

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



INTERNATIONAL UNION OF OPERATING)
ENGINEERS, CRAFT MAINTENANCE)
DIVISION, UNIT 12,)
)
Charging Party,) Case No. S-CE-765-S
)
v.) PERB Decision No. 1144-S
)
STATE OF CALIFORNIA (DEPARTMENT)
OF FOOD AND AGRICULTURE),)
)
Respondent.)
_____ }

Appearance; Van Bourg, Weinberg, Roger & Rosenfeld by William A. Sokol, for International Union of Operating Engineers, Craft Maintenance Division, Unit 12.

Before Caffrey, Chairman; Garcia and Johnson, Members.

DECISION AND ORDER

GARCIA, Member: This case is before the Public Employment Relations Board (Board) on appeal by the International Union of Operating Engineers, Craft Maintenance Division, Unit 12 (IUOE) of a Board agent's dismissal (attached) of its unfair practice charge. IUOE filed a charge alleging that the State of California (Department of Food and Agriculture) violated section 3519(a) and (b) of the Ralph C. Dills Act (Dills Act)¹ by

¹The 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

soliciting employees to resign from membership in IUOE. After investigation, the Board agent dismissed the charge for failure to establish a prima facie case of a violation of the Dills Act.

The Board has reviewed the entire record in this case, including IUOE's unfair practice charge, the warning and dismissal letters, and IUOE's appeal. The Board finds the warning and dismissal letters to be free of prejudicial error and adopts them as the decision of the Board itself.

The unfair practice charge in Case No. S-CE-765-S is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chairman Caffrey and Member Johnson joined in this Decision.

employees because of their exercise of rights guaranteed by this chapter. For purposes of this subdivision, "employee" includes an applicant for employment or reemployment.

(b) Deny to employee organizations rights guaranteed to them by this chapter.

PUBLIC EMPLOYMENT RELATIONS BOARD



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



October 27, 1995

William A. Sokol, Attorney
Van Bourg, Weinberg, Roger & Rosenfeld
180 Grand Avenue, Suite 1400
Oakland, CA 94612

Re: NOTICE OF DISMISSAL AND REFUSAL TO ISSUE COMPLAINT
International Union of Operating Engineers, Craft
Maintenance Division, Unit 12 v. State of California
(Department of Food and Agriculture)
Unfair Practice Charge No. S-CE-765-S

Dear Mr. Sokol:

I indicated to you, in my attached letter dated October 12, 1995, 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 24, 1995, the charge would be dismissed.

I have not received either an amended charge or a request for withdrawal. I did, however, receive a letter on October 19, 1995, which argues that a complaint should issue in this case because the employer did not merely inform employees of the opportunity to withdraw from the union but

made a specific offer of an express benefit, to wit:
she offered to let them use her office to fill out the appropriate papers.

Your letter relies on Rio Hondo Community College District (1980) PERB Decision No. 128, but does not cite an authority for the proposition that an employer's offer to allow use of its offices to fill out payroll-related papers by employees constitutes the offer of a "benefit." Nor does a review of those cases where the Public Employment Relations Board (PERB or Board) has considered whether the promise of a benefit brings employer speech within the ambit of an interference violation lend support to your theory. (See Rio Hondo Community College District (1980) PERB Decision No. 128 (no violation found based on communication of employer's opinion of benefits of withdrawal of lawsuit); San Ramon Valley Unified School District (1979) PERB Decision No. 111 (violation found where employer cancelled in-service training scheduled for day of organizational security election); Santa Monica Community College District (1979) PERB Decision No. 103

Dismissal Letter
S-CE-765-S
October 27, 1995
Page 2

(violation where offer of salary increase conditioned on waiver of future rights).

You informed me in a telephone conversation of October 20, 1995, that an amended charge was not being filed, but later the same day, by letter transmitted via fax, notified me that you were conferring with Mr. Funderburg regarding whether to amend or withdraw the charge. I telephoned you on October 26, 1995, and left a message requesting that you inform me of your decision as the deadline had passed. I have not received a response to my telephonic inquiry.

