STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

ROBERT CLAYTON, Charging Party, v. STATE OF CALIFORNIA (DEPARTMENT OF SOCIAL SERVICES), Respondent.	Case No. SA-CE-1157-S PERB Decision No. 1413-S October 19, 2000

Appearances: California State Employees Association by Douglas Moffett, Labor Relations Representative, for Robert Clayton; State of California (Department of Personnel Administration) by Nalda L. Keller, Labor Relations Counsel, for State of California (Department of Social Services).

Before Dyer, Amador and Baker, Members.

DECISION

DYER, Member: This case comes before the Public Employment Relations Board (PERB or Board) on appeal by Robert Clayton (Clayton) of a PERB administrative law judge's (ALJ) proposed decision (attached) dismissing his unfair practice charge. Clayton alleges that the State of California (Department of Social Services) (State) violated section 3519(a) of the Ralph C. Dills Act (Dills Act)[1] by terminating his employment because of his protected activities.

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

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

The Board has reviewed the entire record in this case, including the unfair practice charge, the ALJ's proposed decision, the briefs of the parties, Clayton's exceptions, and the State's response. The Board finds the proposed decision to be free from prejudicial error and adopts it as the decision of the Board itself.

ORDER

The unfair practice charge in Case No. SA-CE-1157-S is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Amador and Baker joined in this Decision.

(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.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

ROBERT CLAYTON,	)	
	)	
Charging Party,	)	Unfair Practice
	)	Case No. SA-CE-1157-S
v.	)	
	)	PROPOSED DECISION
STATE OF CALIFORNIA (DEPARTMENT OF SOCIAL SERVICES),	)	(3/3/2000)
	)	
Respondent.	)	
	)	

Appearances: Douglas Moffett, Labor Relations Representative, for Robert Clayton; State of California (Department of Personnel Administration) by Nalda L. Keller, Labor Relations Counsel, for State of California (Department of Social Services).

Before Allen R. Link, Administrative Law Judge.

PROCEDURAL HISTORY

On July 20, 1998, Robert Clayton (Clayton), filed an unfair practice charge with the Public Employment Relations Board (PERB or Board) against the State of California (Department of Social Services) (Social Services). The charge alleged violations of the Ralph C. Dills Act (Dills Act).[1]

On July 23, 1999, the Office of the General Counsel, after an investigation of the charge, issued a complaint against the respondent, alleging a violation of subdivision (a) of section 3519.[2]

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[1]Unless otherwise noted, all statutory references are to the Government Code. The Dills Act is codified at section 3512 et seq.

[2]Subdivision (a) of section 3519 states:

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

On July 28, 1999, the respondent filed its answer to the complaint denying all material allegations and asserting affirmative defenses.

A formal hearing was held before the undersigned on November 16 and 17, 1999. At the conclusion of the hearing, transcripts were prepared, briefs were filed and the case was submitted for a proposed decision on February 23, 2000.

INTRODUCTION

Clayton has been employed in various departments within the State of California (State) since 1980. In 1994 he transferred to the State Department of Health Services (Health). On August 25, 1995, he was served with an adverse action of dismissal. That action was based on allegations that, in his application for employment at Health, he failed to disclose two prior rejections in probation. These rejections were at the Department of Commerce (Commerce) and the State Teachers Retirement System (STRS).

He appealed this dismissal and at a "Skelly"[3] hearing on September 12, 1995, it was reduced to a letter of reprimand.

On August 8, 1995, prior to the service of the adverse action by Health, Clayton applied for employment at Social

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[3]Skelly v. State Personnel Board (1975) 15 Cal.3d 194 [124 Cal.Rptr. 14] (Skelly).

Services. His employment at Social Services began on December 1, 1995, and lasted until an adverse action of dismissal was taken against him on June 23, 1998. This action charged him with failing, in his Social Services employment application, to disclose his prior rejections at Commerce and STRS.

Clayton alleged his dismissal was based on his protected activities as a California State Employees Association (CSEA) steward and not on his failure to disclose the prior rejections on his employment application.

FINDINGS OF FACT

Jurisdiction

The parties stipulated Clayton was a State employee at the time of the subject events and the respondent is a State employer within the meaning of the Dills Act.

Protected Activities

Clayton completed CSEA steward training on June 15, 1991. His District Labor Council president assigned him duties ranging from assisting in the distribution of the union newsletter and fliers to polling fellow employees about various work issues.

CSEA is required, by the parties' memorandum of understanding, to provide the State with a list of its active stewards. During the period under examination, 1996-1998, Clayton's name was not on these lists.

