

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



INTERNATIONAL UNION OF OPERATING)
ENGINEERS, CRAFTS MAINTENANCE)
DIVISION, UNIT 12,)
)
Charging Party,) Case No. S-CE-854-S
)
v.) PERB Decision No. 1176-S
)
STATE OF CALIFORNIA (DEPARTMENT)
OF TRANSPORTATION),) November 18, 1996
)
Respondent.)
_____)

Appearances: Van Bourg, Weinberg, Roger & Rosenfeld by Stewart Weinberg, Attorney, for International Union of Operating Engineers, Crafts Maintenance Division, Unit 12; State of California (Department of Personnel Administration) by Paul M. Starkey, Labor Relations Counsel, for State of California (Department of Transportation).

Before Caffrey, Chairman; Garcia and Johnson, Members.

DECISION AND ORDER

JOHNSON, Member: This case is before the Public Employment Relations Board (Board) on appeal of a Board agent's dismissal (attached) of an unfair practice charge filed by the International Union of Operating Engineers, Crafts Maintenance Division, Unit 12 (IUOE). In its charge, IUOE alleged that the State of California (Department of Transportation) (State) violated section 3519 of the Ralph C. Dills Act (Dills Act)¹ by

¹The Dills Act is codified at Government Code section 3512 et seq. Section 3519 provides, in pertinent part:

It shall be unlawful for the state to do any of the following:

- (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to

soliciting employees to resign from membership in the union.

The Board has reviewed the entire record in this case, including IUOE's unfair practice charge, the warning and dismissal letters, IUOE's appeal and the State's response thereto. The Board finds the warning and dismissal letters to be free of prejudicial error and adopts them as the decision of the Board itself.

The unfair practice charge in Case No. S-CE-854-S is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chairman Caffrey and Member Garcia joined in this Decision.

discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter. For purposes of this subdivision, "employee" includes an applicant for employment or reemployment.

(b) Deny to employee organizations rights guaranteed to them by this chapter.

PUBLIC EMPLOYMENT RELATIONS BOARD



Sacramento Regional Office
1031 18th Street, Room 102
Sacramento, CA 95814-4174
(916) 322-3198



August 19, 1996

Stewart Weinberg, Attorney-
Van Bourg, Weinberg, Roger & Rosenfeld
180 Grand Avenue, Suite 14 00
Oakland, CA 94612

Re: **NOTICE OF DISMISSAL AND REFUSAL TO ISSUE COMPLAINT**
International Union of Operating Engineers, Crafts
Maintenance Division, Unit 12 v. State of California
(Department of Transportation)
Unfair Practice Charge No. S-CE-854-S

Dear Mr. Weinberg:

I indicated to you, in my attached letter dated July 25, 1996, 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 August 5, 1996, the charge would be dismissed. This deadline was subsequently extended to August 19, 1996 at your request.

I have not received either an amended charge or a request for withdrawal, and you confirmed by telephone on August 19, 1996 that an amended charge would not be filed. Therefore, I am dismissing the charge based on the facts and reasons contained in my July 25, 1996 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

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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.

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
Les Chisholm
Regional Director

Attachment

cc: K. William Curtis

PUBLIC EMPLOYMENT RELATIONS BOARD



Sacramento Regional Office
1031 18th Street, Room 102
Sacramento, CA 95814-4174
(916)322-3198



July 25, 1996

Stewart Weinberg, Attorney
Van Bourg, Weinberg, Roger & Rosenfeld
180 Grand Avenue, Suite 1400
Oakland, CA 94612

Re: **WARNING LETTER**

International Union of Operating Engineers, Crafts
Maintenance Division, Unit 12 v. State of California
(Department of Transportation)
Unfair Practice Charge No. S-CE-854-S

Dear Mr. Weinberg:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on June 21, 1996. In its charge, the International Union of Operating Engineers, Crafts Maintenance Division, Unit 12 (Union or Charging Party) alleges that the California Department of Transportation (CalTrans) violated Government Code section 3519(a) and (b) by soliciting employees to resign from membership in the Union.

Investigation of this charge revealed the following information. Charging Party is the exclusive representative of State bargaining unit 12, which includes employees employed by CalTrans. The Union and the State were parties to a Memorandum of Understanding (MOU) that expired June 30, 1995.

On May 17, 1996, the Department of Personnel Administration distributed a memo by Chief of Labor Relations Rick McWilliam informing departments that new collective bargaining agreements had not been reached for most State bargaining units, including unit 12. The memo further asked departments to remind employees that they are not prohibited from withdrawing from union membership at any time by notifying the State Controller's Office and the appropriate union in writing.

