STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CARLOS A. VELTRUSKI, Charging Party, v. STATE OF CALIFORNIA (DEPARTMENT OF MOTOR VEHICLES, UNEMPLOYMENT INSURANCE APPEALS BOARD, STATE PERSONNEL BOARD & DEPARTMENT OF JUSTICE), Respondent.	Case No. LA-CE-573-S PERB Decision No. 1497-S August 27, 2002

Appearance: Carlos A. Veltruski, on his own behalf.

Before Baker, Whitehead and Neima, Members.

DECISION

BAKER, Member: This case is before the Public Employment Relations Board (Board) on appeal by Carlos A. Veltruski (Veltruski) from a Board agent's dismissal (attached) of his unfair practice charge. The charge alleged that various departments of the State of California violated section 3519(a) of the Ralph C. Dills Act (Dills Act)[1] by denying him employment because of his protected conduct.

After reviewing the entire record in this case, including the original and amended unfair practice charges, the Board agent's warning and dismissal letters and Veltruski's appeal, the

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

Board adopts the dismissal letter as the decision of the Board itself as the reasoning in the warning and dismissal letters is consistent with the Board's recent decision in State of California (2002) PERB Decision No. 1484-S.

ORDER

The unfair practice charge in Case No. LA-CE-573-S is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Whitehead and Neima joined in this Decision.

STATE OF CALIFORNIA GRAY DAVIS, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
1031 18th Street
Sacramento, CA 95814-4174
Telephone: (916) 327-7242
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February 25, 2002

Linda Nelson, Labor Relations Counsel
Department of Personnel Administration
1515 "S" Street, North Building, Suite 400
Sacramento, CA 95814-7243

Carlos A. Veltruski

Re: Carlos A. Veltruski v. State of California (Department of Motor Vehicles, Unemployment Insurance Appeals Board, State Personnel Board & Department of Justice)
Unfair Practice Charge No. LA-CE-573-S
DISMISSAL LETTER

Dear Mr. Veltruski:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on December 7, 2001. You allege that the State of California (Department of Motor Vehicles, Unemployment Insurance Appeals Board, State Personnel Board & Department of Justice) violated the Ralph C. Dills Act (Dills Act)[1] by refusing to consider your application on its merits.

I indicated to you in my attached letter dated February 11, 2002, 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 February 22, 2002, the charge would be dismissed.

On February 13, 2002, you filed an amended charge that contained information that duplicated the charges made in LA-CE-573-S, and also contained new information regarding the harm you allegedly suffered, and additional charges against State actors and agents of the City of Huntington Park.

As to the harm you allegedly suffered, you have not shown that you were eligible for employment by complying with the application process for any State job. Instead, you allege

[1] The Dills Act is codified at Government Code section 3512 et seq. The text of the Dills Act and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

that because you were once hired as an independent contractor for the State (a title which you dispute), that you should be considered an applicant for reinstatement, and exempted from the examination requirements of other applicants. Your argument is flawed in two ways. First, you have not shown that you were ever an employee of the State-- you must show that at one time you held a position as a permanent or probationary employee. Second, assuming you were at one time an employee of the State, you have not shown that you were separated from your position for a reason that maintains your eligibility for State service. Under these circumstances, it is not shown that you were ever eligible for State service; this fact precludes your having suffered harm by any refusal to consider your application for State employment or reinstatement.

Also in your amended charge, you argue that your rights were violated when Sara Luque and Rosario Marin refused to consider your application for employment. At the time that you were allegedly discriminated against, Both Ms. Luque and Ms. Marin were employees of the State of California, and were acting as agents of the State. Because both Ms. Luque and Ms. Marin are currently agents for the City of Huntington Park, you claim that your charge arises under the Meyers-Milias-Brown Act. However, under the MMBA, an employer is "any public agenc[y]... which has been held to include only *local* governmental entities." Sacramento County Employees Organization v. County of Sacramento (1988) 201 Cal.App.3d 845, 850. Applying this definition, the State and its agents cannot be considered an "employer" for the purposes of the MMBA. Because Ms. Luque and Ms. Marin were agents of the State of California at the time they allegedly discriminated against you, and were not subject to the MMBA, you have failed to show how you were discriminated against by an employer subject to the MMBA. This failure is fatal to your charge of discrimination under the MMBA. Therefore, I am dismissing the charge based on the facts and reasons contained in this letter and my February 11, 2002 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 or when mailed by certified or Express United States mail, as shown on the postal receipt or postmark, or delivered to a common carrier promising overnight delivery, as shown on the carrier's receipt, not later than the last day set for filing. (Regulations 32135(a) and 32130.)

