STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA STATE EMPLOYEES ASSOCIATION, SEIU, LOCAL 1000,	
Charging Party,	Case No. SA-CE-1243-S
v.	PERB Decision No. 1357-S
STATE OF CALIFORNIA (DEPARTMENT OF HEALTH SERVICES),	October 18, 1999
Respondent.	

Appearances; California State Employees Association by Nancy T. Yamada, Attorney, for California State Employees Association, SEIU, Local 1000; State of California (Department of Personnel Administration) by Wendi L. Ross, Labor Relations Counsel, for State of California (Department of Health Services).

Before Caffrey, Chairman; Dyer and Amador, Members.

DECISION AND ORDER

AMADOR, Member: This case comes before the Public Employment Relations Board (Board) on appeal by the California State Employees Association, SEIU, Local 1000 (CSEA) to a Board agent's dismissal (attached) of the unfair practice charge. The charge alleged that the State of California (Department of Health Services) (State) violated the Ralph C. Dills Act (Dills Act) section 3519 (a) and (b)[1] when it terminated the employment of

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

> 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

Dana Bass in retaliation for engaging in protected conduct. The Board agent found that the charge did not state a prima facie case.

The Board has reviewed the original and amended charge, the warning and dismissal letters, CSEA's appeal, and the State's response. The Board finds that the warning and dismissal letters are free of prejudicial error, and adopts them as the decision of the Board itself.

The unfair practice charge in Case No. SA-CE-1243-S is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chairman Caffrey and Member Dyer joined in this Decision.

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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

July 2, 1999

Nancy T. Yamada, Staff Attorney
California State Employees Association
1108 "0" Street, Suite 327
Sacramento, CA 95814

Re: California State Employees Association, SEIU, Local 1000 v. State of California (Department of Health Services)
Unfair Practice Charge No. SA-CE-1243-S
DISMISSAL LETTER

Dear Ms. Yamada:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board on May 19, 1999. The charge alleges that the State of California (Department of Health Services) violated the Ralph C. Dills Act, Government Code section 3519(a) and (b), by retaliating against Dana Bass for engaging in protected conduct.

I indicated to you in the attached letter dated June 22, 1999, 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, the charge should be amended. You were further advised that unless the charge was amended to state a prima facie case or it was withdrawn prior to June 30, 1999, the charge would be dismissed.

We discussed the charge and the findings in the attached letter on June 29, 1999. An amended unfair practice charge was filed on June 30, 1999.

Mr. Bass was employed by the Department of Health Services as a Health Facilities Evaluator Nurse (HFEN). In his position, Mr. Bass participated in investigations of health facilities to determine compliance with State and Federal standards.

The charge alleges that on July 31, 1998, Peggy Severns, Health Facilities Evaluator Supervisor, informed Mr. Bass that she would be seeking adverse action against him. The charge alleges that despite Mr. Bass' repeated requests for an explanation of the basis of the proposed adverse action, "DHS was vague and failed to provide specifics." On December 11, 1998, the Department served Mr. Bass with a Notice of Adverse Action of dismissal.

During our conversation on June 29, 1999, you stated that the Department took adverse action against Mr. Bass on July 31, 1998 when Ms. Severns informed Mr. Bass that she would be seeking adverse action against him. Thereafter, the Department failed to provide Mr. Bass with any specifics about the proposed adverse action.

PERB has determined that adverse action is required to support a claim of discrimination or retaliation under Novato Unified School District (1982) PERB Decision No. 210. In establishing whether an adverse act has occurred, the Board uses an objective test and will not rely on the subjective reactions of the employee. (Palo Verde Unified School District (1988) PERB Decision No. 688; Newark Unified School District (1991) PERB Decision No. 864.)

Mr. Bass was informed that the Department would be seeking adverse action against him. At that point, there was no impact on the terms and conditions of his employment. Although Mr. Bass may have been apprehensive about a possible future adverse action, his subjective reactions do not establish the required adverse action. Therefore, this allegation fails to state a prima facie case.

However, assuming the July 31, 1998 notice from his supervisor demonstrates adverse action, this allegation is untimely filed.

Dills Act section 3514.5(a) states that PERB "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."

