



**STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD**

PROFESSIONAL ENGINEERS IN
CALIFORNIA GOVERNMENT,

Charging Party,

v.

STATE OF CALIFORNIA (STATE WATER
RESOURCES CONTROL BOARD),

Respondent.

Case No. LA-CE-740-S

PERB Decision No. 2830a-S

May 2, 2023

Appearances: Matthew Hanson, Attorney, for Professional Engineers in California Government; California Department of Human Resources by David M. Villalba, Labor Relations Counsel, for State of California (State Water Resources Control Board).

Before Banks, Chair; Krantz and Paulson, Members.

DECISION

KRANTZ, Member: This case is before the Public Employment Relations Board (PERB) for a second time. In *State of California (State Water Resources Control Board)* (2022) PERB Decision No. 2830-S (SWRCB), we considered exceptions by Charging Party Professional Engineers in California Government (PECG) to a proposed decision of an administrative law judge (ALJ) dismissing the complaint in this matter. We partially reversed the proposed decision and remanded to the ALJ to consider an issue that the proposed decision had left unresolved: whether Respondent State of California (State Water Resources Control Board) (Water Board) failed to provide PECG with sufficient information for it to meaningfully represent Water Board employee Rosalyn Fleming in an investigatory interview, thereby

interfering with protected rights under the Ralph C. Dills Act (Dills Act).¹ (*SWRCB, supra*, PERB Decision No. 2830-S, pp. 15-16.)

Following remand, the ALJ issued a second proposed decision, concluding that the Water Board interfered with protected rights because it did not provide PEGC with sufficient information to allow meaningful representation. However, the proposed decision included only a limited remedy requiring the Water Board to post a notice and to cease and desist from further interference with representational rights. The ALJ rejected PEGC's request for litigation sanctions and did not order the Water Board to rescind a three-month suspension it issued against Fleming.

PEGC has now filed exceptions to the ALJ's second proposed decision. PEGC primarily argues that the ALJ erred by rejecting its request for litigation sanctions and by not rescinding Fleming's suspension. The Water Board filed no exceptions and urges us to affirm the proposed decision. Having reviewed the record and the parties' arguments, we find no cause to order the Water Board to rescind Fleming's suspension. Nor do we award litigation sanctions. However, as explained *post*, we supplement the proposed cease-and-desist order to tailor it to the specific violation found.²

¹ The Dills Act is codified at Government Code section 3512 et seq. All statutory references are to the Government Code.

² Neither party excepted to the ALJ's liability conclusion, and we therefore express no opinion on it. (See PERB Reg. 32300, subd. (e) ["Absent good cause, the Board itself will not consider . . . issues and arguments not raised in the statement of exceptions"]; PERB Regulations are codified at Cal. Code Regs., tit. 8, § 31001 et seq.)

FACTUAL AND PROCEDURAL BACKGROUND

The Water Board is a State employer within the meaning of Dills Act section 3513, subdivision (j). PEGC is a recognized employee organization within the meaning of Dills Act section 3513, subdivision (b), and the exclusive representative of State Bargaining Unit 9, a unit comprised of professional engineer classifications. Fleming, a Water Resources Control Engineer at the Water Board, is a State employee within the meaning of Dills Act section 3513, subdivision (c).

On March 12, 2020, Water Board Equal Employment Opportunity Officer Shyla Hoffman held an investigatory interview with Fleming about an incident that had occurred on January 30, 2020.³ PEGC Labor Relations Counsel Jesse Rodriguez represented Fleming at the interview. There is no longer any dispute that Hoffman provided PEGC with insufficient information to allow meaningful representation.

After Hoffman completed her investigation, she prepared a report concluding that Fleming's conduct on January 30 was unprofessional, rude, and violated the Water Board's workplace violence prevention policy. The Water Board later suspended Fleming for three months, citing alleged misconduct on multiple dates, including January 30.

