STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA CORRECTIONAL PEACE OFFICERS ASSOCIATION, Charging Party, v. STATE OF CALIFORNIA (DEPARTMENT OF CORRECTIONS & REHABILITATION), Respondent.	Case No. SA-CE-1671-S PERB Decision No. 2118-S June 15, 2010

Appearances: Suzanne L. Branine, Staff Counsel, for California Correctional Peace Officers Association; Paul M. Starkey, Labor Relations Counsel, for State of California (Department of Corrections & Rehabilitation).

Before Dowdin Calvillo, Chair; McKeag and Wesley, Members.

DECISION

McKEAG, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the California Correctional Peace Officers Association (CCPOA) of a Board agent's dismissal of its unfair practice charge. The charge alleged that the State of California (Department of Corrections and Rehabilitation) (CDCR or State) violated the Ralph C. Dills Act (Dills Act)[1] by retaliating against an employee and by interfering with employee rights. The Board agent dismissed the charge for failure to state a prima facie case.

[1] The Dills Act is codified at Government Code section 3512 et seq. Section 3519 states, in relevant part, that it is unlawful for the state to:

> (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.

The Board has reviewed the dismissal and the record in light of CCPOA's appeal, the State's response to the appeal,[2] and the relevant law. Based on this review, the Board affirms the dismissal of the unfair practice charge.

BACKGROUND

CCPOA is the exclusive representative of State Bargaining Unit 6 employees. Oak Smith (Smith) is employed by CDCR as a Correctional Counselor (CCI) at the Kern Valley State Prison (KVSP). Since 2005, Smith has served as CCPOA's chief job steward at KVSP.

Smith has filed approximately 18 grievances on behalf of unit members at KVSP. Six of the grievances were filed between November 2007 and January 2008. Smith discussed these six grievances with his Supervisor, J.L. Garcia (Garcia), at the informal level of the grievance procedure.

Smith has also filed 13 information requests with KVSP management, as well as numerous memos with KVSP management, CDCR headquarters and other State managers regarding working conditions at KVSP. Seven of the information requests were submitted between October 2007 and February 5, 2008. Many of the information requests were first made informally to Garcia before written requests were submitted.

[2] The Department of Personnel Administration (DPA) contends the charge was filed against the wrong respondent and should be dismissed on that basis. CCPOA listed DPA as the party against which the charge was filed, rather than CDCR. The Board agent identified CDCR as the respondent in the case caption consistent with information contained in the statement of the charge. DPA was served with a copy of the charge and has shown no prejudice as a result of the failure to identify the specific department alleged to have committed an unfair practice on the face of the charge form. Therefore, CCPOA's failure to name CDCR as the respondent in this case is not sufficient, standing alone, to warrant dismissal of the charge. (*State of California (Department of Corrections and Rehabilitation)* (2010) PERB Decision No. 2108-S.)

Smith submitted written requests for overtime to Garcia on April 26, May 2, and December 26, 2007, regarding his own workload.

The charge states that on an unspecified date, "Garcia remarked to Smith 'You are bringing your CCPOA issues to work.'"

On February 7, 2008, Smith received his annual performance evaluation from Garcia. In every performance category, Smith was rated as either meeting or exceeding performance standards. Comments were included on the evaluation form under most categories, including the following:

> QUANTITY OF WORK
>
> Oak, maintains his caseload with minimum supervision. Mr. Smith is reluctant to do anything he perceives as 'special assignments' without the use of overtime to accomplish operational needs.
>
> WORK HABITS
>
> Oak, recently required written instructions from the Warden to complete his assignments. To Oaks [sic] credit he has been punctual when reporting to work.
>
> RELATIONSHIPS WITH PEOPLE
>
> I have found it necessary to speak with Oak with regard to his comments. On occasion, I find his demeanor obstinate and remarks flippant.

On February 27, 2008, Smith filed a second-level grievance challenging these comments on his performance evaluation. CDCR denied the grievance on March 18, 2008.

The charge further alleges that, "Smith was treated differently from other CCIs who received performance evaluations." The charge names three other employees who were not union activists, who received performance evaluations that did not contain negative comments.

Since February 2008, "Smith has protested and discussed with the Warden a new policy that has frequent workload impacts for all CCIs."

