

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



PAUL NICOLAS KASHTANOFF,)
)
Charging Party,) Case No. SF-CO-24-S
)
v.) PERB Decision No. 1007-S
)
CALIFORNIA CORRECTIONAL PEACE) July 29, 1993
OFFICERS ASSOCIATION,)
)
Respondent.)
_____)

Appearance: Paul Nicolas Kashtanoff, on his own behalf.

Before Blair, Chair; Caffrey and Carlyle, Members.

DECISION AND ORDER

CARLYLE, Member: This case is before the Public Employment Relations Board (Board) on appeal by Paul Nicolas Kashtanoff (Kashtanoff) of a Board agent's dismissal (attached hereto) of his unfair practice charge. In the charge, Kashtanoff alleged that the California Correctional Peace Officers Association violated section 3519.5(b) of the Ralph C. Dills Act (Dills Act)¹ by violating its duty of fair representation.

The Board has reviewed the warning and dismissal letters, the original and amended charge, Kashtanoff's appeal and the entire record in this case. The Board finds the Board agent's

¹The Dills Act is codified at Government Code section 3512 et seq. Section 3519.5 states, in pertinent part:

It shall be unlawful for an employee organization to:

(b) 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.

dismissal to be free of prejudicial error and adopts it as the decision of the Board itself.

The unfair practice charge in Case No. SF-CO-24-S is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chair Blair and Member Caffrey joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD



San Francisco Regional Office
177 Post Street, 9th Floor
San Francisco, CA 94108-4737
(415) 557-1350



April 20, 1993

Paul Nicolas Kashtanoff

Re: **DISMISSAL OF UNFAIR PRACTICE CHARGE/REFUSAL TO ISSUE COMPLAINT**
Paul Nicolas Kashtanoff v. California Correctional Peace Officers Association
Unfair Practice Charge No. SF-CO-24-S

Dear Mr. Kashtanoff:

The above-referenced unfair practice charge, filed on April 2, 1993, alleges that the California Correctional Peace Officers Association (Association) failed to represent Charging Party in proceedings before the State Personnel Board (SPB). This conduct is alleged to violate Government Code section 3519.5(b) of the Ralph C. Dills Act (Dills Act).

I indicated to you, in my attached letter dated April 9, 1993, 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 April 19, 1993, the charge would be dismissed.

On April 19, 1993, an amended charge was filed. The amended charge alleges that the Association's attorney, Mark Steinberg, engaged in bad faith conduct in setting Charging Party's State Personnel Board (SPB) case for hearing. The amended charge contains allegations concerning background information involving events prior to the initiation of the SPB proceedings. The amended charge alleges that Steinberg failed to pursue sexual harassment and discrimination charges based on San Quentin State Prison's attempt to label Charging Party a homosexual. Steinberg is also alleged to have failed to represent Charging Party's interests vigorously in the SPB matter because he did not believe that homosexuals should work at San Quentin. The amended charge also alleges that an unnamed Association representative stated that the Association was unwilling to represent Charging Party because he was a homosexual.

As noted in the undersigned's April 9, 1993 letter, PERB does not

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have jurisdiction over the claims that the Association failed to represent Charging Party properly in the SPB proceedings because the Association's duty of fair representation under the Dills Act only covers matters which may be raised through the grievance procedure of the collective bargaining agreement, as opposed to such extra-contractual proceedings as those before the SPB. There is no showing in the charge or the amended charge that the Association failed to pursue a meritorious grievance under the collective bargaining agreement for arbitrary, discriminatory or bad faith reasons.

Therefore, I am dismissing the charge based on the facts and reasons contained above and in my April 9, 1993 letter.

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. (Cal. Code of Regs., tit. 8, sec. 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 p.m.) or sent by telegraph, certified or Express United States mail postmarked no later than the last date set for filing. (Cal. Code of Regs., tit. 8, sec. 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 (20) calendar days following the date of service of the appeal. (Cal. Code of Regs., tit. 8, sec. 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 Cal. Code of Regs., tit. 8, sec. 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.

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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. (Cal. Code of Regs., tit. 8, sec. 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
Deputy General Counsel

By _____
DONN GINOZA
Regional Attorney

Attachment

cc: Mark A. Steinberg

PUBLIC EMPLOYMENT RELATIONS BOARD



San Francisco Regional Office
177 Post Street, 9th Floor
San Francisco, CA 94108-4737
(415) 557-1350



April 9, 1993

Paul Nicolas Kashtanoff

Re: **WARNING LETTER**

Paul Nicolas Kashtanoff v. California Correctional Peace
Officers Association
Unfair Practice Charge No. SF-CO-24-S

Dear Mr. Kashtanoff:

The above-referenced unfair practice charge, filed on April 2, 1993, alleges that the California Correctional Peace Officers Association (Association) failed to represent Charging Party in proceedings before the State Personnel Board (SPB). This conduct is alleged to violate Government Code section 3519.5(b) of the Ralph C. Dills Act (Dills Act).