A document is also 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

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

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.)

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
Alicia A. Clement
Board Agent

Attachment

AAC

STATE OF CALIFORNIA GRAY DAVIS, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
1031 18th Street
Sacramento, CA 95814-4174
Telephone: (916) 327-7242
Fax: (916) 327-6377

February 11, 2002

Carlos A. Veltruski

Re: Carlos A. Veltruski v. State of California (Department of Motor Vehicles, Unemployment Insurance Appeals Board, State Personnel Board & Department of Justice)
Unfair Practice Charge No. LA-CE-573-S
WARNING LETTER

Dear Mr. Veltruski:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on December 7, 2001. You allege that the State of California (Department of Motor Vehicles, Unemployment Insurance Appeals Board, State Personnel Board & Department of Justice) violated the Ralph C. Dills Act (Dills Act)[1] by refusing to consider your application on its merits.

In your charge, you name six employees of the state of California that allegedly discriminated against you. Of those six individuals, only four of them appear in the "attached explanation" and various other documents you supplied. The employees who are not mentioned except on the Unfair Practice Charge form are Michael DiSanto and Sylvia Diaz. Accordingly, allegations regarding those two individuals will be dismissed unless you can provide factual evidence that they took an adverse action against you that was motivated by your participation in protected conduct. Allegations of discrimination against you involving the other four individuals named in your charge are deficient in the following ways.

You allege that Kaye Krumenacker of the Department of Motor Vehicles failed to consider your application for employment during a phone conversation you had with her. This phone conversation took place in December of 2001, within the six month statute of limitations.

You allege that Jimmy Gomez, of the Department of Motor Vehicles, Commerce Office, discriminated against you when he refused to allow you to take an oral examination for various

[1] The Dills Act is codified at Government Code section 3512 et seq. The text of the Dills Act and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

positions that were available, and for which you had applied. You also allege that Mr. Gomez refused to provide you with a Workers' Compensation form.

You allege that Kathy Martinez of the State Personnel Board refused to hire you or consider your application for employment on its merits between November and December of 2001.

You allege that Judge Zaida Hackett of the Unemployment Insurance Appeals Board discriminated against you. In your charge, you state that you have made previous charges against Judge Hackett with Judge Peterson and myself. After reviewing all the charges you previously filed with PERB, I am unaware of any outstanding charges concerning conduct by or on behalf of Judge Hackett. Your current charge contains only a reference to Judge Hackett in an unidentified previous charge.

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.)

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), 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; (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; (6) employer animosity towards union activists (Cupertino Union Elementary School District) (1986) PERB Decision No. 572.); or (7) any other facts which might demonstrate the employer's unlawful motive. (Novato; North Sacramento School District, supra, PERB Decision No. 264.)

Evidence of adverse action is also required to support a claim of discrimination or reprisal under the Novato standard. (Palo Verde Unified School District (1988) PERB Decision No. 689.) In determining whether such evidence is established, the Board uses an objective test and will not rely upon the subjective reactions of the employee. (Ibid.) In a later decision, the Board further explained that:

> The test which must be satisfied is not whether the employee found the employer's action to be 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; footnote omitted.]

As a threshold matter in a charge under the Ralph C. Dills Act, you must show that you were harmed by the State employer at the time that you were refused employment. In order to show harm occurred because of a State employee's refusal to consider your application, you must show that the State employer was under a duty to consider your application at the time you presented it. This can be shown by providing evidence that there was a position available for which you were qualified, (you must specifically name that position in your unfair practice charge), and that you applied for that specific position. You must also show that you complied with the requirements for consideration in each application, (you took the required exam for each position, and you were placed on the list of eligible applicants for State employment). If you do not show that you complied with the requirements for State employment prior to submitting an application, you have not shown that you were harmed, since an applicant who fails to comply with eligibility requirements will not be considered for employment no matter how qualified they may be for a position with the state.

