

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



DONALD WAYNE KUNKEL,

Charging Party,

v.

STATE OF CALIFORNIA (DEPARTMENT OF
TRANSPORTATION),

Respondent.

Case No. SA-CE-1522-S

PERB Decision No. 1835-S

April 10, 2006

Appearances: Donald Wayne Kunkel, on his own behalf; State of California (Department of Personnel Administration) by Nalda L. Keller, Legal Counsel, for State of California (Department of Transportation).

Before Shek, McKeag and Neuwald, Members.

DECISION

McKEAG, Member: This case comes before the Public Employment Relations Board (Board) on appeal by Donald Wayne Kunkel (Kunkel) of a Board agent's dismissal (attached) of his unfair practice charge. The charge alleged that the State of California (Department of Transportation) (State) violated the Ralph C. Dills Act (Dills Act)¹ by unjustly terminating his employment and by continuing to harass him by telephone and over the Internet.

The Board has reviewed the entire record in this matter, including the unfair practice charge, the warning and dismissal letters of the Board agent, Kunkel's appeal and the State's response.

The Board finds the warning and dismissal letters to be free from prejudicial error and adopts them as the decision of the Board itself.

¹The Dills Act is codified at Government Code section 3512, et seq.

ORDER

The unfair practice charge in Case No. SA-CE-1522-S is hereby DISMISSED
WITHOUT LEAVE TO AMEND.

Members Shek and Neuwald joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
1031 18th Street
Sacramento, CA 95814-4174
Telephone: (916) 327-8383
Fax: (916) 327-6377



December 15, 2005

Donald Wayne Kunkel
219 A East Travis Blvd.
Fairfield, CA 94533

Re: Donald Wayne Kunkel v. State of California (Department of Transportation)
Unfair Practice Charge No. SA-CE-1522-S
DISMISSAL LETTER

Dear Mr. Kunkel:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on November 15, 2005. In this charge, you allege that the State of California (Department of Transportation) violated the Ralph C. Dills Act (Dills Act)¹ by unjustly terminating your employment and by continuing to harass you by telephone and over the Internet.

I indicated to you in my attached letter dated December 2, 2005, that the above-referenced charge did not state a prima facie case. You were advised that, if there were any factual inaccuracies or additional facts which would correct the deficiencies explained in that letter, you should amend the charge. You were further advised that, unless you amended the charge to state a prima facie case or withdrew it prior to December 9, 2005, the charge would be dismissed.

I have not received either an amended charge or a request for withdrawal. Therefore, I am dismissing the charge based on the facts and reasons contained in my December 2, 2005 letter.

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. (Regulations 32135(a) and 32130.) A document is also

¹ The Dills Act is codified at Government Code section 3512 et seq.

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

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).)

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.)

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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 

Les Chisholm
Regional Director

Attachment

cc: Nalda L. Keller

PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
1031 18th Street
Sacramento, CA 95814-4174
Telephone: (916) 327-8383
Fax: (916) 327-6377



December 2, 2005

Donald Wayne Kunkel
219 A East Travis Blvd.
Fairfield, CA 94533

Re: Donald Wayne Kunkel v. State of California (Department of Transportation)
Unfair Practice Charge No. SA-CE-1522-S
WARNING LETTER

Dear Mr. Kunkel:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on November 15, 2005. In this charge, you allege that the State of California (Department of Transportation) violated the Ralph C. Dills Act (Dills Act)¹ by unjustly terminating your employment and by continuing to harass you by telephone and over the Internet.

In reviewing this charge, I have considered the information submitted with it, as well as any additional information provided with other charges filed by you. In addition, we have discussed your charge by telephone on multiple occasions, including on December 1 and 2, 2005.

You were formerly employed by the California Department of Transportation (CalTrans), assigned to the San Francisco-Oakland Bay Bridge, and in a position in State Bargaining Unit 12. Unit 12 is exclusively represented by the International Union of Operation Engineers (IUOE). While there were earlier disciplinary actions taken against you, and appeals thereof, your employment was terminated by CalTrans in December 2003. Though IUOE had represented you in earlier appeals, the union refused to represent you with regard to your termination in December 2003.

In the "log of events" submitted with your charge, you appear to allege that you were at least asked to participate in looking for a union other than IUOE to represent Unit 12, as well as in efforts to secure increases in compensation for employees in your classification. You were also involved in proposals for changes in policy, or even legislation, regarding towing practices on the Bay Bridge. You allege that both the State and the union accused you of wrong-doing but you do not believe you did anything wrong. For example, you were accused of lying and

¹ The Dills Act is codified at Government Code section 3512 et seq. Your charge also alleges violations of the Meyers-Milias-Brown Act (MMBA), found at Government Code section 3500 et seq. However, as there is no information in the charge demonstrating you ever had employment covered by that Act, the alleged violation of the MMBA must be dismissed.

"giving the finger" to a driver that you towed off the bridge. You also allege that, at the time of your termination, the State caused the County of Contra Costa to confiscate and destroy firearms that were in your home, and you were accused of being a danger both to yourself and others. You also contend that, at least since your termination and still on-going today, the State has been monitoring your home telephone and computer. The computer monitoring has also resulted in your loss of information and documents maintained on your computer.

Discussion

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.)

Here, while there is some indication that you engaged in activities that would be protected under the Dills Act, the charge lacks specific information necessary to support finding a violation under the above-described standard. 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.) In this regard, the most important omissions are dates on which events occurred and any facts demonstrating that the adverse action taken against you was motivated by your protected activity.

However, the larger problem with your charge, as we have previously discussed, involves the statute of limitations under the Dills Act. Dills Act section 3514.5(a)(1) prohibits PERB from issuing a complaint with respect to "any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge." The limitations period begins to run once the charging party knows, or should have known, of the conduct underlying the charge. (Gavilan Joint Community College District (1996) PERB Decision No. 1177.) The charging party bears the burden of demonstrating that the charge is timely filed. (cf. Tehachapi Unified School District (1993) PERB Decision No. 1024; State of California (Department of Insurance) (1997) PERB Decision No. 1197-S.)

In this case, as discussed above, your termination from State employment occurred in December 2003, nearly two years prior to the filing of the instant charge. For this reason, I must conclude that your charge is untimely.

Finally, because your charge is filed nearly two years after your State employment ended, I must also conclude that any allegations relating to matters subsequent to your termination, such as the alleged telephone and computer monitoring, must be dismissed as outside PERB's purview. PERB Regulation 32602 allows an employee, employer or employee organization to file an unfair practice charge. The Dills Act, at section 3513(c), in relevant part, defines a "state employee" as "any civil service employee of the state." As it appears that you are no longer a state employee, and there is no pending appeal of your termination before a body such as the State Personnel Board, I must conclude that you lack standing to file an unfair practice charge.

Conclusion

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 December 9, 2005, I shall dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,



Les Chisholm
Regional Director