Investigation of the charge revealed the following. Paul Nicolas Kashtanoff was employed by the Department of Corrections and was assigned to work at the San Quentin Correctional Facility. Kashtanoff was separated from employment allegedly for misconduct. Prior to the effective date of the dismissal, Kashtanoff elected to retire from service. However, he appealed the dismissal through the SPB. The Association agreed to represent Kashtanoff at all settlement conferences during the proceedings.

By letter dated March 15, 1991, the Association notified Kashtanoff of a scheduled settlement conference before the SPB on April 8, 1991. By letter dated March 16, 1991, Kashtanoff inquired of Mark Steinberg, attorney for the Association, if the Association was still representing him. Kashtanoff indicates in the letter that the Association had stated that they were representing him as "a courtesy." He also states that he believes that San Quentin is willing to work out a settlement with him. The outcome of the April 8, scheduled conference is not indicated in the charge.

By letter dated August 13, 1992, Steinberg informed Kashtanoff that San Quentin was not willing to settle on Kashtanoff's terms. Steinberg reminds Kashtanoff that it had agreed to represent him "only in terms of a settlement" and that if he wished to proceed beyond settlement negotiations he would have to retain his own attorney or represent himself. Steinberg further advised

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Kashtanoff that the matter is currently off calendar and would be put back on calendar.

By letter dated August 13, 1992, Steinberg notified the SPB administrative law judge that the case should be put back on calendar due to the failure of settlement discussions to resolve the matter. Kashtanoff telephoned Steinberg on August 14 to tell him that he objected to the matter being placed back on calendar.

By letter dated August 17, 1992, Kashtanoff informed Steinberg that he never authorized him to place the case back on calendar. Kashtanoff further indicates that he still anticipates settling the matter with San Quentin.

On August 17, 1992, Kashtanoff discussed his case with Steinberg over the telephone. Steinberg told Kashtanoff that he believed Kashtanoff had authorized him to place the matter back on calendar. Steinberg indicated that he would resume representation for the purpose of settling the case and that a settlement conference with the SPB administrative law judge had been scheduled for October 2, 1992.

By letter dated August 18, 1992, Steinberg confirmed the points of the August 17 telephone conversation and outlined the objectives of the settlement conference, which included modification of the date of separation in order to obtain health benefits coverage and a change of the grounds for separation from dismissal to some other ground.

By letter dated August 18, 1992, Mark Steinberg notified the SPB that it would be representing Kashtanoff at the settlement conference scheduled for October 2, 1992.

Kashtanoff did not agree to the terms of settlement offered by San Quentin. He also did not agree with the settlement objectives sought by the Association. Sometime in December 1992, the Association withdrew from representation of Kashtanoff. The Association did not appear at a settlement conference held on January 4, 1993. Kashtanoff was required then to hire a private attorney, at considerable personal expense.

Based on the facts stated above, the charge as presently written fails to state a prima facie violation of the Dills Act for the reasons that follow.

In order to state a prima facie case involving a breach of the duty of fair representation, facts must be alleged in the charge indicating how and in what manner the Association refused to process a meritorious grievance for arbitrary, discriminatory or

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bad faith reasons. In United Teachers of Los Angeles (Collins) (1982) PERB Dec. No. 258, the PERB stated:

Absent bad faith, discrimination, or arbitrary conduct, mere negligence or poor judgment in handling a grievance does not constitute a breach of the union's duty.

.....

A union may exercise its discretion to determine how far to pursue a grievance on the employee's behalf as long as it does not arbitrarily ignore a meritorious grievance or process a grievance in a perfunctory fashion. A union is also not required to process an employee's grievance if the chances for success are minimal.

In order to state a prima facie case of arbitrary conduct violating the duty of fair representation, a charging party

... must, at a minimum, include an assertion of sufficient facts from which it becomes apparent how or in what manner the exclusive representative's action or inaction was without a rational basis or devoid of honest judgment.

(Reed District Teachers Association, CTA/NEA (Reyes) (1983) PERB Dec. No. 332, citing Rocklin Teachers Professional Association (Romero) (1980) PERB Dec. No. 124.)

There appears to be no claim that Kashtanoff requested representation in a matter covered by the collective bargaining agreement administered by the Association.

The claim in this case is that the Association abandoned Kashtanoff during proceedings before the SPB. However, there is no duty under the Dills Act requiring an exclusive representative to represent employees in this forum. (American Federation of State, County and Municipal Employees (Moore) (1988) PERB Dec. No. 683-S; California Faculty Association (Pomerantsev) (1988) PERB Dec. No. 698-H.) If the Association does represent employees in this forum, it is on a voluntary basis. Therefore, no violation can be based on conduct involved in representing employees before the SPB, even if the employee alleges harm as a result of that representation.

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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 April 19, 1993, I shall dismiss your charge. If you have any questions, please call me at (415) 557-1350.

Sincerely,

DONN GINOZA
Regional Attorney