*** * * OVERRULED IN PART by multiple decisions, as recognized in *State of California (Department of Corrections and Rehabilitation)* (2024) PERB Decision No. 2926-S, pp. 16-19 & fn. 11 * * ***

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

PARVIZ KARIM-PANAHI, Charging Party,	)	Case No. LA-CE-320-S
v.	)	PERB Decision No. 1122-S
STATE OF CALIFORNIA (OFFICE OF EMERGENCY SERVICES), Respondent.	)	November 7, 1995

Appearance: Parviz Karim-Panahi, on his own behalf.

Before Carlyle, Johnson and Caffrey, Members.

DECISION

JOHNSON, Member: This case is before the Public Employment Relations Board (Board) on appeal of the Board agent's dismissal (attached hereto) of an unfair practice charge filed by Parviz Karim-Panahi (Karim-Panahi). In his charge, Karim-Panahi alleged that the State of California (Office of Emergency Services) (OES) unlawfully discriminated and retaliated against him because of his exercise of protected rights in violation of section 3519(a) of the Ralph C. Dills Act (Dills Act).[1] The charge further

[1]The Dills Act is codified at Government Code section 3512 et seq. Section 3519 states, in pertinent part:

> It shall be unlawful for the state to do any of the following:
>
> (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. For purposes of this subdivision, "employee" includes an applicant for employment or reemployment.

alleged that after verbal representations to the contrary, OES unlawfully placed him in a lesser paying position, refused to correct the error and unlawfully terminated him because he notified both state and federal agencies of OES's violations of the law.

The Board has reviewed the warning and dismissal letters, Karim-Panahi's appeal, applicable provisions of the collective bargaining agreement and the entire record in this case. The Board finds the warning and dismissal letters to be free of prejudicial error and adopts them as the decision of the Board itself.

ORDER

The unfair practice charge in Case No. LA-CE-320-S is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Carlyle and Caffrey joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
1031 18th Street, Room 102
Sacramento, CA 95814-4174
(916)322-3198

June 22, 1995

Parviz Karim-Panahi

Re: NOTICE OF DISMISSAL AND REFUSAL TO ISSUE COMPLAINT
Parviz Karim-Panahi v. State of California (Office of Emergency Services)
Unfair Practice Charge No. LA-CE-320-S

Dear Mr. Karim-Panahi:

I indicated to you, in my attached letter dated June 8, 1995, that the above-referenced charge must be dismissed and deferred to arbitration. 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 under PERB's jurisdiction or withdrew it prior to June 20, 1995, the charge would be dismissed.

I have not received either an amended charge or a request for withdrawal. You did, however, inform me by telephone on June 12, 1995 that it was your intent to submit the issues raised by your charge to the grievance procedure under the Unit 11 agreement between the State of California and the California State Employees' Association (CSEA). You subsequently sent me copies of your letter to CSEA, and the response by CSEA, both dated June 12, 1995.

Your June 12 letter to CSEA requested that they submit the issues you raise to arbitration under the Unit 11 agreement. CSEA responded by indicating a belief that certain issues you raise are not within the scope of the Dills Act, or civil service rules, or the collective bargaining agreement, and would have to be addressed through civil litigation. CSEA further stated its belief that a grievance over your alleged termination would fail because you had not engaged in activity which is protected by the "no retaliation" provision of the agreement. In sum, CSEA declined to provide you with representation.

By letter dated June 16, 1995, you argue that the foregoing satisfies the "requirements" of my June 8 letter, and that PERB should now issue a complaint in this matter.

Discussion

The additional information you have submitted does not change the legal analysis required by the law and the facts of this case. As noted in my June 8 letter, the Unit 11 agreement allows individual employees to file grievances alleging violations by the employer of the terms and conditions of that agreement. Your charge alleges that you were threatened with reprisals and terminated because you engaged in protected activity, and the Unit 11 agreement expressly prohibits the complained-of conduct at Article 5, Section 5.5.

There are no facts alleged which show that either you or anyone on your behalf has filed a grievance over your employer's alleged retaliatory conduct.

The Board has ruled that it lacks jurisdiction to issue a complaint, where conduct is arguably prohibited by a collective bargaining agreement which is subject to binding arbitration, until or unless the grievance procedure is exhausted or futility is demonstrated. (Eureka City School District (1988) PERB Decision No. 702.) A charging party's "failure to exercise the grievance process," even if that precludes further pursuit of the grievance process and arbitration, "does not create futility." (Desert Sands Unified School District (1995) PERB Decision No. 1102.)