On June 4, 1996, CalTrans distributed a memo to all employees which informed them that negotiations were continuing between the State and unions representing most bargaining units, and reminded them that represented employees were no longer subject to fair share fee deductions and represented employees are not prohibited from withdrawing from union membership.

The CalTrans memo included the following information:

Employees interested in canceling their union

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membership may do so by notifying their respective union in writing. The union in turn should notify the State Controllers (SCO) to effect the cancellation. Although the SCO will only cancel membership deductions if requested by the union, you may send an informational copy of your request to the SCO at the following address: [Address information omitted.].

Questions regarding starting or canceling union membership and dues deduction should be directed to your respective union.

The Union received a written request for cancellation of union dues from CalTrans employee D.L. Burkett. The request was made using a preprinted form provided by CalTrans for cancellation of various payroll deductions. Burkett's form was filled out by hand, dated June 10, 1996, and mailed to the Union in an envelope bearing the Department's name and return address. A stamp was affixed to the envelope for postage.

It is alleged that Burkett did not personally complete all of the information of the cancellation request form because he would not have knowledge of the various codes required (agency/unit and deduct/org code).

Discussion

The Board has long held that an employer has a protected right to communicate with employees on employment related matters, so long as that communication does not violate certain standards.

(Alhambra City and High School Districts (1986) PERB Dec. No. 560, citing Rio Hondo Community College District (1980) PERB Dec. No. 128 (Rio Hondo).) In Rio Hondo the Board considered the language of section 8(c) of the National Labor Relations Act in adopting a test regarding an employer's free speech rights as follows:

[T]he Board finds that an Employer's speech which contains a threat of reprisal or force or promise of benefit will be perceived as a means of violating the Act and will, therefore, lose its protection and constitute strong evidence of conduct which is prohibited by [the Act].

The determination of whether an employer's speech is protected or constitutes a proscribed threat or promise is made by applying an

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objective rather than a subjective standard. (Trustees of the California State University (1989) PERB Dec. No. 777-H.) Statements made by an employer are viewed in their overall context to determine if they have a coercive meaning (Los Angeles Unified School District (1988) PERB Dec. No. 659), and the Board places considerable weight on the accuracy of the content of the speech in determining whether the communication constitutes an unfair labor practice. (Alhambra City and High School Districts, supra; Muroc Unified School District (1978) PERB Dec. No. 80.)

Thus, where employer speech accurately describes an event, and does not on its face carry the threat of reprisal or force, or promise of benefit, the Board will not find the speech unlawful. (Chula Vista City School District (1990) PERB Dec. No. 834.)

The National Labor Relations Board (NLRB) has applied this same test to questions involving employer conduct like that complained of here. Citing Perkins Machine Company (1963) 141 NLRB 697 and Cyclops Corp. (1975) 216 NLRB 857, the NLRB held that:

Established [NLRB] principle holds that while employers may not solicit employees to withdraw from union membership, they may, on the other hand, bring to employees' attention their right to resign from the union and revoke dues-checkoff authorizations so long as the communication is free of threat and coercion or promise of benefit. [Ace Hardware Corp. (1984) 271 NLRB 178.]

CalTrans's alleged conduct in this case does not violate the standards described above. First, the memos conveying information concerning the right to resign from Union membership simply communicate that the right exists and do not advocate a course of action. The allegations do not establish that the CalTrans's communication was inaccurate, nor that it contained promise of benefit or threat of coercion. The facts alleged do not establish that the CalTrans solicited employees to withdraw from membership, only that the CalTrans informed employees of their right to do so. The Union's subjective perception of this conduct as employer solicitation of employees to drop out of the Union does not establish prima facie evidence of a violation under the applicable, objective standard.

Prima facie evidence of a violation is also not established by Burkett's use of a preprinted form or a Departmental' envelope. The Union concedes that the form is one that may be used for cancellation of a variety of payroll deductions, not just union

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dues, and does not allege facts to establish that Burkett's use of the Department's envelope was sanctioned by the Department.¹

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 which 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 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 August 5, 1996, I shall dismiss your charge. If you have any questions, please call me at (916) 322-3198, ext. 359.

Sincerely,

Les Chisholm
Regional Director

HLC:cb

¹Evidence of departmental knowledge and approval of Burkett's use of the official envelope may not sufficient to establish a prima facie violation, however. Also relevant would be allegations concerning whether envelopes are provided for other correspondence related to payroll deductions (canceling a savings bond deduction, for example).