Therefore, I am dismissing the charge for these reasons, and based on the facts and reasons contained in my October 12, 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 (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

Dismissal Letter
S-CE-765-S
October 27, 1995
Page 3

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
Les Chisholm
Regional Director

Attachment

cc: Warren C. Stracener

PUBLIC EMPLOYMENT RELATIONS BOARD

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



October 12, 1995

William A. Sokol, Attorney
Van Bourg, Weinberg, Roger & Rosenfeld
180 Grand Avenue, Suite 1400
Oakland, CA 94612

Re: **WARNING LETTER**

International Union of Operating Engineers, Craft
Maintenance Division, Unit 12 v. State of California
(Department of Food and Agriculture)
Unfair Practice Charge No. S-CE-765-S

Dear Mr. Sokol:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on September 12, 1995. In its charge, the International Union of Operating Engineers, Craft Maintenance Division, Unit 12 (Union or Charging Party) alleges that the State of California, Department of Food and Agriculture (State or Department) violated Government Code section 3519(a) and (b) by soliciting employees to resign from membership in the Union.

Investigation of this charge revealed the following information. Charging Party is the exclusive representative of State bargaining unit 12, which includes employees employed by the Department. The Union and the State were parties to a Memorandum of Understanding (MOU) that expired June 30, 1995.

James Gillen is employed by the Department at the Orange County Fairgrounds as a Maintenance Worker District Fairs. Gillen is active in the Union and currently serves on the negotiating team representing fairground worker classifications. Gillen has also filed several grievances, including an out-of-class claim for Alberto Aguirre. Aguirre is employed as a Fairground Aid, and in July 1995 he was awarded approximately \$15,000 in back pay as a result of the out-of-class claim.

Gillen's and Aguirre's supervisor is Hank Vidal, Maintenance and Operations Supervisor. On April 28, 1995, Vidal discussed a uniform allowance grievance, filed by Gillen, with several fairground private contractors and, in the presence of unit employees, laughed while discussing the grievance. On another occasion, following Aguirre's back pay award, Vidal became angry with an electrician and cursed both the electrician and Aguirre.

On June 21, 1995, Vidal informed Gillen that he did not want him to attend the bargaining session scheduled the following day in

Warning Letter
S-CE-765-S
October 12, 1995
Page 2

Sacramento. Gillen attended the bargaining session and reported the incident. Representatives of the Department of Personnel Administration (DPA) informed the Department that Gillen's presence was necessary at bargaining sessions.

On June 27, 1995, a memo distributed by DPA Director David Tirapelle informed departments of the expiration of collective bargaining agreements for all State bargaining units as of June 30, 1995. The memo further explained what changes would occur as a result of the expiration of these agreements and the decision not to extend them. Among the changes detailed was the fact an employee could withdraw his/her union membership at any time by notifying the State Controller's Office and the employee's union.

Janice Foster is employed by the Department at the Orange County Fairgrounds as a business assistant in administrative services, reporting to Vidal.¹ On July 15, 1995, Foster approached Union member Drew Daniels and informed him in the presence of other Unit 12 employees that the Union no longer had a contract and that he could save \$26.00 in Union dues by dropping out of the Union. She also stated that other employees could come to her office to fill out the paperwork to drop out of the Union.

On July 16, 1995, Filiberto Salinas, Senior Maintenance Worker,² called all the Hispanic employees together and informed them in Spanish that they could drop out of the Union by going to see Janice Foster to do the paperwork. One employee, Jose Eskabell, went to Foster to ask for clarification of what Salinas had said. Foster stated that if Eskabell did not want to be in the Union, "they won't take any more money out of your check. If you don't drop, nothing's going to change." This comment was interpreted by employees to mean that Foster was encouraging them to drop out of the Union.

Shortly thereafter, Chet Foster, a unit 12 employee and the father of Janice Foster, approached Aguirre and made negative comments about Gillen and the Union. Since the above-described events, Aguirre has missed three days of work due to stress-related medical conditions.

