STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CARLOS A. VELTRUSKI, Charging Party, v. STATE OF CALIFORNIA, Respondent.	Case No. LA-CE-556-S PERB Decision No. 1459-S August 29, 2001

Appearances: Carlos A. Veltruski, on his own behalf; State of California (Department of Personnel Administration) by Linda M. Nelson, Labor Relations Counsel, for State of California.

Before Amador, Baker and Whitehead, Members.

DECISION

WHITEHEAD, Member: This case is before the Public Employment Relations Board (Board) on appeal by Carlos A. Veltruski (Veltruski) of a Board agent's denial (attached) of his motion to amend an unfair practice complaint. The complaint alleged that the State of California (State) violated section 3519(a) of the Ralph C. Dills Act (Dills Act)[1] by denying Veltruski the opportunity for employment based on his protected activity.

[1]The Dills Act is codified at Government Code section 3512 et seq. Section 3519 reads, 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 employees because of their exercise of rights guaranteed by this chapter. For

The Board has reviewed the entire record in this case, including the motion to amend, all supporting and opposing papers thereto, the Board agent's decision on the motion to amend, Veltruski's appeal and the State's opposition. The Board finds the Board agent's decision on the motion to amend to be free from prejudicial error and adopts it as the decision of the Board itself.

ORDER

The motion to amend the unfair practice charge and complaint in Case No. LA-CE-556-S is hereby DENIED.

Members Amador and Baker joined in this Decision.

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purposes of this subdivision, "employee" includes an applicant for employment or reemployment.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

CARLOS A. VELTRUSKI, Charging Party, v. STATE OF CALIFORNIA, Respondent.	UNFAIR PRACTICE CASE NO. LA-CE-556-S DECISION ON MOTION TO AMEND May 11, 2001

Appearances: Carlos A Veltruski as the Charging Party and Linda M. Nelson, Labor Relations Counsel, for the Respondent.

Before Marc S. Hurwitz, Regional Attorney.

HISTORY

The initial unfair practice charge was filed by the Charging Party on June 23, 2000 alleging that agencies of the State of California denied Charging Party as an applicant the opportunity for employment beginning in 1991 based on his protected activity in violation of the Ralph C. Dills Act (Dills Act) (Government Code section 3512 et sec.) After several amended charges were filed, a Complaint issued on February 22, 2001 alleging discrimination by State agencies. Also, in a separate Partial Dismissal letter, other allegations were dismissed as untimely. That Partial Dismissal is presently on appeal to the Board.

On March 20, 2001, Charging Party filed a Motion to Amend the Complaint which states the following,

> This is a Request to Move LA PERB Marc Hurwitz to consider adding detailed and specific charges to the already existing COMPLAINT issued by Attorney Bernard McMonigle on 2-22-2001. Please read attached 17 pages and exhibits and summarizing: These issues are part of original filing. 1) On allegations 4 and 5 [of the Complaint involving the California

Department of Justice (DOJ)] please mention incident with MATTHEW BOTTING [Dep. A.G. representing the State in Federal litigation filed by Charging Party in February 2000] who was supervised directly by Sylvia Diaz, incorporate letter signed by BOTTING on 2-29-00 that was letter resent [several months later] on copy by current Attorney Tom Scheerer [latest Dep. A.G. defending the State in the litigation] that is also under direct supervision of Sylvia Diaz of the LA-AG Office. 2) On allegation 6 and 7 [of the Complaint involving the Unemployment Insurance Appeals Board (UIAB)], please mention the connection with what happened at their Inglewood office on 6-15-00 and in 2nd semester 96 involving P.J.[Presiding Judge Hugh] Harrison (96) and Mrs. Folsoi and P.J. Knipe

FACTS

Department of Justice - In February 2000, Charging Party filed a lawsuit against the Department of Motor Vehicles (DMV) and the California Unemployment Insurance Appeals Board (UIAB) in the United States District Court, and filed other actions before administrative agencies to secure economic benefits for prior employment. He also sought to take action against UIAB and DMV before the State Personnel Board. The actions assert that in the 1990's, Charging Party should have been treated as an employee of the State [not as an independent contractor] and that he was incorrectly denied his rights to equal pay and employee benefits.