Therefore, I am dismissing the charge based on the facts and reasons set forth above as well as those contained in my June 8, 1995 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 (2 0) 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

Les Chisholm
Regional Director

Attachment

cc: Edmund K. Brehl

PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
1031 18th Street, Room 102
Sacramento, CA 95814-4174
(916) 322-3198

June 8, 1995

Parviz Karim-Panahi

Re: WARNING LETTER
Parviz Karim-Panahi v. State of California (Office of Emergency Services)
Unfair Practice Charge No. LA-CE-320-S

Dear Mr. Karim-Panahi:

The above-referenced charge was filed with the Public Employment Relations Board (PERB or Board) on May 1, 1995. As Charging Party, you allege that the State of California, Office of Emergency Services (Employer or OES) unlawfully discriminated and retaliated against you because of your exercise of rights protected under the Ralph C. Dills Act (Dills Act).[1] This conduct is alleged to violate the Dills Act at section 3519(a).

Investigation of this charge revealed the following relevant information. Charging Party is qualified as a professional registered civil engineer. In January 1994, he responded to emergency employment opportunity information concerning the need of the Employer for civil engineers following the Northridge earthquake. He was employed by OES effective February 3, 1994 as a Disaster Worker Specialty Services (DWSS) III, despite verbal representations at the time that he would be employed at Level IV. Level III employees are paid less than Level IV employees. He was informed by a Notice of Personnel Action dated March 7, 1994, and again on June 22, 1994, of his appointment and pay status. He was further informed that his position was placed within State Bargaining Unit 11 - Engineering and Scientific Technicians, represented by California State Employees Association (CSEA), rather than in Bargaining Unit 9 - Professional Engineers, represented by Professional Engineers in California Government (PECG).

CSEA and the State of California are parties to a Memorandum of Understanding (MOU) for Unit 11 which is effective for the period July 31, 1992 through June 30, 1995. The MOU provides for a grievance procedure in Article 6 for the resolution of disputes concerning the "interpretation, application or enforcement of the

[1]The Dills Act is codified at Government Code Section 3512 et seq.

express terms" of the MOU. A grievance may be filed by any employee covered by the MOU. (Article 6, Section 6.2.) The grievance procedure ends in binding arbitration. (Article 6, Section 6.12.) The MOU also provides, in Article 5, Section 5.5, as follows:

> The State and [CSEA] shall be prohibited from imposing or threatening to impose reprisals by discriminating or threatening to discriminate against employees, or otherwise interfering with, restraining, or coercing employees because of the exercise of their rights under the Ralph C. Dills Act or any right given by this [MOU]. The principles of agency shall be liberally construed.

Charging Party informed the Employer through his supervisors at various times that he believed his placement at DWSS Level III rather than Level IV was incorrect based on his qualifications and the information originally communicated to him, and further informed his supervisors that he believed his position should be placed within Bargaining Unit 9. He requested correction of his classification and pay rate by letter dated March 23, 1994. Beginning in May 1994 the Employer began the process of changing emergency employment appointments to limited term appointments and contest conducted tests and interviews as part of this process.

The Employer responded to Charging Party, including by memo dated August 19, 1994, to the effect that his appointment was made at the only level and status available at the time that he was hired and that he was informed of his employment status at the time of his appointment. The August 19 memo did indicate he could be considered for a Level IV appointment based on the results of the DWSS exam then in progress.

On January 3, 1995, Charging Party was offered a limited term appointment as a DWSS Level III.

Charging Party also alleges that the hiring process for the DWSS positions involved favoritism, nepotism and political considerations, and was not based upon qualifications. He has further alleged that the operations of the Employer have been in violation of various State and Federal laws relating to disaster assistance and standards for professional engineers, and has made various allegations to the Employer and to other federal agencies that the program has been corruptly administered and has defrauded both federal and state disaster assistance and emergency relief funds.

On January 17, 1995, Charging Party addressed a memo to the Director of OES requesting administrative and criminal investigations by state and federal authorities. The memo alleges violations by the Employer of the Professional Engineers Act and regulations of the California State Board of Registration for Professional Engineers and Land Surveyors; that negligence and violations of these laws had resulted in waste and fraudulent expenditure of disaster relief monies; that Damage Survey Reports (DSRs) had been signed by persons unqualified to do so; that his objections to these practices had resulted in harassment by his supervisors; and that OES had engaged in discriminatory and fraudulent testing and hiring practices, including the failure to appoint Charging Party to a level consonant with his background and qualifications.

