STATE OP CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

RASH B. GHOSH, Charging Party,	)	Case No. SF-CE-90-S
v.	)	PERB Decision No. 762-S
STATE OF CALIFORNIA (DEPARTMENT OF HEALTH SERVICES), Respondent.	)	September 13, 1989

Appearance: Rash B. Ghosh, Ph.D., on his own behalf.

Before Hesse, Chairperson; Porter, Craib, Shank and Camilli, Members.

DECISION AND ORDER

This case is before the Public Employment Relations Board (Board) on appeal by the charging party of a Board agent's dismissal (attached hereto) of his charge that the respondent violated section 3519 of the Ralph C. Dills Act (Gov. Code sec. 3512 et seq.). We have reviewed the dismissal and affirm it insofar as the Board agent found that the charge was untimely filed. Given this finding, it is unnecessary to determine whether the charge was otherwise sufficient to state a prima facie case, and we decline to do so.

The unfair practice charge in Case No. SF-CE-90-S is hereby DISMISSED WITHOUT LEAVE TO AMEND.[1]

By the BOARD

[1]The charging party's request for oral argument and attorneys' fees is DENIED.

PUBLIC EMPLOYMENT RELATIONS BOARD

Office of the General Counsel
1031 18th Street, Room 200
Sacramento, CA 95814-4174
(916) 323-8015

May 19, 1989

Rash B. Ghosh, Ph.D

Re: Rash **B. Ghosh v. State of California (Department of Health). Unfair Practice Charge No. SF-CE-90-S**
Dismissal **of** Charge **and** Refusal to Issue Complaint

Dear Dr. Ghosh:

On February 17, 1989, you filed an Unfair Practice Charge against the **Department of Health, State of California (State) alleging violation of Dills Act section 3519(a) and (b). More specifically, you allege that on November 24, 1987, the State rejected you during probation, effective December 4, 1987, because on June 10, 1987 you had informed Mr. Howard Hatayama that you had complained to the Union in reference to harassment directed at you by your boss Mr. Rick Notini.**

You spoke with Peter Haberfeld, then the San Francisco Regional Attorney, concerning the original charge on February 21, March 10, 16 and 20, 1989. During the conversations, you were informed that the charge was deficient as originally filed. On March 22, 1988, PERB received a First Amended Unfair Practice Charge from you alleging the same violations.

On April 28, 1989, I indicated to you in my attached letter that the First Amended Charge did not state a prima facie case. You were advised that if there were any factual inaccuracies or additional facts that would correct the deficiencies explained in that letter, you should amend the charge accordingly. You were further advised that unless you amended the charge to state **a** prima **facie** case, **or** withdrew it prior to May 5, 1989, the charge would be dismissed. **On May 4 you requested and were granted a continuance to file the amended charge by May 18, 1989. Your Second Amended Charge was sent by certified mail on May 17, 1989.**

In essence, the Second Amended Charge does not raise any new facts, but merely repeats those facts already presented as **well as making** additional legal arguments. First you assert that Mr. Hatayama refused to transfer you, and repeat the statement which he made

concerning your visit to the union. Nothing further can be drawn from this information to support a finding of nexus.

Second, you repeat your allegation that the settlement agreement which you signed was an invalid agreement. Your argument that the agreement is invalid because you signed a copy but not the original of the agreement appears to have no basis in law.

Third, you assert that you filed your charge within six months from the date on which the official paperwork regarding your demotion was completed. The Public Employment Relations Board has consistently found that the statute of limitation period runs from when the charging party knew or should have known of the alleged illegal conduct. Fairfield-Suisun Unified School District (1985) PERB Decision No. 547. You were aware in late November 1987 that the State was rejecting you from probation, and that is the point at which the statute of limitations began running.

Finally, you repeat your argument that equitable tolling should apply to your case and that if it did, your charge would be timely. In my letter I indicated that equitable tolling does not apply because your original claim with the State Personnel Board was not based on discrimination because of union activity. In your Second Amended Charge you indicate that the original discrimination complaint raised the same theory as your current charge with PERB. Specifically, you rely on your March 26, 1988 mailgram to the SPB. However, a review of the mailgram indicates that you stated "my former supervisor Mr. R. Notini made a plan to fire me soon after he joined the SMU unit in January 1987 because he was biased and racially prejudiced. . . This unit recently discriminated against another Bengali. . .Mr. Notini and other people involved in this matter should be investigated for breaking state affirmative action and civil right laws and economic wastefulness." Nowhere in your mailgram or other documents submitted to the SPB do you mention your claim that you were discriminated against because of your visit to the union. Accordingly, equitable tolling is inappropriate in this case.

