

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



LORELEI NYLANDER-McGUIRE,)
)
 Charging Party,) Case No. LA-CE-371-S
)
 v.) PERB Decision No. 1197-S
)
 STATE OF CALIFORNIA (DEPARTMENT) May 6, 1997
 OF INSURANCE),)
)
 Respondent.)
 _____)

Appearances; Lorelei Nylander-McGuire, on her own behalf; State of California (Department of Personnel Administration) by Michael P. Cayaban, Legal Counsel, for State of California (Department of Insurance).

Before Caffrey, Chairman; Johnson and Dyer, Members.

DECISION AND ORDER

CAFFREY, Chairman: This case is before the Public Employment Relations Board (Board) on appeal by Lorelei Nylander-McGuire (Nylander-McGuire) of a Board agent's dismissal (attached) of her unfair practice charge. In the charge, Nylander-McGuire alleged that the State of California (Department of Insurance) (State) violated the Ralph C. Dills Act (Dills Act)¹ by cancelling her benefits.

The Board has reviewed the entire record in this case, including the unfair practice charge, the Board agent's warning and dismissal letters, Nylander-McGuire's appeal and the State's response thereto. The Board finds the warning and dismissal

¹The Dills Act is codified at Government Code section 3512 et seq.

letters to be free of prejudicial error and hereby adopts them as the decision of the Board itself.

The unfair practice charge in Case No. LA-CE-371-S is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Johnson and Dyer 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



December 6, 1996

Lorelei Nylander-McGuire

Re: Lorelei Nylander-McGuire v. California State Employees
Association. SEIU. AFL-CIO. Local 1000
Unfair Practice Charge No. LA-CE-371-S
DISMISSAL AND REFUSAL TO ISSUE A COMPLAINT

Dear Ms. Nylander-McGuire:

In the above-referenced charge you allege the State of California, Department of Insurance (State) violated the Ralph C. Dills Act (Dills Act or Act) by cancelling your benefits.

You filed the above-referenced charge on October 21, 1996. On October 29, 1996, I spoke with you regarding the above-referenced charge. On November 1, 1996, I issued a warning letter which indicated if you did not amend your charge by November 8, 1996, that it would be dismissed.

On November 7, 1996, I spoke with you regarding the warning letter. I explained that you needed to provide facts in support of your allegations. I reiterated that your charge must contain a clear and concise statement of the facts and conduct alleged to constitute an unfair practice. I also explained your charge must include "the who, what, when, where, and how" of an unfair practice. I granted your request for an extension to amend your charge to November 12, 1996.

On November 13, 1996, I received several handwritten pages, documents, and a newspaper article from you. You did not indicate which documents were applicable to the above-referenced charge and which were applicable to LA-CO-70-S, a separate charge filed against your union. Nor did your proof of service indicate that you served the information on the respondent.

On November 14, 1996, I wrote you the attached letter granting you an extension to amend the above-referenced charge to November 22, 1996. That letter presented specific questions which I indicated would be helpful to my investigation. With the November 14, 1996, letter I also enclosed two unfair practice charge forms and proof of service forms for your use.

LA-CE-371-S
Dismissal letter
December 6, 1996
Page 2

On November 20, 1996, I received an additional six handwritten pages from you. I have not received an amended charge or a request to withdraw the charge.

My investigation revealed the following information. On July 19, 1995, your supervisor, Chuck De Palma, issued a memorandum to your personnel file documenting your behavior. On August 22, 1995, you replied to De Palma's memorandum. In your reply you demanded the State take a lie detector test and volunteered to take one yourself. You also informed the State that you had filed a complaint with the "Bureau and State Personnel Board and [were] claiming the whistleblower's [Act]."

On July 15, 1996, you filed a grievance alleging the State had violated the collective bargaining agreement's Article 11.5, Timely Payment of Wages.

You further allege in October 1996, the State cancelled your health, medical and dental benefits retroactively back to June 1, 1996.

The above-stated information fails to state a prima facie discrimination violation within the jurisdiction of PERB for the reasons that follow.