On August 13, 2008, while again discussing his concerns regarding the policy with his Captain, the Captain told Smith he needed to "let it go." Smith informed the Captain that he had filed a grievance over the policy, but stated that the grievance process was broken and he needed to use every avenue open to him. The Captain replied that he was not going to argue about the issue any more and that Smith needed to "get over it." The Captain also referred Smith to the employee assistance program (EAP).[3]

Smith returned to the Captain's office an hour later to pick up his EAP referral. Smith and the Captain resumed their discussion over the policy. The charge alleges, "The Captain said he felt Smith brought his CCPOA issues to work with him and that it had a negative impact on his work and attitude. Smith and his CCPOA Representative, KVSP Chapter President Marques Jones asked several times, what Smith's CCPOA activities had to do with an EAP referral."

DISCUSSION

On appeal, CCPOA asserts the Board agent erred in dismissing the allegations that CDCR retaliated against Smith for engaging in protected activity when it issued him a negative evaluation, and retaliated against him and interfered with his rights under the Dills Act when he was given an EAP referral.

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[3] EAP is a benefit provided to employees by the State. EAP provides services intended to help employees and their dependents with personal problems that might adversely impact their work performance, health or well-being. Participation in EAP is voluntary and all services provided are confidential.

Retaliation

To demonstrate that an employer discriminated or retaliated against an employee in violation of the Dills Act section 3519(a), a 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; (3) the employer took adverse action against the employee; and (4) the employer took the action 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 (*Carlsbad*).) In determining whether evidence of adverse action is established, the Board uses an objective test and will not rely upon the subjective reactions of the employee. (*Palo Verde Unified School District* (1988) PERB Decision No. 689.) Thus, the appropriate test is not whether the employee feels that the employer's action is 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; fn. omitted.)

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 (*North Sacramento*)), 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 (*City of Torrance* (2008) PERB Decision No. 1971-M; *Coast Community College District* (2003) PERB Decision No. 1560); (5) the employer's failure to offer the employee justification at the time it took action (*Oakland Unified School District* (2003) PERB Decision No. 1529) or the offering of exaggerated, vague, or ambiguous reasons (*McFarland Unified School District* (1990) PERB Decision No. 786); (6) employer animosity towards union activists (*Jurupa Community Services District* (2007) PERB Decision No. 1920-M; *Cupertino Union Elementary School District* (1986) PERB Decision No. 572); or (7) any other facts that might demonstrate the employer's unlawful motive (*North Sacramento*; *Novato*).

Performance Evaluation

The charge alleges Smith engaged in protected activity when he filed information requests and memos with management regarding "working conditions." There are no facts, however, that describe the content of the requests or memos. The charge does not demonstrate that these documents addressed union matters, or whether Smith was conveying personal concerns. Therefore, the charge does not establish that Smith engaged in protected activity when he submitted these documents to management.

The charge also contends that Smith engaged in protected activity when he requested authorization to work overtime. Some communication taken on behalf of unit employees may be considered protected activity. However, when an employee's communication with the employer is for his/her own benefit, the conduct is not protected. (*Los Angeles Unified School*

District (2003) PERB Decision No. 1552; *Oakdale Union Elementary School District* (1998) PERB Decision No. 1246.) Here, Smith sought authorization for overtime regarding his own workload. Accordingly, this conduct does not demonstrate protected activity.

The charge does establish protected activity when Smith, while acting as a job steward, filed grievances on behalf of unit employees. (*Healdsburg Union High School District* (1997) PERB Decision No. 1185; *Klamath-Trinity Joint Unified School District* (2005) PERB Decision No. 1778.) Garcia, who prepared Smith's February 2008 evaluation, was aware of this activity when Smith informally discussed the most recent grievances with him. Thus, CCPOA established the first and second elements of a prima facie case for unlawful retaliation.

