STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

WILLIAM F. HORSPOOL, Charging Party, v. STATE OF CALIFORNIA (DEPARTMENT OF CORRECTIONS), Respondent.	Case No. LA-CE-570-S PERB Decision No. 1546-S August 13, 2003

Appearance: William F. Horspool, on his own behalf.

Before Baker, Whitehead and Neima, Members.

DECISION

BAKER, Member: This case is before the Public Employment Relations Board (Board) on what purports to be an appeal by William F. Horspool (Horspool) of the Board agent's partial dismissal (attached) and deferral of his unfair practice charge to arbitration. Horspool argues that his charge was improperly deferred to arbitration. However, the record reveals that this matter has not been deferred to arbitration, but that the charge was partially dismissed and that a complaint has been issued on the remainder. Horspool's appeal to the Board does not challenge the partial dismissal, but merely seeks to amend the complaint to include additional allegations. This is not a proper ground for appeal to the Board. The text of the complaint placed Horspool on notice that:

> Any amendment to the complaint shall be processed pursuant to California Code of Regulations, title 8, sections 32647 and 32648. [Complaint, p. 2.]

Accordingly, having reviewed the entire record in this matter, the Board dismisses Horspool's appeal as improper and affirms the Board agent's partial dismissal letter.

ORDER

The partial dismissal of the unfair practice charge in Case No. LA-CE-570-S is hereby AFFIRMED.

Members Whitehead and Neima joined in this Decision.

STATE OF CALIFORNIA GRAY DAVIS, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD

Los Angeles Regional Office
3530 Wilshire Blvd., Suite 1435
Los Angeles, CA 90010-2334
Telephone: (213) 736-3543
Fax: (213) 736-4901

October 31, 2002

William F. Horspool
127 Barrett Road
Riverside, CA 92507

Re: William F. Horspool v. State of California (Department of Corrections)
Unfair Practice Charge No. LA-CE-570-S
NOTICE OF PARTIAL DISMISSAL AND DEFERRAL TO ARBITRATION

Dear Mr. Horspool:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on September 24, 2001. William F. Horspool alleges that the State of California (Department of Corrections) (State or Respondent) violated section 3519(a), (b) and (c) of the Ralph C. Dills Act (Dills Act)[1] by failing to bargain in good faith, by making a unilateral change, and by retaliating against Mr. Horspool.

I indicated in the attached letter dated July 29, 2002, that all allegations concerning retaliation contained in this charge were subject to deferral to arbitration. I also indicated that you lacked standing to allege a) that the State failed to participate in the grievance procedure in good faith and b) that the State unilaterally changed its policy regarding the payment of holiday pay and breached the MOU in other respects. 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 or withdrawn prior to August 5, 2002, the allegations concerning retaliation would be deferred to arbitration and dismissed and the other allegations would be dismissed.

I received your First Amended charge on August 8, 2002.[2] You allege that there is enmity between you and the State especially in light of the prior charge you filed against the State, Charge No. LA-CE-403-S, awaiting a decision by the Administrative Law Judge. You assert that the grievance machinery on actions against you has been exhausted on all of the grievances you filed, and that "further request for arbitration would be futile." The Amended Charge provides the status of grievances discussed in my Warning Letter dated July 29, 2002.

The first grievance filed December 21, 2000 alleged that the State incorrectly calculated your Industrial Disability Leave (IDL). The State has not responded at the fourth level.

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[1] The Dills Act is codified at Government Code section 3512 et seq. The text of the Dills Act and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

[2] This letter does not deal with the allegation or related December 2000 grievance that you learned on December 8, 2000 that the State took adverse action against you by denying your request for reclassification to full time employment.

The next grievance was filed March 9, 2001 regarding a Letter of Instruction (LOI) given to you. The State granted the grievance in part but you assert that you were not granted the remedies you sought. In addition, the State did not comply with the letter granting the grievance by returning the LOI and rebuttal you submitted.

On March 16, 2001, you filed a grievance concerning the State's conduct of prohibiting you from returning to work after obtaining medical clearance. The State denied this grievance at level four but failed to address the issue involved.

You point out that a copy of each grievance and the response are sent to CCPOA pursuant to the collective bargaining agreement at Article VI, section 6.09A.2.d. In addition, pursuant to Article VI, section 6.11B, only CCPOA may appeal the Step 3 or 4 decision to binding arbitration. Based on the same article and section, you assert that CCPOA denied arbitration on all matters by failing to request arbitration within twenty-one (21) days as required.