The PERB Complaint issued February 22, 2001 states that Supervising Deputy Attorney General Sylvia Diaz took adverse action against Charging Party in February 2000 by denying him the opportunity for employment with the DOJ because of his protected activity.

Charging Party points out that his initial charge filed on June 23, 2000 also describes how Deputy Attorney General Botting refused to consider Charging Party for employment beginning in February 2000 because of Charging Party's protected activity. By letter dated February 29, 2000, Mr. Botting (defending the Charging Party's personal injury - civil rights

litigation against the State of California et al. in U.S. District Court), advised Charging Party that the complaint was not properly served, that permanent residence status is not something any agency of the State can grant, that the Court cannot force State agencies to file forms and petitions with the Immigration and Naturalization Service for employment-based immigration, that there was no employment relationship, only that of a sub-contracting vendor, that the suit was untimely, and suggesting that the Complaint be dismissed since not doing so could potentially expose Charging Party to attorney's fees for pursuing a frivolous lawsuit.

In or about July 2000, Charging Party learned that Mr. Botting was no longer working there and that Deputy Attorney General Thomas M. Scheerer was now representing the State in the federal lawsuit. Charging Party discussed his situation with Mr. Scheerer and Mr. Scheerer reiterated what Mr. Botting indicated previously. He also wrote to Charging Party and enclosed a copy of Mr. Botting's February 29, 2000 letter.

Unemployment Insurance Appeals Board - Allegations concerning the Inglewood Office, at page 6 of the Statement of Charge of the Initial Charge filed June 23, 2000, states as follows,

> I also went in person to the Inglewood Office of Appeals of the CA UIAB on Thursday, June 15, 2000 and I requested to be appointed as a state employee to perform services, but the acting PJ [Presiding Judge Judy Folsoi was very rude with me (she is the same judge that is so rude with interpreters that she forgot to swear me in as the official interpreter at the beginning of the recorded hearing and would NOT permit me to tell her that she had forgotten to swear me in as the official interpreter at the beginning of the recorded hearing and would NOT permit me to tell her that she had forgotten to swear me into the record and then the transcriber realized the interpreter had not been sworn into the record by the judge and the hearing had to be conducted all over again), and she instructed other employees not to pay attention to what I was saying. I informed her that I was on a mission to fight for the rights of interpreters and their wages and working conditions and terms of employment. I left a letter for the presiding judge Knipe but he has not responded to me yet.

In or about 1996, Charging Party was an interpreter for the Inglewood Office of the UIAB where Presiding Judge Hugh Harrison and Judge Judy Folsoi were working. At that time, Charging Party advised UIAB that he claimed he was actually an employee of the UIAB. On June 15, 2000 Charging Party informed Acting Presiding Judge Folsoi that he wished to apply for State employment and that he was going to improve the working conditions of the interpreters. Charging Party had also filed actions against the UIAB before administrative agencies for employment benefits. On June 15, 2000, Charging Party also asked Judge Folsoi and a secretary why he had been removed from the list of qualified interpreters. Judge Folsoi did not answer but she advised Charging Party she was not going to give him a job and she then directed several employees present not to pay attention to Charging Party. Before departing, Charging Party left a letter for Presiding Judge Knipe requesting to be given a position as an interpreter/auditor in order to issue a report on how interpreters can better perform their services, and expressing his desire to unionize interpreters and improve their working conditions. On June 23, 2000 Judge Knipe advised Charging Party by letter that there was no current need for any additional interpreters in the office.

ISSUES

1. Has the Respondent retaliated against Charging Party as an applicant by the actions of Deputy Attorneys General Botting and Scheerer in violation of Dills Act section 3519(a)?

2. Has the Respondent retaliated against Charging Party as an applicant by the actions of officials at the Inglewood office of the UIAB in violation of Dills Act section 3519(a)?

ANALYSIS

To demonstrate a violation of Dills Act section 3519(a), the charging party must show that: (1) the employee exercised rights 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 (Novato); Carlsbad Unified School District (1979) PERB Decision No. 89.)

Evidence of adverse action is also required to support a claim of discrimination or reprisal under the Novato standard. (Palo Verde Unified School District (1988) PERB Decision No. 689.) In determining whether such evidence is established, the Board uses an objective test and will not rely upon the subjective reactions of the employee. (Ibid.) In a later decision, the Board further explained that:

> The test which must be satisfied is not whether the employee found the employer's action to be adverse, but whether a reasonable person under the same circumstances would consider the action to have an adverse impact on the employee's employment. [Newark Unified School District (1991) PERB Decision No. 864; emphasis added; footnote omitted.]