On July 27, 1995, Stephanie Castignolia, a Personnel Services Specialist II for the Department in the 32nd District

¹Foster is designated as a supervisory employee.

²Salinas' position is included in unit 12.

Warning Letter
S-CE-765-S
October 12, 1995
Page 3

Agricultural Association,³ telephoned Union representative Fred Young in Anaheim to inform him that the Union had a "troublemaker" at the fairgrounds, whose grievance filings were causing members to drop out of the Union. Castignolia identified the troublemaker as Gillen.

Castignolia also telephoned Rick Funderburg, the Union's Unit 12 Coordinator, and they spoke on August 3, 1995. Castignolia gave Funderburg the same message regarding Gillen, and stated that Drew Daniels and Chet Foster had resigned from the Union. Funderburg informed Gillen of his conversation with Castignolia on the same day.

Discussion

The Board has long held that an employer has a protected right to communicate with employees on employment related matters, so long as that communication does not violate certain standards.

(Alhambra City and High School Districts (1986) PERB Dec. No. 560, citing Rio Hondo Community College District (1980) PERB Dec. No. 128 (Rio Hondo).) In Rio Hondo the Board considered the language of section 8(c) of the National Labor Relations Act in adopting a test regarding an employer's free speech rights as follows:

[T]he Board finds that an Employer's speech which contains a threat of reprisal or force or promise of benefit will be perceived as a means of violating the Act and will, therefore, lose its protection and constitute strong evidence of conduct which is prohibited by [the Act].

The determination of whether an employer's speech is protected or constitutes a proscribed threat or promise is made by applying an objective rather than a subjective standard. (Trustees of the California State University (1989) PERB Dec. No. 777-H.) Statements made by an employer are viewed in their overall context to determine if they have a coercive meaning (Los Angeles Unified School District (1988) PERB Dec. No. 659), and the Board places considerable weight on the accuracy of the content of the speech in determining whether the communication constitutes an unfair labor practice. (Alhambra City and High School Districts, supra; Muroc Unified School District (1978) PERB Dec. No. 80.)

³Castignolia's position is included in bargaining unit 1, represented by the California State Employees' Association.

Warning Letter
S-CE-765-S
October 12, 1995
Page 4

Thus, where employer speech accurately describes an event, and does not on its face carry the threat of reprisal or force, or promise of benefit, the Board will not find the speech unlawful. (Chula Vista City School District (1990) PERB Dec. No. 834.)

The National Labor Relations Board (NLRB) has applied this same test to questions involving employer conduct like that complained of here. Citing Perkins Machine Company (1963) 141 NLRB 697 and Cyclops Corp. (1975) 216 NLRB 857, the NLRB held that:

Established [NLRB] principle holds that while employers may not solicit employees to withdraw from union membership, they may, on the other hand, bring to employees' attention their right to resign from the union and revoke dues-checkoff authorizations so long as the communication is free of threat and coercion or promise of benefit. [Ace Hardware Corp. (1984) 271 NLRB 178.]

The Department's alleged conduct in this case does not violate the standards described above. First, the only communication concerning resignation from Union membership which clearly involved an agent of the Department is that of Janice Foster. In addition, the allegations do not establish that the Department's communication was inaccurate, nor that it contained promise of benefit or threat of coercion. The facts alleged do not establish that the Department solicited employees to withdraw from membership, only that the Department and unit employees informed employees of their right to do so. The "fact" that this conduct was subjectively perceived by at least some employees as encouragement to drop out of the Union does not establish prima facie evidence of a violation under the applicable, objective standard.

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 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 24, 1995, I

Warning Letter
S-CE-765-S
October 12, 1995
Page 5

shall dismiss your charge. If you have any questions, please call me at (916) 322-3198, ext. 359.

Sincerely,

Les Chisholm
Regional Director

HLC:cb

cc: Richard G. Funderburg