

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



JOHN DOUGLAS BARKER & DAVID OSUNA,

Charging Party,

v.

CALIFORNIA STATE EMPLOYEES
ASSOCIATION,

Respondent.

Case No. SA-CO-253-S

PERB Decision No. 1551-S

October 17, 2003

Appearance: Steven B. Bassoff, Attorney, for John Douglas Barker & David Osuna.

Before Baker, Whitehead and Neima, Members.

DECISION

WHITEHEAD, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by John Douglas Barker (Barker) and David Osuna (Osuna) of a Board agent's dismissal (attached) of their unfair practice charge. The charge alleged that the California State Employees Association (CSEA) violated the Ralph C. Dills Act (Dills Act)¹ by retaliating against Barker and Osuna for their protected conduct and by imposing unreasonable restrictions on their membership rights. Barker and Osuna alleged in the original charge that this conduct constituted a violation of Dills Act section 3519.5(a) and (b),² and in

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

²Dills Act section 3519.5 provides, in part:

It shall be unlawful for an employee organization to:

- (a) Cause or attempt to cause the state to violate Section 3519.
- (b) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or

the amended charge, Dills Act section 3515.5.³

The Board agent dismissed the charge on the basis that there was no nexus between the alleged protected conduct and the alleged adverse actions, and because discipline for interference with the ratification of other bargaining units' memorandum of understandings (MOU) by CSEA's Civil Service Division (CSD) involved an internal union matter, a matter not actionable by the Board.

Upon review of the unfair practice charge, amended charge, the warning and dismissal letters, and Barker's and Osuna's appeal, the Board affirms the Board agent's dismissal consistent with the discussion below.

BACKGROUND

Barker and Osuna allege in the charge that they are the elected chairpersons of the bargaining unit negotiating councils (BUNC) for bargaining units 20 and 14, respectively. Bargaining units 14 and 20 voted not to participate in the master table negotiations that included the BUNCs of CSEA bargaining units 1, 3, 4, 11 and 15. Although CSEA policies provide for the autonomy of each unit, Barker and Osuna allege that they were discriminated against by officials of CSD for not participating in the master table. The alleged discrimination involved Barker's and Osuna's removal from their respective BUNC chairmanship positions. Although the CSEA board reinstated them to these positions, CSD did not recognize the CSEA board's actions. Since February 2002, CSD has allegedly refused to pay for bargaining unit conference calls in which Barker and Osuna were participating, has

otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.

³Dills Act section 3515.5 provides, in pertinent part:

Employee organizations may establish reasonable restrictions regarding who may join and may make reasonable provisions for the dismissal of individuals from membership.

refused to reimburse Barker and Osuna for expenses incurred while attending bargaining unit meetings and negotiation sessions with their teams, has refused to seat Barker and Osuna at the June 2002 CSD Council meeting and has refused to pay for expenses incurred in attending that meeting, and has refused to provide Barker and Osuna with staff support during negotiations and in presenting their units' positions to unit members and state negotiators. The charge alleges that CSEA's actions affect Barker's and Osuna's ability to negotiate on behalf of their unit members. Barker and Osuna further claim that CSD did not treat BUNC chairpersons who participated in the master table negotiations in this way.

CSEA responded to the charge. The crux of CSEA's response is that Barker and Osuna lobbied the Legislature to oppose a bill affecting other bargaining units and therefore, CSEA had the right to discipline them by removing them from their BUNC chairmanships. CSEA asserts that the master table MOU did not impact Barker's and Osuna's units; and that further, Barker and Osuna made no attempt to ascertain that fact by contacting CSD officers, Department of Personnel Administration, or any CSEA staff. Barker's and Osuna's conduct led to delay in the approval of the master table MOU by the Legislature. As a result, under the CSD procedures, Barker and Osuna were charged with violating CSD policy file 9CSD0.02(g), (h) and (j)⁴ and were disciplined for those violations. CSEA alleges that Barker and Osuna

⁴As provided in Exhibit A of CSEA's response, these CSD policy file sections provide the following.