With regard to the third element, a negative performance evaluation has been held to constitute an adverse action. (*State of California (Department of Youth Authority)* (2000) PERB Decision No. 1403-S; *California State University, Long Beach* (1987) PERB Decision No. 641-H; *Woodland Joint Unified School District* (1987) PERB Decision No. 628.) In this case, Smith's evaluation indicated that he met or exceeded performance standards. In other words, Smith received a positive performance review. It is noteworthy that the evaluation contained written comments and constructive criticism that suggested some minor performance issues. However, we find these statements were insufficient to transform an otherwise positive performance evaluation into an adverse action. Thus, under the objective test, the evaluation issued to Smith does not constitute an adverse action.[4]

To establish the final element, unlawful motive, the charge must allege facts that demonstrate a nexus or connection between the protected activity and the adverse action. The

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[4] Member Wesley finds the comments on Smith's performance evaluation constitute an adverse action. Where negative comments on an evaluation may reasonably be considered to have an adverse impact on terms and conditions of employment, such as future employment opportunities, Member Wesley would find such action is adverse under the Dills Act.

initial factor of timing is established as several grievances were filed shortly before Smith received his evaluation. CCPOA contends there is also disparate treatment because other CCIs, who are not union activists, did not receive negative evaluations. But, there are no facts to show these employees were similarly situated. The charge does not allege that any of these employees engaged in similar conduct, such as receiving written instructions from the Warden, engaging in obstinate behavior or making flippant remarks. Without evidence of similar conduct, the fact that other employees did not receive negative comments on their evaluations does not demonstrate disparate treatment. Therefore, the charge does not support a finding of disparate treatment for the same conduct.

CCPOA further contends that union animus is demonstrated by Garcia's statement that Smith brings his CCPOA issues to work. On its face, this statement does not demonstrate union animus. Moreover, the charge does not describe the context in which the statement was made or even when the statement was made. Therefore, the charge does not support a finding of union animus. Accordingly, the charge does not establish the nexus element and the allegation was properly dismissed for failure to establish the third and fourth elements of a prima facie case for unlawful retaliation.

EAP Referral

As discussed above, Smith engaged in protected activity when he filed grievances through February 2008. Smith also engaged in protected activity when he brought a union representative to his meeting with the Captain on August 13, 2008. However, this protected activity occurred after the Captain told Smith he would be given an EAP referral and, thus, cannot be considered as the basis for the alleged adverse action.

Furthermore, the EAP referral does not constitute adverse action. Participation in the program is voluntary and all services provided are confidential. A reasonable person would not find that a referral to a voluntary service designed to assist employees with personal problems would have an adverse impact on the employee's employment. Thus, it is unnecessary to address the nexus element, and dismissal of this allegation was also proper.[5]

Interference

Finally, the charge alleges that giving Smith the EAP referral interfered with his Dills Act rights.

The test for whether an employer has interfered with the rights of employees under the Dills Act does not require that unlawful motive be established, only that at least slight harm to employee rights results from the conduct. In *State of California (Department of Developmental Services)* (1983) PERB Decision No. 344-S, citing *Carlsbad* and *Service Employees International Union, Local 99 (Kimmett)* (1979) PERB Decision No. 106, the Board described the standard as follows:

> [I]n order to establish a prima facie case of unlawful interference, the charging party must establish that the respondent's conduct tends to or does result in some harm to employee rights granted under [the Act].

Furthermore, the Board has held that a finding of coercion does not require evidence that the employee actually felt threatened or intimidated or was in fact discouraged from

[5] Procedurally, CCPOA contends the Board agent failed to provide a second warning letter regarding the EAP allegation that was raised for the first time in its amended charge. CCPOA asserts PERB Regulation 32620(d) requires a Board agent to issue further warning letters addressing new allegations. (PERB regs. are codified at Cal. Code Regs., tit. 8, sec. 31001 et seq.) However, the purpose of Regulation 32620(d) is to prohibit the dismissal of a charge based on information obtained from a respondent after a warning letter has issued, unless the information has first been communicated to the charging party. CCPOA does not claim the Board agent relied on new facts obtained from the employer to dismiss the charge.

participating in protected activity. (*Clovis Unified School District* (1984) PERB Decision No. 389.) However, under the above described test, a violation may only be found if the claimed rights are provided for under the Dills Act.

The charge does not provide facts that demonstrate how referral to EAP interfered with Smith's rights. Smith could choose to utilize the benefit or not. There is no indication of harm or possible harm to Dills Act rights. Therefore, this allegation is also dismissed for failure to state a prima facie case.

ORDER

The unfair practice charge in Case No. SA-CE-1671-S is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chair Dowdin Calvillo and Member Wesley joined in this Decision.