

STATE OF CALIFORNIA  
DECISION OF THE  
PUBLIC EMPLOYMENT RELATIONS BOARD



INTERNATIONAL UNION OF OPERATING  
ENGINEERS,

Charging Party,

v.

STATE OF CALIFORNIA (STATE PERSONNEL  
BOARD),

Respondent.

Case No. SA-CE-1395-S

PERB Decision No. 1680-S

August 20, 2004

Appearances: Weinberg, Roger & Rosenfeld by Matthew J. Gauger, Attorney, for International Union of Operating Engineers; Dorothy Backsai Egel, Attorney, for State of California (State Personnel Board).

Before Duncan, Chairman; Whitehead and Neima, Members.

DECISION

NEIMA, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the International Union of Operating Engineers (IUOE) from a Board agent's dismissal (attached) of its unfair practice charge. The charge alleged that the State of California (State Personnel Board) (SPB) violated the Ralph C. Dills Act (Dills Act)<sup>1</sup> by petitioning the Court of Appeal for a writ of prohibition and/or order staying proceedings, in, inter alia, PERB Case No. SA-CE-1295-S.

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

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<sup>1</sup>The Dills Act is codified at Government Code section 3512, et seq.

ORDER

The unfair practice charge in Case No. SA-CE-1395-S is hereby DISMISSED  
WITHOUT LEAVE TO AMEND.

Chairman Duncan and Member Whitehead joined in this Decision.

## PUBLIC EMPLOYMENT RELATIONS BOARD



Sacramento Regional Office  
1031 18th Street  
Sacramento, CA 95814-4174  
Telephone: (916) 327-8383  
Fax: (916) 327-6377



June 3, 2003

Matthew Gauger, Attorney  
Van Bourg, Weinberg, Roger & Rosenfeld  
1006 4th Street, Suite 1050  
Sacramento, CA 95814

Re: International Union of Operating Engineers v. State of California (State Personnel Board)  
Unfair Practice Charge No. SA-CE-1395-S  
**DISMISSAL LETTER**

Dear Mr. Gauger:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on February 28, 2003. The International Union of Operating Engineers (IUOE or Charging Party) alleges that the State of California (State Personnel Board) (SPB or Respondent) violated the Ralph C. Dills Act (Dills Act)<sup>1</sup> by petitioning the Court of Appeal for a writ of prohibition and/or order staying proceedings in, inter alia, PERB Case No. SA-CE-1295-S.<sup>2</sup> On April 3, 2003, Charging Party filed a First Amended Charge naming the Department of Personnel Administration (DPA) as an additional respondent in this matter.<sup>3</sup> Charging Party filed its Second Amended Charge on April 24, 2003.

I indicated to you in my attached letter dated May 14, 2003, 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 May 27, 2003, the charge would be dismissed.

I have not received either an amended charge or a request for withdrawal. Therefore, I am dismissing the charge based on the facts and reasons contained in my May 14, 2003 letter.

<sup>1</sup> 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](http://www.perb.ca.gov).

<sup>2</sup> Unfair Practice Charge No. 1295-S was filed by IUOE against the SPB. In State of California (State Personnel Board) (2002) PERB Decision No. 1491-S, the Board remanded the charge for formal hearing and DPA was joined as a party. The formal hearing in that matter concluded on March 30, 2003.

<sup>3</sup> SPB filed oppositions both to the addition of DPA as a respondent and/or the joining of DPA as a party. It is unnecessary, for purposes of this letter, to address this dispute.

Right to Appeal

Pursuant to PERB Regulations,<sup>4</sup> 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 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).)