Clayton testified that at least three of his supervisors were aware of his CSEA activities. He identified them as Dick Williams (Williams), his second level supervisor and manager of

the Program Assistance Bureau; Leslie Frye (Frye), his third level supervisor and director of child support; and a third person whose identity he could not recall.

In 1998, when he distributed fliers about a CSEA meeting regarding a telecommute issue, he inadvertently placed some of the fliers in supervisors' mailboxes. One supervisor, Carmen Cody (Cody), came to him to explain she should not have been given the flier. Clayton apologized and the matter was dropped. He cites this incident to support his contention that other managers/supervisors were aware of his CSEA activities. Cody did not testify at the formal hearing.

Clayton knew of no other supervisors or managers that were aware of his CSEA activities.

During his tenure at Social Services, Clayton never requested time off to deal with union matters, nor did he ever file a grievance or attend an investigatory interview in a representational role. Both Frye and Williams insist they had no knowledge of Clayton's stewardship or any other CSEA role when they participated in discussions regarding his eventual dismissal.

In 1998, Clayton filed both an informal and a formal complaint about a letter of reprimand he received from Williams. This matter will be discussed at greater length below.

Social Services Employment Performance

With one exception, Clayton's Social Services employment as an associate governmental program analyst was free of controversy. This exception occurred in June 1998 when he was accused of improperly delivering an incoming facsimile (fax) transmission. The cover sheet of the fax was designated "confidential" and allegedly contained negative information about another employee in the office. Rather than delivering the fax to Williams, the "confidential" addressee, Clayton gave it to the subject employee. He was given a "Letter of Reprimand (Informal)" for this action.

In appealing this letter, Clayton filed both an informal and a formal complaint. His attempt to have the reprimand withdrawn eventually resulted his asking to see his personnel file. Social Services has a policy which requires a personnel file to be examined prior to its being shown to the involved employee. Pursuant to this policy, Personnel Analyst Dan Knipp (Knipp) examined Clayton's file.

As a result of this examination, Knipp became aware that Clayton had previously been rejected during his probationary periods at Commerce and STRS. He also determined that these rejections had not been disclosed in his Social Services employment application. Knipp requested the assistance of Julie Chappie (Chappie), a Social Services labor relations analyst. Chappie conducted an investigation in which she contacted Commerce and STRS. Neither Chappie nor Knipp had personally met

Clayton prior to the time they reviewed and investigated his file. Nor did either of them have any knowledge, at that time, of any protected activity on Clayton's part.

Once the investigation was completed, Williams, Frye and the legal department were made aware of Clayton's employment application deficiencies. A consensus developed that Clayton's employment should be terminated. Frye made the ultimate decision that an adverse action of dismissal would be prepared and served on Clayton.

Social Services entered into evidence five terminations it issued to other employees from December 1991 to May 1997. Each of these terminations were based on allegations that the subject employee failed to disclose prior rejections in probation or resignations-under-pressure from previous State departments.

Clayton alleges that Rolando Villarama (Villarama), his initial Social Services supervisor, was aware, as early as September 29, 1995, of one or both of his rejections in probation. He supports this allegation with his own testimony, as well as that of Linette Kleinsasser (Kleinsasser), a fellow Social Services analyst who also worked at Health with Clayton. They allege that at the time that Clayton was attempting to transfer to Social Services, Villarama spoke to Kleinsasser about his inability to get any personnel information from Health. Kleinsasser told him that she had worked with Clayton at Health and that she would vouch for his work ethic and reliability. In addition to her personal testimony, Kleinsasser submitted a

declaration that was originally used in a federal lawsuit filed by Clayton against Social Services. In that declaration she described subsequent conversations with Villarama, as follows:

> Mr. Villarama approached me at least two more times after that seeking validation that Mr. Clayton would be a good employee and that he had nothing to worry about if he hired Mr. Clayton. In a conversation with Mr. Clayton, he told me that he had finally faxed his performance (probation) reports to Mr. Villarama because they were missing from his personnel file and there was a problem getting them included into the file. It is my belief that Mr. Villarama would not have hired Mr. Clayton without seeing those reports.

However, in that same declaration she states:

> . . . I understand Mr. Villarama has testified under oath that he is unaware of the nature of Mr. Clayton's employment history difficulties, particularly with the California Department of Health Services (DHS) . . . .

Villarama did not testify in the formal hearing in this case.

Clayton also submitted letters from his personal attorney and clinical psychologist. Each of these letters stress that his complete emotional recovery from an earlier stress related illness is dependent on his being able to place the previous rejections in probation behind him. This requires, according to these letters, his being able to refrain from disclosing the rejections to future departments in employment applications. The attorney's letter stated that he believed the Skelly decision permitted Clayton to disregard the Commerce and STRS rejections on future employment applications.