PERB has held that the six month statutory limitations period begins to run when the charging party knew or should have known of the conduct giving rise to the alleged unfair practice. (Regents of the University of California (1983) PERB Decision No. 359-H.)

The statutory limitations period extends six months prior to the filing of the unfair practice charge. In this case, the charge was filed on May 19, 1999. Therefore, the statutory limitations period began to run on November 19, 1998 and only alleged unfair practices which occurred on or after November 19, 1998 are timely filed. Accordingly, the allegation that the Department took adverse action against Mr. Bass on July 31, 1998, when it informed him that it would be seeking adverse action against him, in untimely filed and must be dismissed.

The amended charge again alleges that the Department "conducted a cursory investigation of the complaint lodged against" Mr. Bass

because the investigation failed to include an investigatory-interview of Mr. Bass. However, as I explained in the attached letter, the charge fails to provide facts alleging that Department policy requires such interviews or that the Department routinely conducts interviews under these circumstances, and that the Department departed from this policy. Therefore, these facts fail to demonstrate the required nexus to establish a prima facie case.

Finally, the amended charge alleges that in July 1998, a complaint was lodged against Mr. Bass by a health facility which complained about Mr. Bass' behavior during a recent inspection of the facility. The charge alleges that this complaint was the impetus for the Notice of Adverse Action of dismissal issued on December 11, 1998. The charge contends that it is not unusual for Department employees who participate in the inspection of health facilities to receive complaints because their findings can affect the continued operation of these facilities. CSEA states that it does not know of any "other instance where an HFEN, with no prior formal disciplinary action, has been dismissed as a result of a complaint of this nature."

The charge attempts to demonstrate that the Department treated Mr. Bass differently because of his participation in protected activity by dismissing him for the July 1998 complaint. However, Mr. Bass was not dismissed solely because of the July 1998 complaint. The Notice of Adverse Action cites, for example, five instances where Mr. Bass left early or arrived late to training classes; falsification of training class attendance records; complaints of unprofessional, angry and threatening behavior while conducting investigations filed by co-workers; inaccurate and unsubstantiated investigative findings; failure to accurately account for the use of a State car; and inaccuracies in expense claim, overtime authorization and July 1998 time sheet. The charge, therefore, fails to demonstrate that the Department engaged in disparate treatment of Mr. Bass when it issued him the Notice of Adverse Action of dismissal. Accordingly, the charge fails to state a prima facie case and is 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 Regs., tit. 8, sec. 32635(a).) Any document filed with the Board must contain the case name and number, and the original and five (5) copies of all documents must be provided to the Board.

A document is considered "filed" when actually received before the close of business (5 p.m.) on the last day set for filing or when mailed by certified or Express United States mail, as shown on the postal receipt or postmark, or delivered to a common carrier promising overnight delivery, as shown on the carrier's receipt, not later than the last day set for filing. (Cal. Code Regs., tit. 8, sec. 32135(a); see also Cal. Code Regs., tit. 8, sec. 32130.)

A document is also considered "filed" when received by facsimile transmission before the close of business on the last day for filing together with a Facsimile Transmission Cover Sheet which meets the requirements of Cal. Code Regs., tit. 8, sec. 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code. Regs., tit. 8, secs. 32135(b), (c) and (d); see also Cal. Code Regs., tit. 8, secs. 32090 and 32130.)

The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95814-4174
FAX: (916) 327-7960

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 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 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. A document filed by facsimile transmission may be concurrently served via facsimile transmission on all parties to the proceeding. (Cal. Code Regs., tit. 8, sec. 32135(c).)

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 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

Robin W. Wesley
Regional Attorney

Attachment

cc: Wendi L. Ross

PUBLIC EMPLOYMENT RELATIONS BOARD

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

June 22, 1999

Nancy T. Yamada, Staff Attorney
California State Employees Association
1108 "O" Street, Suite 327
Sacramento, CA 95814

Re: California State Employees Association, SEIU, Local 1000 v. State of California (Department of Health Services)
Unfair Practice Charge No. SA-CE-1243-S
WARNING LETTER

Dear Ms. Yamada:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board on May 19, 1999. The charge alleges that the State of California (Department of Health Services) violated the Ralph C. Dills Act, Government Code section 3519(a) and (b), by retaliating against Dana Bass for engaging in protected conduct.