PERB Regulation 32647 allows the Charging Party, after issuance of a complaint, to move to amend the complaint by filing a request to amend the complaint and an amended charge meeting the requirements of section 32615. PERB Regulation 32615(a)(5) requires, inter alia, that an unfair practice charge include a "clear and concise statement of the facts and conduct alleged to constitute an unfair practice." Thus, the charging party's burden includes alleging the "who, what, when, where and how" of an unfair practice. (State of California (Department of Food and Agriculture) (1994) PERB Decision No. 1071-S, citing United Teachers-Los Angeles (Ragsdale) (1992) PERB Decision No. 944.) Mere legal conclusions are not sufficient to state a prima facie case. (Ibid.; Charter Oak Unified School District (1991) PERB Decision No. 873.)

Department of Justice - Charging Party has demonstrated he engaged in protected activity. But Charging Party has not alleged with a clear and concise statement in the Motion to Amend and the attached documents (or in the initial Charge) that Mr. Botting or Mr. Scheerer were Supervisors acting for the State employer, in a position to hire Charging Party.[1] Only Sylvia Diaz of the Enforcement, Regulation and Administration Section of the Civil Law Division, who had contact with Charging Party, is a Supervising Deputy Attorney General.

Both attorneys Botting and Scheerer were DOJ employees merely defending the State in the lawsuit brought by Charging Party. An adverse action regarding an applicant's prospective employment has not been taken merely by defending a lawsuit, and pointing out defects in the suit, and that the losing party may be subject to paying attorney's fees.

Accordingly, the Motion to Amend the complaint as to Mr. Botting and Mr. Scheerer is denied.

Unemployment Insurance Appeals Board - The request to amend and attachments references conduct by the State occurring in or about 1996. The Dills Act states that PERB may not issue a complaint on an underlying charge based upon an alleged unfair practice occurring more than six months before the filing of the charge. (Government code section 3514.5(a)(1).) This limitations period is mandatory; it is a jurisdictional bar to charges filed outside the six-month period. (California State University, San Diego (1989) PERB Decision No. 718-H.) The limitations period begins to run once a charging party knows or should have known of the conduct underlying the charge. (Fairfield-Suisun Unified School District (1985) PERB Decision No. 547.) PERB has determined that a charging party's belated discovery of

[1] The party seeking to establish agency bears the burden of proving agency by a preponderance of the evidence. Inglewood Unified School District (1990) PERB Decision No. 792, aff'd Inglewood Teachers Assn. v. Public Employment Relations Board (1991) 227 Cal. App. 3d 767, 780.

the legal significance of the underlying conduct does not excuse an otherwise untimely filing. (California State Employees' Association (Darzins) (1985) PERB Decision No. 546-S.)

The doctrine of equitable tolling, under which the statutory limitations period is tolled, while a charging party pursues an alternative legal remedy, is not applicable to the statutes administered by PERB. (San Diego Unified School District (1991) PERB Decision No. 885; The Regents of University of California (1990) PERB Decision No. 826-H.) Even if the conduct in question occurred in late December 1996, the statute of limitations began at that time, and the Charging Party had until the latter part of June 1997 to file a charge. The initial charge in this case was not filed until June 23, 2000.

Accordingly, the Request to Amend the Complaint is denied as to allegations occurring in 1996, well outside the statutory period.

Charging Party has demonstrated that he engaged in protected activity prior to the incident on June 15, 2000 and Judge Knipe's reply on June 23, 2000. However, a prima facie violation has not been stated. First, Charging Party has not demonstrated that a position as an interpreter or auditor was announced or available at the time he sought to be considered for employment in June 2000. No information has been provided suggesting that Judge Knipe was in error when he advised Charging Party on June 23, 2000 that his office had no current need for any new interpreters. An employer is not under any obligation to create for a prospective applicant a position or the kind of position being sought.

Accordingly, the Motion to Amend as to this incident is denied as well.

Dated: May 11, 2001

Marc S. Hurwitz
Regional Attorney