ISSUE

Did Social Services terminate Clayton's employment because of his protected activity, in violation of subdivision (a) of section 3519?

CONCLUSIONS OF LAW

The Board, in Carlsbad Unified School District (1979) PERB Decision No. 89 (Carlsbad), set forth the following test for alleged violations of subdivision (a) of section 3543.5 of the Educational Employment Relations Act (EERA):[4]

> 1. A single test shall be applicable in all instances in which violations of section 3543.5(a) are alleged;
>
> 2. Where the charging party establishes that the employer's conduct tends to or does result in some harm to employee rights granted under the EERA, a prima facie case shall be deemed to exist;
>
> 3. Where the harm to the employees' rights is slight, and the employer offers justification based on operational necessity, the competing interest of the employer and the rights of the employees will be balanced and the charge resolved accordingly;
>
> 4. Where the harm is inherently destructive of employee rights, the employer's conduct will be excused only on proof that it was occasioned by circumstances beyond the employer's control and that no alternative course of action was available;
>
> 5. Irrespective of the foregoing, a charge will be sustained where it is shown that the employer would not have engaged in the complained-of conduct but for an unlawful motivation, purpose or intent. [Emphasis added.]

[4]EERA is codified at section 3540 et seq.

In Novato Unified School District (1982) PERB Decision No. 210 (Novato), the Board clarified the Carlsbad test for retaliation or discrimination in light of the National Labor Relations Board decision in Wright Line, Inc. (1980) 251 NLRB 1083 [105 LRRM 1169] enforced in part (1st Cir. 1981) 662 F.2d 899 [108 LRRM 2513]. In Novato, unlawful motive must be proven in order to find a violation. In addition, a nexus or connection must be demonstrated between the employer's conduct and the exercise of a protected right resulting in harm or potential harm to that right.

In order to establish a prima facie case, the charging party must first prove that the subject employee engaged in protected activity.[5] Next, it must establish that the employer had knowledge of such protected activity. Lastly, it must prove that the subject adverse action(s) were taken, in whole or in part, as a result of such protected activity.

Proving the existence of unlawful motivation can be a difficult burden. The Board acknowledged this when it stated the following in Carlsbad:

> Proof Of Unlawful Intent Where Offered Or Required
>
> Unlawful motivation, purpose or intent is essentially a state of mind, a subjective

[5]Section 3515 grants State employees:

> . . . the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations. . . .

> condition generally known only to the charged party. Direct and affirmative proof is not always available or possible. However, following generally accepted legal principles the presence of such unlawful motivation, purpose or intent may be established by inference from the entire record. [Fn. omitted.]

In addition, the Board, in Novato, set forth examples of the types of circumstances to be examined in a determination of whether improper animus is present and a motivating factor in the employer's action(s). These circumstances are (1) disparate treatment of the affected employee(s), (2) proximity of time between the participation in protected activity and the adverse action, (3) inconsistent explanations of the employer's action(s), (4) departure from established procedures or standards, and (5) inadequate investigation(s). (See also Baldwin Park Unified School District (1982) PERB Decision No. 221 (Baldwin Park).)

Protected Activity

Clayton's protected activity on behalf of CSEA consisted of little more than (1) distributing newsletters and fliers, and (2) talking to other employees about the union. Even this activity was somewhat diminished by CSEA's failure to list him as an active steward in the periodic lists it sends to Social Services.

Knowledge of Protected Activity

Despite Clayton's assertion to the contrary, the two supervisory employees who testified disclaimed any knowledge of union activity on his part at the time they participated in the

discussions that led to his termination. All three persons testified credibly. As the burden of proof is on Clayton to provide persuasive evidence to support his allegations, it must be determined there is insufficient evidence to support a conclusion that Clayton's activities on behalf of CSEA were known to Social Service supervisory personnel.

Due to the preceding analysis, it is determined that Clayton's CSEA activity never progressed beyond a minimal level. In addition, it is also determined that his supervisors, Williams and Frye, were not aware of such activity at the time they participated in the discussions that led to his dismissal. However, his filing of the appeal complaints were known to both Williams and Frye.

Proof of Unlawful Motivation

One of the circumstances Novato sets forth to be examined is timing of the negative personnel action vis-a-vis the protected activity. Clayton's general CSEA activity started when he became a steward in 1991 and continued until his dismissal. There was no marked escalation of such activity immediately prior to the dismissal.