Dana Bass is employed by the Department of Health Services as a Health Facilities Evaluator Nurse. In 1995, Mr. Bass was appointed a job steward for the California State Employees Association (CSEA). During 1996-98, Mr. Bass served as the District Bargaining Unit Representative and as a member of the Statewide Bargaining Committee for Unit 17.

In 1998, while serving as a CSEA representative, Mr. Bass made complaints to the district manager about supervisors who intimidated, harassed and threatened unit members; organized and picketed at his worksite over contract and grievant issues; distributed and posted employee rights notices; and counseled employees concerning working conditions and represented employees before management.

On July 3, 1998, Mr. Bass met with District Administrator Edgar Quam concerning the Department's "disrespectful and demeaning treatment of rank-and-file employees." Thereafter, the Department sent Mr. Bass on a three week out-of-town assignment. Mr. Quam informed Peggy Severns, Health Facilities Evaluator Supervisor, about the concerns raised by Mr. Bass and instructed Ms. Severns to address and resolve these concerns.

On July 31, 1998, upon Mr. Bass' return from the out-of-town assignment, Ms. Severns informed Mr. Bass that she would be seeking adverse action against him. The Department refused to

advise Mr. Bass of the specific allegations supporting any adverse action.

On December 11, 1998, the Department served Mr. Bass with a Notice of Adverse Action of dismissal and placed him on administrative leave. The charge alleges that, "[o]ne of the charges against Bass [in the Notice of Adverse Action] was in regard to his attendance at a Statewide Bargaining Committee meeting in April 1997." The Notice of Adverse action alleged, among other things, five instances where Mr. Bass left early or arrived late to class while attending an extended training seminar. The allegation concerning his "attendance at a Statewide Bargaining Committee meeting" states:

> On Friday, April 18, 1997, you left the training class at 10:10 a.m. and the class did not conclude until 2:35 p.m. that day. When your supervisor asked why you left the training five hours early, you said you returned home because you were flying from Sacramento to Southern California to attend a Labor Union meeting over the weekend. You chose to take an earlier flight rather than remain at the training class. You failed to request time off in the approved manner before you took any of these absences.

The Department terminated Mr. Bass' employment on December 23, 1998. On February 5, 1999, Mr. Bass received notice that following the Skelly hearing held on January 29, 1999, the Department refused to withdraw or modify the termination.

Based upon the facts stated above, the charge fails to state a prima facie case.

To demonstrate a violation of Dills Act section 3519(a), the charging party must show that: (1) the employee engaged in activity protected by the Dills Act; (2) the employer was aware of that activity; (3) the employer took adverse action against the employee; and (4) the employer's action was motivated by the employee's participation in the protected activity. (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.)

Although the unfair practice charge clearly demonstrates the requisite protected activity, knowledge and adverse action, the charge fails to establish a connection or nexus between Mr. Bass' protected activity and his termination.

CSEA contends that the Department dismissed Mr. Bass because he attended a CSEA Statewide Bargaining Committee meeting in April 1997. However, the Notice of Adverse Action indicates that the Department pursued adverse action, in part, because Mr. Bass did not request time off in the approved manner. Furthermore, the adverse act was remote in time from the protected activity. Mr. Bass attended the CSEA meeting in April 1997 and he was not served with the Notice of Adverse Action until December 11, 1998.

CSEA also asserts that the Department failed to hold an investigatory interview with Mr. Bass prior to serving him with the Notice of Adverse Action. CSEA contends that an investigatory interview should be held when the adverse action recommends the most serious form of discipline, that of dismissal. However, CSEA is not aware of a formal policy requiring an investigatory interview before a Notice of Adverse Action is issued. Nor does CSEA allege that the Department routinely conducts such interviews.

These facts fail to demonstrate that the State departed from standard policies or practices when serving Mr. Bass with the Notice of Adverse Action. Accordingly the charge fails to demonstrate a connection or nexus between Mr. Bass' protected activity and the adverse action and, thus, the charge must 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 have the case number written on the top right hand corner of the charge form. The amended charge must be served on the respondent's representative and the original proof of service must be filed with PERB. If I do not receive an amended charge or withdrawal from you before June 30, 1999, I shall dismiss your charge. If you have any questions, please call me at (916) 327-8385.

Robin W. Wesley
Regional Attorney