CSD policy file 9CSD0.02(g) prohibits:

Taking a public position, in the name of the Association or the Division, which is contrary to the adopted policy of the Division or purporting to act on behalf of the Association, division, a committee, or a DLC when not so authorized. An individual retains the right of free expression regarding Association and Division matters provided s/he clearly indicated s/he is doing so as an individual and disclaims any intent to represent the position of the Association or Division; (CSDC 14/93/1).

CSD policy file 9CSD0.02(h) prohibits:

then made an end-run around the CSD by attempting to obtain reinstatement from the CSEA board. CSEA further alleges that CSD was not required to accept the CSEA board's reinstatement nor was the CSEA board authorized by its bylaws to review CSD discipline.

CSEA additionally argues that lobbying the Legislature to reject MOUs negotiated by other units is not protected conduct. (Konocti Unified School District (1982) PERB Decision No. 217; Emporium Capwell Co. v. Western Addition Community Organization (1975) 420 U.S. 50, 60 [95 S. Ct. 277] 43 L.Ed.2d 12.) CSEA also contends that it did not discriminate against Barker and Osuna because units 17 and 21 had also declined to join the master table and their chairpersons, Ken Hennington and Margo Pacey, have not made similar claims, nor were similar actions taken against them by CSD. CSEA further states that Barker and Osuna have the same rights to participate in negotiations as any member. Their only claim is that CSEA refuses to reimburse them for various expenses, which CSEA claims is properly the result of Barker and Osuna engaging in unprotected conduct. Finally, the State and CSEA have reached tentative agreement on the MOUs for both units 14 and 20, and Barker and Osuna have directly participated in the entire bargaining process. Thus, the charge should be dismissed.

In their amended charge, Barker and Osuna characterize CSEA's conduct under a different legal theory. They allege that the master table agreed to waive grievances involving health and dental benefit premiums pending against the State in order to reach an MOU with the State. Units 14 and 20 did not agree to the waiver. However, according to Barker and

Misuse of Division, DLC or BUNC funds, equipment or supplies;
(CSDC 14/93/1).

CSD policy file 9CSD0.02(j) prohibits:

Behavior which is determined by the hearing panel or officer to be of such a nature that it causes discredit to the Association or

Osuna, the bill submitted to the Legislature to approve the MOU allegedly included language subjecting units 14 and 20 to the same provisions despite the fact that those units were still negotiating with the State. Barker and Osuna allege that their units authorized them to meet with legislators to object to those units' inclusion in the bill, which they proceeded to do. Subsequent to their lobbying efforts, around February 2002, CSD removed Barker and Osuna from their positions as chairpersons of their respective BUNCs until May 2003. At some unidentified date, the CSEA board reinstated Barker and Osuna to their BUNC chairperson positions. Beginning in February 2002, the CSD engaged in the aforementioned alleged discriminatory acts, despite the reinstatement to their positions by the CSEA board. Barker and Osuna argue that as the exclusive representative, only CSEA has authority to place reasonable restrictions on their membership rights, not CSD. Therefore, according to Barker and Osuna, CSD's conduct violated Dills Act section 3515.5.

The Board agent found that Barker and Osuna did not state a prima facie case of discrimination. Applying the test set forth in Novato Unified School District (1982) PERB Decision No. 210 (Novato) and assuming that service as a BUNC chairperson was protected activity, the Board agent found that there was no showing of nexus between the protected activity and CSEA's actions. (Novato; California State Employees Association (Hard, et al.) (1999) PERB Decision No. 1368-S.) The Board agent also found that the parties disputed whether or not the waiver of the multi-unit grievance impacted units 14 and 20. The Board agent further noted that there was no evidence that the chairpersons of the two other units that also refused to participate in the master table negotiations suffered any adverse action.

With regard to the claim that CSEA violated Dills Act section 3515.5, citing California School Employees Association and its Shasta College Chapter #381 (Parisot) (1983) PERB

the Division, the DLC's, the BUNC's or any of its members;
(CSDC 14/93/1).