Dills Act section 3514.5 provides in part,

> Procedures for investigating, hearing, and deciding these cases shall be devised and promulgated by the board and shall include all of the following:
>
> (a) Any employee, employee organization, or employer shall have the right to file an unfair practice charge, except that the board shall not ... (2) issue a complaint against conduct also prohibited by the provisions of the agreement between the parties until the grievance machinery of the agreement, if it exists and covers the matter at issue, has been exhausted, either by settlement or binding arbitration. However, when the charging party demonstrates that resort to contract grievance procedure would be futile, exhaustion shall not be necessary. The board shall have discretionary jurisdiction to review such settlement or arbitration award reached pursuant to the grievance machinery solely for the purpose of determining whether it is repugnant to the purposes of this chapter. If the board finds that such settlement or arbitration award is repugnant to the purposes of this chapter, it shall issue a complaint on the basis of a timely filed charge, and hear and decide the case on the merits; otherwise, it shall dismiss the charge... The board shall, in determining whether the charge was timely filed, consider the six-month limitation set forth in this subdivision to have been tolled during the time it took the charging party to exhaust the grievance machinery.

Based on the above facts and Dills Act section 3514.5, the charge of retaliation for protected activity must be deferred to arbitration under the MOU and dismissed in accordance with PERB Regulation 32620(b)(5).

For the grievance where the State has not responded within the specified time frames, Article VI, section 6.03B allows the grievant to file a grievance at the next level. For the grievance where the State granted the grievance but you were not granted the remedies you sought, and the State failed to comply with the decision, PERB has no jurisdiction over this. Pursuant to Dills Act section 3514.5, it may only review settlements or arbitration awards for the purpose of determining if they are repugnant to the Dills Act.

Also, futility has not been demonstrated. By Barrett McInerney's letter dated July 26, 2002, the State has waived all contract based procedural defenses, which is required when a matter is deferred to arbitration. (See State of California (Department of Food and Agriculture) (2002) PERB Decision No. 1473-S.) In addition, I have confirmed with CCPOA that you must request that CCPOA take the above grievances to arbitration. The CCPOA State Review Committee meets each month to review requests. If CCPOA refuses to take a grievance to arbitration, futility is established. (See State of California (Department of Corrections) (Schwartzman)(1986) PERB Decision No. 561-S.)

As I explained in the attached letter, Government Code section 3514.5(a) and PERB Regulation 32620(b)(5) require a Board agent to dismiss an allegation in a charge where the dispute is subject to final and binding arbitration pursuant to a collective bargaining agreement. (Dry Creek Joint Elementary School District (1980) PERB Order No. Ad-81; State of California (Department of Food and Agriculture) (2002) PERB Decision No. 1473-S.) The charge alleges that the State retaliated against you. This conduct is covered by the parties' collective bargaining agreement, the Respondent has agreed to waive any procedural defenses, and there is no evidence that the dispute arises in other than a stable collective bargaining environment. Accordingly, the allegations of retaliation, except for footnote No. 2 above, must be dismissed and deferred to arbitration. Following the arbitrations of this matter, the Charging Party may seek a repugnancy review by PERB of the arbitrator's decisions under the Dry Creek criteria. (See Regulation 32661; Los Angeles Unified School District (1982) PERB Decision No. 218; Dry Creek Joint Elementary School District (1980) PERB Order No. Ad-81a.)[3]

Next, as discussed in my July 29, 2002 letter, since you lack standing to bring allegations concerning unilateral change and the State's failure to bargain in good faith, these allegations are also dismissed.

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[3] Pursuant to Government Code section 3514.5(a), the six-month limitation on the filing of a charge is tolled during the time required to exhaust the grievance machinery where that procedure ends in binding arbitration.

Right to Appeal

Pursuant to PERB Regulations,[4] you may obtain a review of this dismissal by filing an appeal to the Board itself within twenty (20) calendar days after service of this dismissal. (Regulation 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. (Regulations 32135(a) and 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 Regulation 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. (Regulations 32135(b), (c) and (d); see also Regulations 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. (Regulation 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 Regulation 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. (Regulation 32135(c).)