Dills Act § 3513:5(a)(1) provides the Public Employment Relations Board shall not, "issue 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 your burden, as the charging party to demonstrate the charge has been timely filed. (See Tehachapi Unified School District (1993) PERB Decision No. 1024.)

On July 19, 1995, your supervisor, Chuck De Palma, issued a memorandum to your personnel file documenting your behavior. The six month period in which to file a charge regarding that conduct concluded on January 19, 1996. This charge was not filed until October 21, 1996. Therefore your allegation that the State discriminated against you by placing this memorandum into your personnel file is not within the six months statute of limitations period. Thus this allegation must be dismissed.

You also allege the State violated the Dills Act by cancelling your benefits in October 1996. While this allegation was timely filed, the charge does not present a clear and concise statement of any facts demonstrating a prima facie violation of the Dills Act.

LA-CE-371-S
Dismissal letter
December 6, 1996
Page 3

The State's action is remote in time to any of your activities which could be considered protected under the Dills Act. Nor did the charge factually demonstrate any of the other factors indicative of nexus. Thus this allegation must also be dismissed.

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.

LA-CE-371-S
Dismissal letter
December 6, 1996
Page 4

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

Tammy L. Samsel
Regional Director

Attachments

cc: Michael P. Cayaban

PUBLIC EMPLOYMENT RELATIONS BOARD



Los Angeles Regional Office
3530 Wilshire Blvd., Suite 660
Los Angeles, CA 90010-2334
(213)736-3127



November 14, 1996

Lorelei Nylander-McGuire

Re: Lorelei Nylander-McGuire v. State of California (Department of Insurance and Lorelei Nylander-McGuire v. California State Employees Association. SEIU, AFL-CIO, Local 1000
Unfair Practice Charge No. LA-CO-70-S
Unfair Practice Charge No. LA-CE-370-S

Dear Ms. Nylander-McGuire:

You filed the above-referenced charges on October 21, 1996. On October 29, 1996, I spoke with you regarding both of the above-referenced charges. On November 1, 1996, I issued separate warning letters explaining your charges failed to state prima facie violations as they were presently written. Those letters indicated if you did not amend your charges by November 8, 1996, that they would be dismissed.

On November 7, 1996, I spoke with you regarding those warning letters. I explained that you needed to provide facts in support of your allegations. I reiterated that your charge must contain a clear and concise statement of the facts and conduct alleged to constitute an unfair practice. I also explained your charge must include "the who, what, when, where, and how" of an unfair practice. I granted your request for extensions to amend your charges to November 12, 1996.

On November 13, 1996, I received several handwritten pages, documents, and a newspaper article from you. You did not indicate which documents were applicable to which of your charges. Nor did your proof of service indicate that you served the information on the respective respondents.

I have enclosed two unfair practice charge forms, and proof of service forms for your use. The amended charges should be prepared on a standard PERB unfair practice charge forms, 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 charges must be served on the respondent and the original proofs of service must be filed with PERB. If I do not receive amended charges or withdrawals from you before November 22, 1996 your charges be dismissed.

3 will

For Unfair Practice Charge No. LA-CE-371-S the following information would further my investigation.

1. What did you do to exercise your rights protected under the Dills Act?
2. On what date(s) did you exercise those rights?
3. What action did the State take against you?
4. On what date(s) did the State take action against you?
5. In the November 1, 1996, warning letter I listed several factors indicative of nexus. What facts do you have that demonstrate the State's conduct was unlawfully motivated by your exercise of rights protected under the Dills Act?

For Unfair Practice Charge No. LA-CO-70-S the following information would further my investigation.

1. On what date(s) did you contact CSEA?
2. On those dates who did you speak with?
3. What did the CSEA representatives tell you?
4. What did CSEA do for you?
5. When did CSEA act?
6. What did CSEA fail to do for you?
7. When did CSEA fail to act?

