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-781-S
v.	)	PERB Decision No. 1150-S
STATE OF CALIFORNIA (DEPARTMENT OF DEVELOPMENTAL SERVICES),	)	May 9, 1996
Respondent.	)	

Appearances; Van Bourg, Weinberg, Roger & Rosenfeld by William A. Sokol, Attorney, for International Union of Operating Engineers, Craft-Maintenance Division, Unit 12; State of California (Department of Personnel Administration) by Susan B. Sandoval, Labor Relations Counsel, for State of California (Department of Developmental Services).

Before Caffrey, Chairman; Garcia and Dyer, Members.

DECISION AND ORDER

GARCIA, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the International Union of Operating Engineers, Craft Maintenance Division, Unit 12 (IUOE) to a Board agent's dismissal (attached) of the unfair practice charge. In the charge, IUOE had alleged that the State of California (Department of Developmental Services) (DDS) violated section 3519(a) and (c) of the Ralph C. Dills Act (Dills Act)[1] when it "withdrew" a first level response to a DDS

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

> It shall be unlawful for the state to do any of the following:

employee's grievance. The Board agent dismissed the charge on the grounds that PERB had no authority to enforce settlement agreements, nor did the amended charge establish a "unilateral change" violation.

The Board has reviewed the unfair practice charge, the warning and dismissal letters, IUOE's appeal, and DDS's opposition to the appeal.[2] The Board finds the Board agent's

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> (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.
>
> (c) Refuse or fail to meet and confer in good faith with a recognized employee organization.

[2]The Department of Personnel Administration (DPA), who represented DDS in this case, filed a statement of opposition to the appeal, arguing that the appeal is facially defective because DPA was served with the appeal 11 days after the appeal was filed at PERB. (The appeal was filed with PERB on January 8, 1996, and DPA was served on January 19, 1996.)

Although PERB Regulation 32140 requires that service shall be "concurrent with the filing in question," it provides no penalty for failure to comply. Therefore, it is within the Board's discretion whether to overlook this technical violation of the regulation. According to California appellate case law, service of process statutes should be liberally construed to effectuate service if actual notice has been received by the defendant, and the question of service should be resolved by considering each situation from a practical standpoint. (See Pasadena Medi-Center Associates v. Superior Court (1973) 9 Cal.3d 773, 778 [108 Cal.Rptr. 828].) Furthermore, courts will not presume prejudice simply by the passage of time. (See, e.g., Putnam v. Claque (1992) 3 Cal.App.4th 542, 565-566 [5 Cal.Rptr.2d 25] (Putnam), where the court refused to imply prejudice to the defendant from a mere delay in service, stating that prejudice may be inferred only from an unjustified and protracted delay in service, particularly when the defendant has actual knowledge of

dismissal of the charge to be free of prejudicial error and therefore adopts it as the decision of the Board itself.

The unfair practice charge in Case No. S-CE-781-S is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chairman Caffrey and Member Dyer joined in this Decision.

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the existence of the action. The purpose of this approach is to eliminate unnecessary, time-consuming, and costly disputes over legal technicalities, without prejudicing the right of defendants to proper notice of court proceedings. (Hammer Collections Co. v. Ironsides Computer Corp. (1985) 172 Cal.App.3d 899, 902 [218 Cal.Rptr. 627].)

Looking at the circumstances in the case at bar, there is no evidence that DDS was prejudiced by the delay in service, since the delay was fairly brief and prejudice will not be inferred from delay alone (Putnam, supra). Furthermore, DDS already had notice of the existence of the case and there is no claim that witnesses or evidence had become unavailable in the interim. Under the guidance of the court cases discussed above, we decline to hold that IUOE's delay in serving DDS is fatal to the appeal; however, we wish to remind parties that Regulation 32140 does require concurrent service.