[4] PERB's Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

Extension of Time

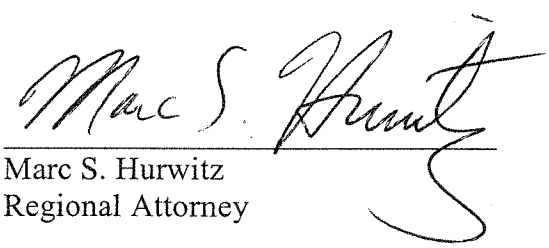
A request for an extension of time, in which to file a document with the Board itself, must be in writing and filed with the Board at the previously noted address. A request for an extension must be filed at least three (3) calendar days before the expiration of the time required for filing the document. 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. (Regulation 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
General Counsel

By 
Marc S. Hurwitz
Regional Attorney

Attachment

cc: Barrett W. McInerney, Labor Relations Counsel, Department of Personnel Administration

PUBLIC EMPLOYMENT RELATIONS BOARD

Los Angeles Regional Office
3530 Wilshire Blvd., Suite 1435
Los Angeles, CA 90010-2334
Telephone: (213) 736-3127
Fax: (213) 736-4901

July 29, 2002

William F. Horspool
127 Barrett Road
Riverside CA 92507

Re: William F. Horspool v. State of California (Department of Corrections)
Unfair Practice Charge No. LA-CE-570-S
WARNING LETTER (DEFERRAL TO ARBITRATION)

Dear Mr. Horspool:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on September 24, 2001. William F. Horspool alleges that the State of California (Department of Corrections) (State or Respondent) violated section 3519(a), (b) and (c) of the Ralph C. Dills Act (Dills Act)[1] by failing to bargain in good faith, by making a unilateral change, and by retaliating against Mr. Horspool.

My investigation revealed the following information. Charging Party is a Correctional Officer for the Respondent at the California Rehabilitation Center (CRC) and a job steward for The California Correctional Peace Officers Association (CCPOA). At all times relevant to this charge, CCPOA and the State were parties to a collective bargaining agreement effective July 1, 1999 through July 2, 2001. The agreement culminates in binding arbitration pursuant to Article VI, Section 6.12.D. On December 1, 2000, Charging Party completed testimony in a previously filed unfair practice charge against the State. (Charge No. LA-CE-403-S.) The present case involves a series of grievances which were filed by Mr. Horspool subsequent to this protected activity.

The first grievance was filed on December 21, 2000 alleging that the State did not correctly calculate Mr. Horspool's Industrial Disability Leave (IDL) benefits following a knee injury. Charging Party alleges that the State violated Article XIII Section 13.06 of the MOU which deals with such pay. This grievance was denied at the second step procedure. A third step grievance was filed on May 22, 2001, but no response has been issued at this level.

A second grievance was filed December 26, 2000, after Charging Party learned that the State had denied his request for reclassification to full time employment. This grievance reached the fourth level, and was denied on August 1, 2001. The parties collective bargaining agreement states at Article XXVI Section 26.01.J.1 that "[t]o be considered for a change in time base [the employee] must... b. Have a satisfactory performance evaluation for the prior six (6) month period or term of service, whichever is shortest." The person ruling on the grievance found that

[1] The Dills Act is codified at Government Code section 3512 et seq. The text of the Dills Act and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

Mr. Horspool's status could not be changed because Charging Party had not worked in the two years prior to his application. He interpreted the MOU to mean that if "the prior six months is shorter than your last term of service... you must have a satisfactory performance evaluation for the prior six (6) month period." Charging Party alleges that the State treated him differently because of his union activities in denying him full time status. He provides examples of two employees who had been reclassified even though their names appeared on a Delinquent Performance Reports List. Mr. Horspool never appeared on such a list and had never received less than a satisfactory evaluation.

A third grievance was filed March 9, 2001 concerning a Letter of Instruction (LOI) received by Charging Party on March 8, 2001. The LOI documented an incident that had occurred on April 11, 1997. The second level response by the State granted Charging Party's grievance in part, and ruled that the LOI was improperly filed because it had not been served on him within the 30 day contractual time limit.

In a fourth grievance filed on March 16, 2001, Charging Party alleged that he had been improperly prohibited from returning to work after obtaining medical clearance. Article X Section 10.02.C.6. states in part:

> If... the returning employee has a valid medical clearance verification from his/her physician allowing said employee to return to work and, with reasonable notice by the employee or upon institutional order, the employee presents him/herself for medical clearance... the employee shall be allowed to return to paid status.