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<sup>4</sup> PERB's Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

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

Lēs Chisholm  
Regional Director

Attachment

cc: Dorothy B. Egel  
Linda D. Buzzini



## PUBLIC EMPLOYMENT RELATIONS BOARD



Sacramento Regional Office  
1031 18th Street  
Sacramento, CA 95814-4174  
Telephone: (916) 327-8383  
Fax: (916) 327-6377



May 14, 2003

Matthew Gauger, Attorney  
Van Bourg, Weinberg, Roger & Rosenfeld  
1006 4th Street, Suite 1050  
Sacramento, CA 95814

Re: International Union of Operating Engineers v. State of California (State Personnel Board)  
Unfair Practice Charge No. SA-CE-1395-S  
**WARNING LETTER (Second Amended Charge)**

Dear Mr. Gauger:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on February 28, 2003. The International Union of Operating Engineers (IUOE or Charging Party) alleges that the State of California (State Personnel Board) (SPB or Respondent) violated the Ralph C. Dills Act (Dills Act)<sup>1</sup> by petitioning the Court of Appeal for a writ of prohibition and/or order staying proceedings in, inter alia, PERB Case No. SA-CE-1295-S.<sup>2</sup> On April 3, 2003, Charging Party filed a First Amended Charge naming the Department of Personnel Administration (DPA) as an additional respondent in this matter.<sup>3</sup> Charging Party filed its Second Amended Charge on April 24, 2003.

In Case No. SA-CE-1295-S, IUOE alleges that SPB violated the Dills Act by refusing to approve settlement agreements for employees who participated in the Board of Adjustment disciplinary review procedure that was a result of the negotiated agreement between IUOE and the State of California. This dispute between IUOE and SPB has also been the subject of litigation, including the matter captioned as California State Personnel Board v. California Department of Personnel Administration, et al., Sacramento County Superior Court, No. 01CS00109.

On January 10, 2003, SPB filed with the Court of Appeal, Third Appellate District a Petition for Writs of Prohibition and/or Notice of Motion and Motion for Orders to Stay PERB Case No. SA-CE-1295-S and/or Sacramento County Superior Court Case No. 02CS01750 Pending

<sup>1</sup> 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](http://www.perb.ca.gov).

<sup>2</sup> Unfair Practice Charge No. 1295-S was filed by IUOE against the SPB. In State of California (State Personnel Board) (2002) PERB Decision No. 1491-S, the Board remanded the charge for formal hearing and DPA was joined as a party. The formal hearing in that matter concluded on March 30, 2003.

<sup>3</sup> SPB filed oppositions both to the addition of DPA as a respondent and/or the joining of DPA as a party. It is unnecessary, for purposes of this letter, to address this dispute.

the Determination of the Appeal in Case No. 3 Civil C040263. In other words, SPB sought a stay of the PERB case filed by IUOE, and a separate, related action filed by IUOE in the Sacramento County Superior Court,<sup>4</sup> pending the determination of the appeal filed by DPA regarding the Superior Court's judgment in California State Personnel Board v. California Department of Personnel Administration, et al., Sacramento County Superior Court, No. 01CS00109.

The Court of Appeal denied SPB's petition on February 4, 2003. The Court's ruling stated, "Remedy by appeal and writ of review is adequate."

In the instant charge, relying on Bill Johnson's Restaurants, Inc. v. National Labor Relations Board (1983) 461 U.S. 731 (Bill Johnson's) and Inglewood Unified School District (1990) PERB Decision No. 792 (Inglewood), as well as the more recently-decided BE & K Construction Co. v. National Labor Relations Board (2002) 536 U.S. 516 [122 S.Ct. 2390] (BE & K), IUOE alleges that the SPB, by filing the above-described petition with the court, violated the Dills Act at section 3519(a) and (b).

#### Discussion

In Inglewood, citing both Bill Johnson's and Rim of the World Unified School District (1986) PERB Order No. Ad-161, the Board observed that "it is an unfair labor practice for an employer to prosecute a baseless lawsuit with the intent of retaliating against employees for their exercise of protected rights." As made explicit in Bill Johnson's, retaliatory motive and lack of reasonable basis "are both essential prerequisites" to the standard applied by the National Labor Relations Board (NLRB). However, in BE & K, the U.S. Supreme Court revisited the holdings of Bill Johnson's.