Decision No. 280, California Correctional Peace Officers Association (Colman) (1989) PERB Decision No. 755-S, California State Employees Association (Hackett, et al.) (1993) PERB Decision No. 979-S (Hackett), the Board agent found that CSEA could reasonably discipline Barker and Osuna for interfering with the employer's ratification of tentative agreements of other bargaining units. According to the Board agent, the Hackett case involved a similar set of facts. In Hackett, CSEA suspended the membership of certain unit 1 bargaining committee members, an action that prevented two of them from running for union office. CSEA disciplined these individuals because they distributed fliers and in other ways, criticized and opposed ratification of MOUs for other bargaining units.

Accordingly, the Board agent determined that CSEA disciplined Barker and Osuna because of their efforts to oppose ratification of the MOUs for other bargaining units. The Board agent thus found that Barker and Osuna failed to allege a prima facie violation of the Dills Act and dismissed the charge.

BARKER'S AND OSUNA'S APPEAL

Barker's and Osuna's appeal focuses on the alleged violation of Section 3515.5 but does not dispute the Board agent's dismissal of the discrimination charge. On appeal, they argue that the Board agent's dismissal is based on the erroneous conclusion that the CSD has authority to overrule the CSEA board's reinstatement of Barker and Osuna to their BUNC chair positions for units 14 and 20. Barker and Osuna further contend that CSD's conduct in removing them from their BUNC chair positions places unreasonable restrictions on their membership rights without authority to do so in violation of Dills Act section 3515.5. As CSEA is the exclusive representative of units 14 and 20, not CSD, only CSEA has the authority to make reasonable restrictions on their membership rights; yet, CSEA has not disciplined Barker and Osuna. Without authority, CSD may not deny Barker and Osuna their rights under Sections 3515.5 and 3519.5(b). As CSEA has failed to remedy CSD's violation of

Barker's and Osuna's rights, CSEA is also unreasonably restricting their membership rights and thereby interfering with their rights under the Dills Act.

DISCUSSION

As Barker and Osuna did not appeal the Board agent's ruling regarding discrimination, it is unnecessary to address that allegation. Accordingly, the Board adopts that portion of the Board agent's dismissal.

Instead, Barker's and Osuna's appeal only disputes the Board agent's determination regarding the violation of Dills Act sections 3515.5 and 3519.5(b) for removing them from their respective BUNC chairmanships. Barker and Osuna claim that the decision was based upon the erroneous conclusion that CSD has the right to overrule the CSEA board's decision to reinstate them. However, they fail to cite any CSEA or CSD policy, bylaw or rule that supports this contention.⁵ Despite that, the Board must assume that facts alleged by the charging party are true. (San Juan Unified School District (1977) EERB Decision No. 12⁶; Golden Plains Unified School District (2002) PERB Decision No. 1489.) Even assuming that CSD should honor Barker's and Osuna's reinstatement to their BUNC chair positions, that assumption is not relevant to the Board's determination in this matter as explained below.

A recent decision, California State Employees Association (Hard, et al.) (2002) PERB Decision No. 1479-S (CSEA (Hard)), addressed a violation of Section 3515.5. In CSEA (Hard), the Board found that CSEA failed to follow its own procedures in suspending a member. In addition, the suspension occurred during the nomination period for CSEA office and prevented the member from seeking office. The Board concluded that CSEA's conduct

⁵CSEA also did not cite or reference any provisions to support its contentions that CSEA has no authority to review CSD's disciplinary actions.

⁶Prior to January 1978, PERB was known as the Educational Employment Relations Board or EERB.

violated Dills Act section 3515.5, which in turn interfered with the member's rights, also in violation of Section 3519.5(b). (Id., California State Employees Association (Hard, et al.) (2002) PERB Decision No. 1479a-S.)