On January 20, 1995, Charging Party was required to meet with Field Operations Manager D.A. Christian. Christian both verbally and in writing reprimanded Charging Party for alleged conduct and performance problems, including specifically his attempt to send the January 17 memo to the OES Director. The written reprimand included a warning that failure to follow the established correspondence procedure could result in "severe disciplinary action."

On January 23, 1995, Charging Party wrote a second memo requesting FBI and state investigation, prosecution and protection which incorporated the allegations of the January 17 memo. The January 23 memo further alleged that he had been subjected to retaliation based on the earlier memo, including being ordered to sign DSRs that he did not believe to be legitimate. On January 24, 1995, Christian verbally ordered Charging Party to withdraw his January 23 memo, and warned that he would be terminated if he did not do so.

Charging Party was informed by a Notice of Personnel Action, Report of Separation, dated March 22, 1995, that he had been terminated by OES.

Discussion

Section 3514.5(a) of the Ralph C. Dills Act (Dills Act) states, in pertinent part, that PERB shall not:

> Issue a complaint against conduct also prohibited by the provisions of the [collective bargaining agreement in effect] between the parties until the grievance machinery of the agreement, if it exists

> and covers the matter at issue, has been exhausted, either by settlement or binding arbitration.

In Lake Elsinore School District (1987) PERB Decision No. 646, PERB held that section 3541.5(a) of the Educational Employment Relations Act, which contains language identical to section 3514.5(a) of the Dills Act, established a jurisdictional rule requiring that a charge be dismissed and deferred if: (1) the grievance machinery of the agreement covers the matter at issue and culminates in binding arbitration; and, (2) the conduct complained of in the unfair practice charge is prohibited by the provisions of the agreement between the parties. PERB Regulation 32620(b) (5) (Cal. Code of Regs., tit. 8, sec. 32620(b)(5)) also requires the investigating Board agent to dismiss a charge where the allegations are properly deferred to binding arbitration.

These standards are met with respect to this case. First, the grievance machinery of the MOU covers the dispute raised by the unfair practice charge and culminates in binding arbitration. Second, the conduct complained of in this charge that the Employer threatened and took reprisals against Charging Party because of his exercise of rights protected by the Dills Act is arguably prohibited by the express provisions of Article 5, Section 5.5 of the MOU.

I discussed the question of deferral to arbitration with you by telephone on June 8, 1995. You indicated that you had not filed a grievance under the Unit 11 MOU because of your belief that you were not properly assigned to that unit. You also cite a speculative belief that CSEA would not be supportive of your grievance because of your efforts to be placed in Unit 9 and complaints over other matters such as hiring practices. Such speculation is not evidence that resort to the grievance procedure would be futile, nor would mere "disagreement or personal preference [be sufficient to] bypass the statutory deferral requirement." (State of California (Department of Corrections) (1986) PERB Decision No. 561-S, citing State of California (Department of Developmental Services) (19 85) PERB Order No. 145-S.)

You also argued, in part, that PERB should exercise jurisdiction over this case because it is PERB's role to determine the appropriate unit placement of state employees. This argument is not persuasive, however, since the instant charge is not an

appropriate vehicle to resolve unit placement,[2] and individual employees lack standing to file a unit modification petition. (Riverside Unified School District (1985) PERB Order Nos. 148 and 148a, and California School Employees Association (Petrich) (198.9) PERB Decision No. 767.)

Accordingly, this charge must be deferred to arbitration and will be dismissed. Such dismissal is without prejudice to the Charging Party's right, after arbitration, to seek a repugnancy review by PERB of the arbitrator's decision under the Dry Creek criteria. (See PERB Reg. 32661 [Cal. Code of Regs., tit. 8, sec. 32661]; Los Angeles Unified School District (1982) PERB Decision No. 218; Dry Creek Joint Elementary School District (1980) PERB Order No. Ad-81a.)

If there are any factual inaccuracies in this letter or any additional facts which would require a different conclusion than the one 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 and the original proof of service filed with PERB. If I do not receive an amended charge or withdrawal from you before June 20, 1995, I shall dismiss your charge without leave to amend. If you have any questions, please call me at (916) 322-3198, extension 359.

Sincerely,

Les Les Chisholm
Regional Director

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[2]PERB's unit modification regulations are found at California Code of Regulations, title 8, section 32781 et seq.