The second step officer found that the Return to Work Coordinator "had legitimate questions related to [Mr. Harspool's] ability to work full duty with no restrictions," and denied the grievance. Charging Party filed a third step grievance which has not been ruled upon.

Charging party filed a fifth grievance on May 1, 2001 on behalf of Officer M. Buchanan regarding two LOIs that Mr. Buchanan had received. Charging Party alleges that the LOIs were improper because they lacked a contractually required expiration date. This grievance was denied. Charging Party also asserts that the State is not following DPA rules by refusing the payment of premium holiday pay to Permanent Intermittent Employees (PIE). The state only pays "the pro-rated holiday pay regardless if the PIE works on the holiday or not."

On March 26, 2001, Mr. Horspool was scheduled for a second level grievance conference concerning his LDI and LOI grievances. Prior to the conference, Lt. R Halberg mistakenly gave Mr. Horspool a document entitled "Second Level Grievance Response," denying his grievance. After being notified of his mistake, Lt. Halberg asked for the return of the document. Mr. Horspool refused, saying that the Response proved that the State was not participating in the grievance process in good faith since the State had denied his grievance even before he had a chance to present his case. Lt. Halberg informed Mr. Horspool that he was being insubordinate, and could receive discipline as a result of his actions. Mr. Horspool

again refused to return the documents. Later that day, Mr. Horspool copied the document, and returned the original to Lt. Halberg. On March 27, 2001, a Second Level grievance response was issued granting the grievance as described above. On March 28, 2001, Mr. Horspool received a Memo from Lt. Halberg documenting the incident and stating in part: "You were defiant and insubordinate to a higher ranking officer. Your conduct on this occasion was unacceptable and will not be tolerated by this department."

Section 3519(a) of the Dills Act provides 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 employees because of their exercise of rights guaranteed by this chapter..."

Article V, Section 5.03.A. of the MOU states:

> The State and the Union shall not 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 the Ralph C. Dills Act.

Article V, Section 5.03.B. of the MOU states:

> The State shall not impose or threaten to impose reprisals on the Union, to discriminate against the Union, or otherwise to interfere with, restrain, or coerce the Union because of the exercise of rights guaranteed to it by the Ralph C. Dills Act.

In order to state a prima facie case of retaliation, Charging Party must show that the employee was engaged in protected activity, the activities were known to the employer, and that the employer took adverse action because of ("nexus") such protected activity. (Novato Unified School District (1982) PERB Decision No. 210.)

Although the timing of the employer's adverse action in close temporal proximity to the protected conduct is an important factor in establishing nexus, the Charging Party must also allege facts establishing one or more of the following factors: "(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." (Santa Clarita Community College District (1996) PERB Decision No. 1178.)

Charging Party alleges that the State retaliated against Mr. Horspool by engaging in the conduct alleged in his grievances and by rejecting those grievances because of his union

activities. Furthermore, Charging Party alleges that the State has violated the parties' collective bargaining agreement in numerous places. Specifically, the IDL grievance involves an interpretation of Article XIII, Section 13.06 of the MOU dealing with Industrial Disability Leave. The grievance concerning reclassification centers around Article XXVI, Section 26.01.J. quoted above. Finally, Charging Party's grievance concerning the State's refusal to let him return to work after receiving medical clearance involves an interpretation of Article X, Section 10.02.C.6 quoted above.

Based on these facts and Dills Act section 3514.5, the charge of retaliation for protected activity must be deferred to arbitration under the MOU and dismissed in accordance with PERB Regulation 32620(b)(5).

Section 3514.5(a) of the Dills Act states, in pertinent part, that PERB shall not:

> Issue a complaint against conduct also prohibited by the provisions of the [collective bargaining] agreement between the parties until the grievance machinery of the agreement, if it exists and covers the matter at issue, has been exhausted, either by settlement or binding arbitration.

In Dry Creek Joint Elementary School District (1980) PERB Order No. Ad-81a, the Board explained that:

> While there is no statutory deferral requirement imposed on the National Labor Relations Board (hereafter NLRB), that agency has voluntarily adopted such a policy both with regard to post-arbitral and pre-arbitral award situations.[2] EERA section 3541.5(a) essentially codifies the policy developed by the NLRB regarding deferral to arbitration proceedings and awards. It is appropriate, therefore, to look for guidance to the private sector.[3] [Fn. 2 omitted; fn. 3 to Fire Fighters Union v. City of Vallejo (1974) 12 Cal.3d 608.]