This case differs from CSEA (Hard) in that CSD removed Barker and Osuna from their positions as BUNC chairs and refused to reimburse them for expenses incurred by individuals in those positions; but CSEA did not suspend or dismiss them from membership. As worded, Dills Act section 3515.5 only provides the Board with authority to determine the reasonableness of restrictions regarding who may join, and of rules for the dismissal of individuals from membership. (Section 3515.5; CSEA (Hard).) Barker and Osuna have not cited any authority to support the application of this section to removal of individuals as bargaining unit chairs or for CSD's refusal to reimburse them for expenses incurred by participating in negotiations. We therefore disagree that the reasonableness of CSEA's conduct is at issue in this case.

Historically, the Board has been reluctant to interfere in the internal union affairs of employee organizations unless those affairs impact the member's relationship with his/her employer. (Service Employees International Union, Local 99 (Kimmett) (1979) PERB Decision No. 106; California School Employees Association and its Shasta College Chapter #381 (Parisot) (1983) PERB Decision No. 280; California State Employees Association (Roberts) (1993) PERB Decision No. 1005-S.) Here, there was no showing of any impact of CSEA's removal of Barker and Osuna from their BUNC chair positions on their relationship with their employer. In fact, Barker and Osuna did not dispute CSEA's contention that they continued to participate in negotiations, but only claimed that they were not reimbursed for expenses. They were neither suspended nor dismissed from membership in CSEA, conduct which could have invoked Board evaluation of disciplinary rules under Section 3515.5.

Barker and Osuna otherwise have not provided any facts that would invoke the Board's review of CSEA's procedures to remove chairpersons from the bargaining table. Although Barker and Osuna purported only to lobby against the bill's impact on units 14 and 20, it is undisputed that their conduct created sufficient confusion to delay the bill, which in turn affected the ratification of MOUs for other bargaining units. Barker and Osuna further did not dispute CSEA's contention that they failed to confirm that the bill actually applied to units 14 and 20.

Under the circumstances in this case, we conclude that CSEA's choice of its bargaining representatives is purely an internal matter. Consequently, CSEA's removal of Barker and Osuna as units 20 and 14 BUNC chairpersons, respectively, does not violate the Dills Act.

We conclude that Barker and Osuna did not state a prima facie violation of the Dills Act.

ORDER

The unfair practice charge in Case No. SA-CO-253-S is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Baker and Neima joined in this Decision.

representatives had distributed fliers and taken other action to criticize and oppose the ratification of agreements of other bargaining units.

Similarly, in this case, CSEA (through its Civil Service Division) has taken disciplinary action against Mr. Osuna and Mr. Baker because of their activities to oppose the ratification of the collective bargaining agreements for bargaining units other than the ones that they represent. Accordingly, this charge must be dismissed.

Right to Appeal

Pursuant to PERB Regulations,² 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. (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

² PERB's Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

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).)

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.)

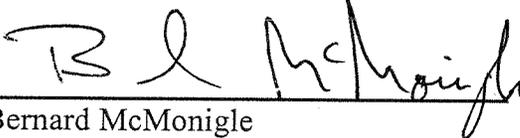
Final Date

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



Bernard McMonigle
Regional Attorney

Attachment

cc: Richard Burton

PUBLIC EMPLOYMENT RELATIONS BOARD



Sacramento Regional Office
1031 18th Street
Sacramento, CA 95814-4174
Telephone: (916) 327-8386
Fax: (916) 327-6377



January 3, 2003

Steven B. Bassoff, Labor Relations Counsel
331 J Street, Suite 200
Sacramento, CA 95814

Re: John Douglas Barker & David Osuna v. California State Employees Association
Unfair Practice Charge No. SA-CO-253-S
WARNING LETTER

Dear Mr. Bassoff:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on July 11, 2002. John Douglas Barker & David Osuna allege that the California State Employees Association violated the Ralph C. Dills Act (Dills Act)¹ by taking reprisals against them.

David Osuna is the elected CSEA negotiations chairperson for state bargaining unit 14. John Barker holds the same position for unit 20. In recent bargaining with the state employer several bargaining units joined together as part of the CSEA Civil Service Division Master Table negotiations. Bargaining units 14, 20, 17 and 21 did not join the master table.