Sincerely,

Tammy L. Samsel
Regional Director

PUBLIC EMPLOYMENT RELATIONS BOARD



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



November 1, 1996

Lorelei Nylander-McGuire

Re: Lorelei Nylander-McGuire v. State of California (Department
of Insurance
Unfair Practice Charge No. LA-CE-370-S
WARNING LETTER

Dear Ms. Nylander-McGuire:

In the above-referenced charge you allege the State of California, Department of Insurance (State) violated the Ralph C. Dills Act (Dills Act or Act) by cancelling your benefits.¹

Your charges states in its totality:

The employer has delayed and withheld wages, filed false and incorrect adverse action against employee. Employer has committed Gov. improprieties. Employer failed to provide employee with information pertaining to union matters, SROA matters. Had the employee not found out by chance from a CAUSE Union employee, the employee would not have been able to assert SROA status. Employee is an injured worker under doctor's care and is an employee, yet the employer noticed the employee that the employee's benefits pertaining to health, medical and dental had been cancelled in October 1996 (1st week) retroactively back to June 1, 1996. I would request PERB to have my insurance coverage reinstated, monies paid forthwith and for PERB upon receiving all facts, documents, and evidences refer me those areas not covered by

¹I received your notice of appearance form designating the Public Employment Relations Board as your representative. PERB cannot act as your representative. During our October 29, 1996, conversation you indicated your attorney would not be handling this charge. You indicated your attorney was only handling your workers' compensation claims. In any event, you did not provide your attorney's name. Therefore I will direct all communications to you.

LA-CE-370-S
Warning Letter
November 1, 1996
Page 2

PERB, to the ADA Act and civil issues and to segregate and give assistance to those matters in which PERB adjudicates. Please provide a contact name, address, phone nb. and case file no. so that I (Lorelei) may send copies of grievances, letters and documents and evidences from: CSEA-Union, employer, and self. Thank you. [sic] (emphasis in original.)

On October 29, 1996, I spoke with you regarding this charge.² You explained you had evidence regarding State and/or CSEA misconduct which dated back several years. I indicated the Public Employment Relations Board's (PERB or Board) jurisdiction is limited to a six month statute of limitations period.

You expressed a concern that my decision or any later decision by the Public Employment Relations Board (PERB or Board) may be unduly influenced. I indicated to you that I would provide you with a written explanation of my analysis of your charge, and that you would have an opportunity to respond. This letter contains my analysis of your charge as your charge is presently written.

The charge fails to state a prima facie case for the reasons that follow.

PERB regulation 32615(a)(5) states a charge shall contain a "clear and concise statement of the facts and conduct alleged to constitute an unfair practice." A charging party should allege the "who, what, when, where, and how" of an unfair practice.

(United Teachers-Los Angeles (Ragsdale) (1992) PERB Decision No. 944.) Mere legal conclusions are insufficient. (See State of California (Department of Food and Agriculture) (1994) PERB Decision No. 1071-S.)

To demonstrate a violation of Dills Act section 3519(a), the charging party must show that: (1) the employee exercised rights protected under the Dills Act; (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

²We also discussed Unfair Practice Charge No. LA-CO-70-S, which you filed against the California State Employees Association.

LA-CE-370-S
Warning Letter
November 1, 1996
Page 3

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.)

Your charge does not include facts demonstrating the above-stated factors. To state a prima facie case you must allege facts indicating you engaged in a protected activity which the State had knowledge of, and that your protected activity motivated the State to eliminate your benefits.³

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

³In the event that you are not trying to allege a discrimination violation, but instead a unilateral change violation please make note of the following information. Government Code section 3519(c) makes it unlawful for a public employer to "refuse or fail to meet and confer in good faith with a recognized employee organization." (emphasis added) Thus, however meritorious the allegations of dissatisfied individual employees may be concerning wages, hours, or their terms and conditions of employment, an individual employee does not have standing to file a charge of bad faith bargaining or unilateral change against an employer. (Oxnard School District (1988) PERB Decision No. 667. For this reason, this charge fails to state a prima facie unilateral change violation.

LA-CE-370-S
Warning Letter
November 1, 1996
Page 4

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 November 8, 1996. I shall dismiss your charge. If you have any questions, please call me at (213) 736-3008.

Sincerely,

Tammy L. Samsel
Regional Director