Based on the reasons described above, as well as those contained in my April 28 letter, this charge is dismissed for failure to state a prima facie case.

Right to Appeal

Pursuant to Public Employment Relations Board regulations, 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 (California Administrative Code, title 8, section 32635(a)). To be timely filed, the original and five copies of such appeal must be actually received by the Board itself before the close of business (5:00 p.m.) or sent by telegraph, certified or Express United States mail postmarked no later than the last date set for filing (California Administrative Code, title 8, section 32135). Code of Civil Procedure section 1013 shall apply. The Board's address is:

Public Employment Relations Board
1031 18th Street
Sacramento, CA 95814

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 calendar days following the date of service of the appeal (California Administrative Code, title 8, section 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 California Administrative Code, title 8, section 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.

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 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 (California Administrative Code, title 8, section 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,

CHRISTINE A. BOLOGNA
General Counsel

By .
Robert Thompson
Deputy General Counsel

Attachment

PUBLIC EMPLOYMENT RELATIONS BOARD

Office of the General Counsel
1031 18th Street, Room 200
Sacramento, CA 95814-4174
(916) 323-8015

April 28, 1989

Rash B. Gosh, Ph.D.

Re: Rash B. Gosh v. State of California (Department of Health). Unfair Practice Charge No. SF-CE-90-S

Dear Dr. Gosh:

On February 17, 1989, you filed an Unfair Practice Charge against the Department of Health, State of California (State) alleging violation of Dills Act section 3519(a) and (b). More specifically, you allege that on November 24, 1987, the State rejected you during probation, effective December 4, 1987, because on June 10, 1987 you had informed Mr. Howard Hatayama that you had complained to the Union in reference to harassment directed at you by your boss Mr. Rick Notini.

You spoke with Peter Haberfeld, then the San Francisco Regional Attorney, concerning the original charge on February 21, March 10, 16 and 20, 1989. During the conversations, you were informed that the charge was deficient as originally filed. On March 22, 1988, PERB received a First Amended Unfair Practice Charge from you alleging the same violations.

My investigation revealed the following information. On November 19, 1986, you were appointed as an Associate Hazardous Waste Specialist. You worked under the supervision of Howard Hatayama, the Supervising Waste Management Engineer. On January 12, 1987, you were placed under the supervision of Mr. Rick Notini.

You explained that during the initial weeks of work under Mr. Notini's supervision, he lauded your work. You state that you began to sense that he had a problem with you when he questioned why Stanford had accepted you but not him. After a meeting between you and a woman of some prominence on May 13, 1987, he became, in your words, "tough". He became disapproving and, toward the end of May indicated that he was going to fire you. In early June, he repeated the threat and showed you a paper he appeared to be drafting which

evaluated your work performance negatively. On the next day, you contacted the Union in Sacramento and were told that you would have the right to file a rebuttal to a negative evaluation.

In reaction to the worsening relationship with Mr. Notini, you went, on June 10, 1987, to speak with Mr. Howard Hatayama, Mr. Notini's supervisor. You requested that he transfer you to a group which was supervised by someone other than Mr. Notini. He expressed his evaluation that your work was very good, and characterized Mr. Notini's negative comments as arising from a "personality conflict". He stated, further, that he would consider a transfer.

A few days later you spoke again with Mr. Hatayama about a transfer. You mentioned at that time that you had gone to the Union and they had told you of your right to rebut what appeared to be Mr. Notini's forthcoming misrepresentation about you work performance. Mr. Hatayama expressed anger that you had obtained assistance from the Union to challenge the evaluation. He said:

> "You went to the Union and want to fight it. Go ahead. We also went to the Administration and we will see."

From that point forward, Mr. Hatayama consistently supported the negative evaluations prepared by Mr. Notini.

The First Amended Charge has attached to it, 3 separate evaluations of your work prepared by Mr. Notini. The evaluation prepared for the period commencing on March 18, 1987 was not signed by Mr. Notini until July 7, 1987 and thereafter sent to you. It rates your performance as "improvement needed". You complain that Mr. Notini concealed from you, prior to the dated your received the evaluation, his conclusion that improvement was needed in specified areas. You state that he had made no effort to correct or improve your work during the first seven months he was your supervisor and express your conclusion that he was motivated to get rid of you rather than work with you to cure alleged defects in your performance.