The Court, noting that in Bill Johnson's, as well as in Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc. (1993) 508 U.S. 49, regulation of litigation had been limited to "suits that were both objectively baseless *and* subjectively motivated by an unlawful purpose," (emphasis in original), turned its attention to the "class of reasonably based but unsuccessful lawsuits." (BE & K.) Observing that "the genuineness of a grievance does not turn on whether it succeeds," and that legitimate interests may be advanced by the pursuit even of unsuccessful suits, the Court concluded that petitioning may be "genuine both objectively and subjectively" so long as the plaintiff's purpose is to stop conduct reasonably believed to be illegal. (Id.)

Further, the Court questioned the NLRB's reliance on antiunion animus to infer retaliatory motive, as "ill will is not uncommon in litigation." (Id.) The Court, examining the relevant provision of the National Labor Relations Act (NLRA) at 29 U.S.C. 158(a)(1), which parallels the Dills Act language relied on here by IUOE, concludes "there is no suggestion that these

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<sup>4</sup> IUOE's petition to the Sacramento County Superior Court was filed in November 2002.

provisions [of the NLRA] were part of any effort" to prohibit all reasonably based but unsuccessful suits filed with a retaliatory purpose. (Id.)

### Retaliatory Motive

With respect to the assertion of retaliatory motive, IUOE contends that PERB may, under Bill Johnson's, consider the fact that SPB's petition was denied by the Court of Appeal. However, IUOE offers no additional facts in support of the claim that SPB filed its petition with retaliatory motive, except by reference to the facts alleged by IUOE in PERB Case No. SA-CE-1295-S. Thus, IUOE asserts that:

The SPB filed this petition out of anti-union animus to impose upon IUOE the costs of litigation, regardless of the outcome. This petition is simply one piece of a broader course of conduct aimed at harming the Union and interfering with employees' exercise of their rights under the Dills Act. IUOE, and its members, should not have to pay for SPB's frivolous petition.

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.]

In Bill Johnson's, the NLRB relied in large part for motive on direct evidence that agents of the petitioner had made threats to "get even with" and "hurt" the defendants. Here, IUOE asks PERB to rely largely on actions taken by SPB some two or more years earlier, and to infer unlawful motive from that "broader course of conduct" and SPB's more recent actions that assert its legal position in on-going litigation over decisions it made earlier.

Given the holdings of BE & K, it is clear that SPB's lack of success with its recent stay request is not, alone, enough to support an inference of retaliatory motive. IUOE's argument that an inference of unlawful motive should be taken from SPB's earlier conduct is likewise not persuasive.

#### Reasonable Basis

Regarding the "reasonable basis" prong of the Bill Johnson's test, IUOE argues that SPB's petition was frivolous as to the PERB case because, in the absence of exceptional circumstances, parties to an administrative proceeding must wait for the appeal process. (Leedom v. Kyne (1958) 358 U.S. 184; Tex-Cal Land Management v. Agricultural Labor Relations Board (1979) 24 Cal.3d 335.) IUOE further notes that the Dills Act provides, at section 3520, the proper route for appeal of Board decisions. IUOE also asserts, with regard to the Superior Court case, that SPB could have sought relief from the trial court rather than filing the disputed petition. Finally, with regard to the lack of reasonable basis, IUOE cites the ruling of the Court of Appeal denying the petition.

As already noted, SPB's lack of success with its petition is not sufficient to find that its suit was without a reasonable basis under BE & K. As currently written, though the charge asserts that SPB had other outlets to pursue its position at a later time, the charge does not allege specific facts to establish that SPB's purpose in filing the petition lacked a reasonable basis, subjectively or objectively.

Conclusion

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 Third 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 May 27, 2003, I shall dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Les Chisholm  
Regional Director