In the spring of 2002, Osuna and Barker were removed from their chairperson positions by the Civil Service Division; that action was later overturned by the CSEA Board of Directors. However, you contend that since February 2002, they have been prevented from carrying out their duties. Specifically, the Civil Service Division refuses to pay for bargaining unit conference calls if Mr. Osuna or Mr. Barker participate. They are also not reimbursed for expenses incurred for attending bargaining unit meetings, sessions with their bargaining teams and Civil Service Division meetings. The Civil Service Division also refused to seat them at its meetings or provide them with staff support in negotiations.

You contend that Mr. Osuna and Mr. Barker have been discriminated against by CSEA because their units did not participate in the master table.

In its response to this charge, CSEA states that Mr. Osuna and Mr. Barker have been disciplined because they lobbied legislators to reject the master table agreement reached in

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.

December 2001.² According to CSEA, such activities are a violation of reasonable Civil Service Division rules. The Civil Service Division does not recognize the CSEA Board action which reinstated Mr. Osuna and Mr. Barker to their BUNC chair positions.

To determine whether a union has illegally retaliated against an employee for engaging in protected internal union activity PERB applies the same test which has long been applied to employers under Dills Act section 3519(a). California State Employees Association (1999) PERB Decision No. 1368-S.

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.)

Although the timing of the employer's adverse action in close temporal proximity to the employee's protected conduct is an important factor (North Sacramento School District (1982) PERB Decision No. 264), 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 (State of California (Department of Transportation) (1984) PERB Decision No. 459-S); (2) the employer's departure from established procedures and standards when dealing with the employee (Santa Clara Unified School District (1979) PERB Decision No. 104.); (3) the employer's inconsistent or contradictory justifications for its actions (State of California (Department of Parks and Recreation) (1983) PERB Decision No. 328-S; (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; (6) employer animosity towards union activists (Cupertino Union Elementary School District) (1986) PERB Decision No. 572.); or (7) any other facts which might demonstrate the employer's unlawful motive. (Novato; North Sacramento School District, supra, PERB Decision No. 264.)

In your charge, you have not demonstrated that CSEA, through the Civil Service Division, was improperly motivated by the protected activity of Mr. Barker and Mr. Osuna. Assuming that service as a chairperson is protected activity, there is no indicia of reprisal because of that service or their refusal to participate in master table negotiations.³

² Mr. Osuna and Mr. Barker contended that the master agreement impacted their units by waiving a pending multi-unit grievance. CSEA contends that they were in error and the master agreement did not affect the rights of their units.

³ I note that two other units also refused to participate in the master table and there are no facts demonstrating that those chairpersons suffered any adverse action.

An alternative theory is that the disciplining of Mr. Osuna and Mr. Barker because they went to the Legislature (the employer) and lobbied against ratification of the tentative master table agreement violates Government Code section 3515.5. That section states in relevant part:

...Employee organizations may establish reasonable restrictions regarding who may join and may make reasonable provisions for dismissal of individuals from membership.

Reviewing similar statutory language, PERB has long recognized the right of employee organizations to impose reasonable discipline in addition to membership suspension. California School Employees Association Chapter 381 (Parisot) (1983) PERB Decision No. 280. PERB grants great deference to a union's interpretation of what conduct is sufficient to violate its own bylaws. California Correctional Peace Officers Association (Colman) (1989) PERB Decision No. 755-S The imposition of discipline for interfering with the ratification of the contracts of other bargaining units is a matter for a union's internal judgement; it is not reprisal for protected activity. California State Employees Association (Hackett, et al.) (1993) PERB Decision No. 979-S. Under these cases, it is clear that a union could reasonably discipline members who interfere with the employer's ratification of tentative agreements of other bargaining units.

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 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 and the original proof of service must be filed with PERB. If I do not receive an amended charge or withdrawal from you before January 10, 2003, I shall dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,



Bernard McMonigle
Regional Attorney

BMC