The evaluation prepared for the period beginning July 18, 1987 also rates your performance as "improvement needed". The evaluation signed by Mr. Notini on November 18, 1987 rates your performance as "unacceptable". The comment indicates that there has been improvement, but according to the evaluator, it is insufficient and does not meet the standards appropriate for an Associate Hazardous Material Specialist.

On November 24, 1987, the State delivered to you a "Notice of Rejection during Probation". The notice was signed on November 18, 1987 and by its terms, became effective on December 12, 1987.

On December 7, 1987, you signed a Stipulated Settlement Agreement which was prepared by the staff attorney for the Department of Health Services. John Sikora, your Union representative, asked you to sign the stipulation, but you refused to sign the original. Instead, you signed the copy, believing that it could not bind you to the terms of the stipulation.[1]

You asserted two reasons for rejecting the Settlement Agreement. In your view, you became a permanent employee in the classification Associate Hazardous Materials Specialist automatically on November 18, 1987, one year after you commenced employment; you received the rejection from probation six days after you became permanent. In addition, you asserted that the rejection was motivated by discrimination and had nothing to do with your performance level.

As a result of the Stipulated Agreement, you were demoted from an Associate Hazardous Materials Specialist to a Hazardous Materials Specialist and began to receive a salary which has been reduced between five and six hundred dollars per month.

You have attached, as an exhibit to the First Amended Unfair Practice Charge, a notice dated March 29, 1987, that you were being paid a "revolving fund warrant" rather than a regular "Comptroller's payroll warrant". Copies of mailgrams you sent on March 26, 1988 and June 27, 1988, indicate that you had begun to receive what you termed a "substantially reduced" salary. The notice indicates further that the State Administration was still in the process of completing the necessary paperwork to reflect your demotion.

On March 25, 1988, you received a letter from the State Personnel Board (SPB) upholding the Stipulation. The SPB letter was dated February 24, 1988 and the envelope indicates that it was sent on February 26, 1988. Prior to that communication you were unaware either that the Stipulation was reviewed by the SPB or that you would have had an opportunity to oppose the demotion and reduction in pay.

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[1]Under the agreement the state withdrew your rejection from probation and you were demoted to the classification of Hazardous Materials Specialist, Range B. In addition you agreed to waive your SPB appeal and any alternative forms of appeal arising out of the dispute.

On March 26, 1988, you wrote a mailgram to the President of the SPB. In that document, a copy of which is attached to the First Amended Unfair Practice Charge, you explained that you had received the SPB letter the previous day and asserted that the denial of probation and demotion resulted from the racial prejudice which Mr. Notini bears toward you. You concluded the mailgram by indicating that a more detailed letter would follow.

During the first week of June 1988, you received a letter from Mr. Walter Vaughn, an Assistant Executive Officer with the SPB, dated May 24, 1988. It refers to your letter of April 18, 1988, apparently the follow-up letter to the mailgram, and states that your complaints of "discrimination, harassment, abuses and incompetency in the Department of Health Services" raise issues which should be discussed with an attorney. As to the issue of your rejection on probation, the letter concludes that the stipulation is controlling.

After receiving the SPB letter, you hired a private attorney to address your concerns. He wrote a letter to the SPB. You apparently sent a letter as well.

On September 6, 1988, you received another letter from Mr. Vaughn. He responds to your claim that the agreement was invalid by stating that such an issue should have been raised by you as a response to the SPB letter of February 24, 1988. However, he points out, your letter of March 26, 1988 was not sent within the required thirty day time period. He concludes that you have no further recourse before the SPB.

You informed me that the SPB did not inform you, before you received Mr. Vaughn's letter of September 6, 1988, that you had thirty days within which to appeal. More importantly, you point out that by the time you received the SPB letter the appeal period had, by the SPB's calculations terminated. The SPB had mailed the Order to the wrong address and it had not found its way to you (after having been routed once more through the SPB) before March 25, 1988.

You apparently responded to the SPB letter by requesting formal reconsideration of the conclusion that you had no further recourse concerning the validity of the Stipulation. Mr. James C. Waller, Chief Administrative Law Judge for the SPB, wrote you a letter, dated January 31, 1989, stating that he had reviewed SPB #23571—Rash B. Gosh, finds both that a settlement was approved by the SPB on February 24, 1988 and that it became final thirty days after the

SPB's approval. Therefore, he rules, your request to reconsider the issues is denied.

