatened to discriminate, or otherwise interfered with, restrained or coerced you 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 and therefore does not state a prima facie violation of Dills Act section 3519(a).

You have not demonstrated that you previously engaged in any recent protected/union activity. Filing a Workers' Compensation claim is not protected activity under the Dills Act. I do note that you filed at least one Unfair Practice Charge, State of California (Secretary of State) (1990) PERB Decision No. 812-S.

Next, you have not demonstrated the required "nexus" between any protected activity and the adverse action. On the contrary, Ms. Steiger's actions appear motivated by a desire to follow certain procedures and make payment under an amended award. You have not demonstrated that she has an unlawful motive. Thus, without the critical elements of protected activity and nexus, you have not shown a reprisal/discrimination violation under the Dills Act.[3]

Next, Dills Act section 3514.5(b) provides,

> The board shall not have authority to enforce agreements between the parties, and shall not issue a complaint on any charge based on alleged violation of such an agreement that would not also constitute an unfair practice under this chapter.

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[3]See Labor Code section 132a where discrimination for filing a Workers' Compensation claim is addressed. PERB is not the proper forum for such a discrimination claim.

Even if the State violated Article 5.6 of the agreement and the Industrial Disability Leave laws, PERB does not enforce agreements. Therefore, as a prima facie violation has not been demonstrated, the charge will be dismissed.

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 respondent[4] and the original proof of service must be filed with PERB. If I do not receive an amended charge or withdrawal from you before October 12, 1993, I shall dismiss your charge. If you have any questions, please call me at (213) 736-3127.

Sincerely,

Marc S. Hurwitz
Regional Attorney

MSH:wc

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[4]Warren Curtis Stracener, Esq., Dept, of Personnel Administration, Legal Office, Sacramento, CA.