You must also show evidence of discrimination by a State actor. The Ralph C. Dills Act provides applicants and employees of the State with a remedy against discrimination by the State. It does not provide a remedy against individual employees of the State. However, an employee acts as an agent of the State when they act in an authorized capacity on behalf of the State. It is critical that you indicate that each employee was authorized to act under State authority, and how each employee was acting in an official capacity at the time the alleged discrimination took place.

In the matter of your charge against Kaye Krumenacker, you have provided me with evidence that you requested employment from Ms. Krumenacker, and that Ms. Krumenacker refused to consider your application on its own merits. You have not indicated what position you were applying for, and whether you had complied with the eligibility requirements for that position. As such, your charge does not show how you were harmed by her decision. You allege that Ms. Krumenacker had knowledge of your protected activity because on your application for employment, you were required to disclose that you had previously worked for the State, and give your reason for leaving employment with the State. In explaining the reason why you no longer work for the State of California, you indicate that you were retaliated against for you efforts to unionize interpreters. However, you have not shown that Ms. Krumenacker was authorized to make employment decisions for the State at the time that you requested employment from her, nor have you provided a nexus between Ms. Krumenacker's decision to refuse your application and her knowledge of your protected activities. You must provide facts that tend to indicate that Ms. Krumenacker's decision not to accept your application was motivated by her knowledge of your protected activities.

In the matter of Jimmy Gomez, you allege that he was made aware of your protected activities in much the same way that Ms. Krumenacker was made aware of them—that you were obliged to disclose them on your application as an explanation of why you left employment with the State. You have not indicated what position you were applying for and whether you had complied with the eligibility requirements for that position. As such, your charge does not show how you were harmed by his decision. You have also not shown that Mr. Gomez was authorized to make employment decisions for the State at the time that you requested employment from him, nor have you shown that Mr. Gomez based any employment related decisions on your protected activities. You must show the nexus between the adverse act and Mr. Gomez's knowledge of your protected activity.

In the matter of Kathy Martinez, you have provided me with evidence of Ms. Martinez's knowledge that you engaged in protected activities, as she is reviewing a charge that you filed with the State Personnel Board. You have not indicated what position you were applying for, and whether you had complied with the eligibility requirements for that position. As such, your charge does not show how you were harmed by his decision. Again, you have not provided any facts that tend to indicate that Ms. Martinez was authorized to make employment decisions for the State at the time that you requested employment from her, or that her decision not to consider your application on its merits was motivated by your protected acts. The nexus between the adverse acts and Ms. Martinez's knowledge of your protected activity is a necessary element in every allegation of unfair labor practices.

In the matter of Judge Hackett, you have not shown that Judge Hackett was aware that you engaged in protected activity, or that Judge Hackett was authorized to and did make an adverse employment decision against you. You state in your charge that you have made allegations against Judge Hackett in the past. I have reviewed your past charges with PERB, and I am unaware of any unresolved charges with our office against Judge Hackett. If you are able to show that you engaged in protected activity, and that Judge Hackett was aware of your protected activity, you must also provide evidence that Judge Hackett made an adverse employment decision *because of* your protected activity.

Finally, in your charge you name Rosario Marin and Sara Luque, both of whom are currently employees of "the City of Huntington Park." I am unable to consider their actions in this charge because you have not indicated whether the parties were State employees or City of Huntington Park employees at the time they allegedly discriminated against you. The letter you sent to PERB on December 31, 2001 did not correct this deficiency. If you wish for me to consider their actions as unfair labor practices, you must show either that they were acting as State employees at the time they allegedly took adverse actions against you, or you may file a separate charge that shows that they were acting as City of Huntington Park employees at the time that they allegedly took adverse actions against you. Please note that PERB will consider charges against a city employer under the Meyers-Milias-Brown Act. I urge you to take careful notice of the differences between the two statutes if you choose to file a charge under the Meyers-Milias-Brown Act rather than the Ralph C. Dills Act.

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 February 22, 2002, I shall dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Alicia A. Clement
Board Agent

AAC