However, he attempts to rely on the chronological interrelationship between his appeal complaints and his dismissal to support an inference of unlawful motivation. Timing is important in an unlawful motivation inquiry to the extent that it shows that a supervisor responded to protected activity by initiating negative personnel action against the union activist.

That cause and effect was not present in this case. Here, Clayton was initially charged with an impropriety that caused him to receive an informal reprimand. His appeal from this reprimand set up circumstances that caused his personnel file to be examined. This examination resulted in the employer learning of his failure to list his prior rejections. This led to his eventual dismissal. There was no evidence that Williams or Frye were so incensed by his appeal complaints that they retaliated by asking the personnel department to examine his file in an attempt to locate evidence of employment application fraud.

The evidence clearly shows that there is nothing in the proximity of time between Clayton's protected activity and his dismissal that supports an inference of unlawful motivation.

Even if there were some scintilla of such evidence, it has been held by the Board that timing alone is insufficient to create an inference of a nexus between protected activity and negative personnel actions. (Moreland Elementary School District (1982) PERB Decision No. 227; Charter Oak Unified School District (1984) PERB Decision No. 404.)

Unlawful motivation may also be inferred from disparate treatment of the employee. However, there was no evidence proffered regarding dissimilar treatment of other Social Services employees who had failed to disclose prior rejections in probation. To the contrary, there was evidence five other employees, who had likewise failed to disclose such rejections,

were also terminated. There is nothing with regard to disparate treatment that would support an inference of unlawful motivation.

Inconsistent employer explanation(s) can also be used to support an inference of unlawful motivation.

In this case the employer has continuously expressed a clear, unequivocal explanation for its action. Clayton asked to see his personnel file. In accordance with departmental policy his file was examined by Knipp who noticed the inconsistency between the information contained therein and Clayton's employment application. Knipp then notified a labor relations analyst who investigated, thereby leading to Clayton's eventual dismissal.

There is no evidence to support an inference of unlawful motivation with regard to inconsistent employer explanations.

With regard to departures from established procedures or standards, Clayton alleges that Social Services knew of his prior rejections from his first immediate supervisor, Villarama. Clayton asserts Villarama was aware of his difficulties at Health, and the reasons therefore. Kleinsasser supports him in this assertion. However, Kleinsasser's own declaration states that Villarama, at some time in the past in some unknown forum, denied such knowledge.

This evidence suffers from four defects. First, it is hearsay which, although admissible, cannot be used to exclusively support a finding.

Second, even if Villarama knew, to some extent, of the difficulties Clayton was having at Health, there is no evidence that he knew that Clayton had been twice rejected prior to his employment at Health. It must be remembered that Clayton was not terminated by Social Services because of his rejection at Health, but rather because he failed to disclose his rejections at Commerce and STRS.

Third, even if Villarama had sufficient knowledge of Clayton's prior rejections, and if such knowledge could be imputed to Social Services, it would be little more than a departure from established procedures. This departure would consist of a rebuttal to Social Services' contention that it first learned of such rejections when it examined Clayton's personnel file. This departure, although supportive of an inference of unlawful motivation, would be insufficient, by itself, to support an ultimate conclusion that his termination was due to his protected activities.

Lastly, even if Social Services knew of the rejections in 1995, there is no evidence that supports Clayton's allegation that its decision to terminate him in 1998 was based on his protected activities.

The evidence with regard to departures from established procedures or standards is insufficient to support an inference of unlawful motivation.

There was no evidence with regard to inadequate investigations.

The examination of the Novato and Baldwin Park circumstances leads to a conclusion that there was insufficient evidence upon which to support an inference of unlawful motivation.

Summary

After an examination of the foregoing, it is determined that there is insufficient evidence to support a charge that Clayton's dismissal was the result of his protected activities.

PROPOSED ORDER

Based on the foregoing findings of fact, conclusions of law and the entire record in this case, it is found that the State of California (Department of Social Services) did not violate the Ralph C. Dills Act, Government Code section 3519(a), when it terminated Robert Clayton. It is ORDERED that all aspects of the charge and complaint in Case No. SA-CE-1157-S, Robert Clayton v. State of California (Department of Social Services), are hereby DISMISSED.

Pursuant to California Code of Regulations, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the Board itself within twenty days of service of this Proposed Decision. The Board's address is:

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

In accordance with PERB Regulations, the statement of exceptions should identify by page, citation or exhibit number

the portions of the record, if any, relied upon for such exceptions. (See Cal. Code of Regs., tit. 8, sec. 32300.)

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. (See Cal. Code of 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.)

Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party of filed with the Board itself. (See Cal. Code of Regs., tit. 8, secs. 32300, 32305, 32140 and 32135(c).)

Allen R. Link
Administrative Law Judge