STATE OF CALIFORNIA PETE WILSON, *Governor*

PUBLIC EMPLOYMENT RELATIONS BOARD

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

December 18, 1995

William A. Sokol, Attorney-
Van Bourg, Weinberg, Roger & Rosenfeld
180 Grand Avenue, Suite 1400
Oakland, CA 94 612

Re: International Union of Operating Engineers v. State of California (Department of Developmental Services)
Unfair Practice Charge No. S-CE-781-S
DISMISSAL LETTER

Dear Mr. Sokol:

On November 8, 1995, you filed an unfair practice charge on behalf of the International Union of Operating Engineers (IUOE), in which you allege that the State of California, Department of Developmental Services (DDS) violated sections 3519(a) and (c) of the Ralph C. Dills Act. More specifically, you contend that on July 7, 1995, DDS "withdrew" a settlement of a grievance submitted by member James Dofelmire. Through this charge you seek to have PERB enforce the "settlement" that was reached on June 27, 1995, when Dofelmire concurred with his supervisor's first level of review finding that Dofelmire was working out of class and did not appeal his grievance to the second level of review.

I indicated to you, in my attached letter dated November 21, 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 December 4, 1995, the charge would be dismissed.

On November 29, 1995, you submitted a letter seeking to clarify the position of IUOE. Briefly stated, IUOE's argument is that DDS is failing to abide by the grievance clause of the contract and that said failure is a unilateral change in terms and conditions of employment. You have not provided any additional facts to support the charge.

As we discussed on the phone, in determining whether a party has violated Dills Act section 3519 (c), PERB utilizes either the "per se" or "totality of the conduct" test, depending on the specific conduct involved and the effect of such conduct on the negotiating process. (Stockton Unified School District (1980) PERB Decision No. 143.) Unilateral changes are considered "per

se" violations if certain criteria are met. Those criteria are: (1) the employer implemented a change in policy concerning a matter within the scope of representation, and (2) the change was implemented before the employer notified the exclusive representative and gave it an opportunity to request negotiations. (Walnut Valley Unified School District (1981) PERB Decision No. 160; Grant Joint Unified High School District (1982) PERB Decision No. 196.)

As I indicated, the withdrawal of a first level review of a grievance by DDS in this one instance, does not establish a change in policy. DDS submitted a response to the grievance at the second level of review and was willing to proceed with the grievance. IUOE seeks to have PERB find that the change in the grievance response is a unilateral change and a violation of a settlement. The alleged facts in this case don't support that theory. Therefore, I am dismissing the charge based on the facts and reasons contained in my November 21, 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 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 Roger Smith
Board Agent

RCS:cb

Attachment

PUBLIC EMPLOYMENT RELATIONS BOARD

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

November 21, 1995

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

Re: International Union of Operating Engineers v. State of California (Department of Developmental Services)
Unfair Practice Charge No. S-CE-781-S
WARNING LETTER

Dear Mr. Sokol:

On November 8, 1995, you filed an unfair practice charge on behalf of the International Union of Operating Engineers (IUOE), in which you allege that the State of California, Department of Developmental Services (DDS) violated sections 3519(a) and.(c) of the Ralph C. Dills Act. More specifically, you contend that on July 7, 1995, DDS "withdrew" a settlement of a grievance submitted by member James Dofelmire. Through this charge you seek to have PERB enforce the "settlement" that was reached on June 27, 1995, when Dofelmire concurred with his supervisor's first level of review finding that Dofelmire was working out of class and not appealing to the second level of review of his grievance.

The Dills Act provides at section 3514.5(b) that:

> The board shall not have authority to enforce agreement 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.

PERB Regulation 32615(a)(5) (codified at California Code of Regulations, title 8, section 31001 et seq.) requires that an unfair practice charge contain a clear and concise statement of the facts to constitute an unfair practice charge. Your charge fails to provide a statement of facts or a theory upon which an unfair practice can be based. As I indicated to you in our telephone conversation, without additional information the charge fails to state a prima facie violation of the Dills Act.

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 December 4, 1995, I shall dismiss your charge. If you have any questions, please call me at (916) 322-3198, extension 359.

Sincerely,

Roger Smith
Board Agent

RCS:mmh