Although Dry Creek was decided under the Educational Employment Relations Act[2] the NLRB deferral standard has also been applied to the Dills Act. (State of California (Department of Food and Agriculture) (2002) PERB Decision No. 1473-S.)

In Collyer Insulated Wire (1971) 192 NLRB 837 [77 LRRM 1931] and subsequent cases, the National Labor Relations Board articulated standards under which deferral to the contractual grievance procedure is appropriate in prearbitral situations. These requirements are: (1) the dispute must arise within a stable collective bargaining relationship where there is no enmity by the respondent toward the charging party; (2) the respondent must be ready and willing to

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[2] The Educational Employment Relations Act is codified at Government Code section 3540 et seq.

proceed to arbitration and must waive contract-based procedural defenses; and (3) the contract and its meaning must lie at the center of the dispute.

These standards are met with respect to this case. First, no evidence has been produced to indicate that the parties are not operating within a stable collective bargaining relationship. Second, by the attached letter from its representative, Barrett W. McInerney, Esq. dated July 26, 2002, the Respondent has indicated its willingness to proceed to arbitration and to waive all procedural defenses concerning the allegations of retaliation. Finally, the issues raised by this charge directly involve an interpretation of Article V of the MOU.

It is clear that retaliation against employees or the union due to the exercise of rights guaranteed by the Dills Act is arguably prohibited by the MOU. Since the agreement culminates in binding arbitration and the State has waived procedural defenses, this allegation is subject to being deferred to arbitration (See State of California (Department of Food and Agriculture) (2002) PERB Decision No. 1473-S.).

Mr. Horspool argues that deferral to arbitration is futile. He states that the State's failure to respond to grievances in a timely fashion, their denial of his grievances, and the grievance response given by Lt. Halberg prior to his conference shows that the grievance procedure is futile. In California State University (1984) PERB Decision No. 392-H, the Board ruled that deferral is inappropriate where the integrity of the arbitration process is at issue.

Charging Party's argument is not persuasive. Article VI, Section 6.03.B. of the parties' agreement states:

> If there has been no mutually agreed-upon time extension, failure to respond to the grievance within the specified time frames shall allow the grievant to file a grievance at the next level. If this occurs, the higher level must respond to the grievance and may not return it to a lower level.

This shows that the parties foresaw that the State may not respond to a grievance within the specified time frames. Furthermore, mere denial of grievances does not show futility, and one of Mr. Horspool's grievances was granted. Additionally, even if a tentative decision were written prior to the grievance conference, this alone does not show futility of the process. The person ruling on the grievance knew the relevant facts and arguments before the conference occurred.

Accordingly, all allegations concerning retaliation must be deferred to arbitration and will be dismissed. Following the arbitration of this matter, Charging Party may seek a repugnancy review by PERB of the arbitrator's decision under the Dry Creek criteria. (See Regulation

32661; Los Angeles Unified School District (1982) PERB Decision No. 218; Dry Creek Joint Elementary School District, supra.)[3]

Charging party also alleges that the State violated the Dills Act by failing to participate in the grievance procedure in good faith. However, the duty to bargain in good faith is not owed to individual employees and they consequently lack standing to bring such a charge. (See State of California (Department of General Services) (2001) PERB Decision No. 1420-S.) As an employee, Mr. Horspool lacks standing and this allegation will be dismissed.

In addition, Charging Party alleges that the State unilaterally changed its policy regarding the payment of holiday pay for PIEs and breached the MOU in other respects as indicated above. Individual employees lack standing to bring a charge alleging unilateral change. (Oxnard School District (Gorcey/Tripp) (1988) PERB Decision No. 667.) As an employee, Mr. Horspool is without standing to bring such allegations and they will be dismissed.

If there are any factual inaccuracies in this letter or additional facts that 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, Barrett W. McInerney, Esq., Legal Office, Department of Personnel Administration in Sacramento, California, and the original proof of service must be filed with PERB. If I do not receive an amended charge or withdrawal from you before August 5, 2002, I shall dismiss your charge. If you have any questions, please call me at (213) 736-3543.

Sincerely,

Marc S. Hurwitz
Regional Attorney

Attachment
JET/MSH

[3] Pursuant to Government Code section 3514.5(a), the six-month limitation on the filing of a charge is tolled during the time required to exhaust the grievance machinery where that procedure ends in binding arbitration.