On February 23, 1989, a day after receiving Judge Waller's letter from the law office of Mr. Barnard Cohn, you wrote a reply.

Based on the facts described above, your charge does not state a prima facie violation of the Dills Act for the reasons which follow.

To state a prima facie violation of the Dills Act, Charging Party must allege and ultimately establish that the alleged unfair practice either occurred, or was discovered within the six month period immediately preceding the filing of the charge with PERB. Government Code section 3514.5(a)(1). San Dieguito Union High School District (1982) PERB Decision No. 194. Your charge complains of your rejection from probation which you became aware of on November 24, 1987. That demotion was to be effective on December 4, 1987. On December 7, 1987, you signed a copy of a Stipulated Settlement Agreement which demoted you. The demotion was implemented and your mailgrams of March and June of 1988 indicate that you were paid pursuant to the agreement that you be demoted. It is of no effect that the paperwork was only completed in August, 1988. Your charge was filed on February 17, 1989, clearly after expiration of the six month period beginning on November 24, 1987.

In State of California, Department of Developmental Services (Mata) (1981) PERB Order No. Ad-122-S, PERB held that Section 3514(a)(2) of the Dills Act tolls the statutory six month period of limitations when the charging party has several legal remedies and reasonably and in good faith pursues one. That test, in the Board's view, satisfies the concern that the partly against which the claims are filed is informed of the dispute within sufficient time to enable it to identify and locate persons with knowledge of the events or circumstances surrounding the injury.

Even applying the principles of tolling does not make your charge timely. Although you filed materials with the SPB beginning on March 26, 1987, these materials did not raise with the SPB the issue contained in your charge here, namely that your rejection was because of your union activity. Thus, your activities with the SPB do not toll the statute because they were not reasonable good faith efforts to remedy your case of discrimination based on union activity. Rather, the communications appear to raise the argument that you were rejected for reasons of race and/or national origin. Accordingly, your charge is untimely and will be dismissed.

Even assuming the charge is timely, it still does not state a prima facie case. To demonstrate a violation of section 3519 of the Dills Act, the charging party must show that: (1) the employee exercised rights under the EERA, (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; Carlsbad Unified School District (1979) PERB Decision No. 89; Department of Developmental Services (1982) PERB Decision No. 228-S; California State University. (Sacramento) (1982) PERB Decision No. 211-H.

The charge as presently set forth fails to state a prima facie violation of Section 3519(a) of the Dills Act. You alleged that in June 1987, you obtained the assistance of the Union and as a consequence, were represented by the Union, through the date in December, 1987, when you signed the Stipulated Agreement that you would be working in a lower classification at a lower salary. You have also alleged that the employer in November, 1987, demoted you, and thereafter commenced paying you a lower salary. Consequently, the charge contains allegations which technically satisfy the first two pleading requirements in a discrimination charge: that you engaged in protected activity under the Dills Act, and that you were treated adversely by the employer.

However, there are no allegations to satisfy the third element: that there was some connection between your exercise of protected activity and the employer's adverse treatment. Although timing of the employer's adverse action in close temporal proximity to the employee's protected conduct is an important factor, it does not, without more, demonstrate a connection between the employee's conduct and the employer's 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, (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. Novato Unified School District, supra; North Sacramento School District (1982) PERB Decision No. 264. You allege that Mr. Hatayama knew you had gone to the Union for assistance and stated: "You went to the Union and want to fight it.

Go ahead. We also went to the Administration and we will see." This statement is insufficient to suggest that the State demoted you and reduced your salary because you sought and obtained assistance from the Union.

As presently written, this charge fails to demonstrate any of these factors and therefore does not state a prima facie violation of section 3543.5(a).

Finally, your charge fails to state a violation of the Dills Act because you waived your right to pursue a remedy with the Public Employment Relations Board (PERB) when you signed the settlement agreement in December 1987. Although you challenge the validity of this agreement, you have benefitted from portions of the agreement. There is no evidence that this agreement should be voided now.

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 any additional facts that would correct the deficiencies explained above, please amend the charge accordingly. 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 must be signed under penalty of perjury by the charging party. The amended charge must be served on the respondent and the original proof of service must be filed with PERB. If I do not receive an amended charge or withdrawal from you before May 5, 1989, I shall dismiss your charge. If you have any questions, please call me at (916) 323-8015.

Sincerely,

Robert Thompson
Deputy General Counsels

RT:ckc