Fleming appealed her suspension to the State Personnel Board (SPB). After holding an evidentiary hearing, an SPB ALJ issued a proposed decision. The SPB ALJ found that on January 30, Fleming did not violate the workplace violence prevention policy but did engage in insubordination and discourteous treatment. The SPB ALJ

³ All further undesignated date references are to 2020.

upheld Fleming's suspension based on the following findings: (1) In March 2018, the Water Board issued Fleming a three-week suspension for multiple instances of rude conduct and warned her against further similar conduct; (2) On October 29, 2018, Fleming was hostile, discourteous, and insubordinate to a supervisor who met with Fleming about excessive non-work-related discussions during work hours. Most notably, Fleming became angry and told the supervisor, "you will pay a price for this"; (3) In November 2018, the Water Board issued Fleming a counseling memorandum for her conduct on October 29, 2018 and further warned her regarding such behavior; (4) In September 2019, Fleming was rude to a coworker; (5) In October and November 2019, Fleming was willfully disobedient in refusing to comply with deadlines; and (6) Fleming engaged in insubordination and discourteous conduct on January 30.

Fleming did not appeal the SPB proposed decision. In the absence of any appeal, the decision became final.

DISCUSSION

When resolving exceptions to a proposed decision, we apply a de novo standard of review. (*City of San Ramon* (2018) PERB Decision No. 2571-M, p. 5.) In doing so, we review the proposed remedy de novo. (*The Accelerated Schools* (2023) PERB Decision No. 2855, pp. 16-31 (*Accelerated Schools*).)

The Legislature has vested PERB with broad authority to decide what remedies are necessary to effectuate the purposes and policies of the Dills Act and the other acts we enforce. (Dills Act, § 3514.5, 1st par. & subd. (c); *Mt. San Antonio Community College Dist. v. Public Employment Relations Bd.* (1989) 210 Cal.App.3d 178, 189.) PERB remedies must serve the dual purposes of compensating for harms that an

unfair practice causes and deterring further violations. (*County of San Joaquin v. Public Employment Relations Bd.* (2022) 82 Cal.App.5th 1053, 1068; *Accelerated Schools, supra*, PERB Decision No. 2855, p. 16; *Bellflower Unified School District* (2022) PERB Decision No. 2544a, p. 26.)

We apply these standards here to resolve questions relating to rescission, litigation sanctions, and the proper scope of the cease-and-desist order.

I. Rescission

If an employer's unfair practice during an investigatory interview is one material cause of eventual discipline, the proper remedy is to rescind the discipline, purge related records, and make the employee whole, typically while leaving open whether the employer may lawfully re-investigate any alleged misconduct or issue lesser discipline. (*County of San Joaquin (Sheriff's Department)* (2018) PERB Decision No. 2619-M, p. 13 & fn. 13; *Capistrano Unified School District* (2015) PERB Decision No. 2440, pp. 45 & 47-53 (*Capistrano*).) PEGC claims that the Water Board's unfair practice was one material cause of Fleming's three-month suspension. The primary basis for proving that unfair practices in an investigatory interview materially caused discipline is to show that the discipline was based, at least in part, on information or admissions obtained in the interview, or on employee conduct during the interview. (*Capistrano, supra*, PERB Decision No. 2440, p. 47.)

Here, PEGC did not prove causation. While Fleming's conduct on January 30 materially contributed to the Water Board's decision to suspend her, no information or admissions obtained during the unlawful interview constituted such a material cause. Nor did the Water Board materially rely on Fleming's conduct at the interview. We

therefore affirm the ALJ's decision not to order the Water Board to rescind Fleming's suspension or purge related records.

II. Litigation Sanctions

PECG seeks an award of litigation sanctions based on legal work performed in this case. A party seeking such relief normally must meet a standard akin to that under Rule 11 of the Federal Rules of Civil Procedure, showing that its opponent pursued a frivolous argument in bad faith. (*Sacramento City Unified School District* (2020) PERB Decision No. 2749, p. 11.) Because the Water Board raised non-frivolous arguments in this case, PECG cannot meet this standard.⁴

III. Cease-and-Desist Order

The proposed decision directs the Water Board to cease and desist from interfering with representational rights. We supplement that order by directing the Water Board to refrain from relying on: (1) any information or admission obtained during

⁴ In contrast, for a charging party to obtain an award based on litigation fees or costs in a separate proceeding, or based on salaries or other costs of representation or bargaining, it need only show by a preponderance of the evidence that the offending party's conduct caused a harm and that it is reasonably feasible to estimate the financial impact. (*City and County of San Francisco* (2023) PERB Decision No. 2858, p. 15; *Alliance Judy Ivie Burton Technology Academy High et al.* (2022) PERB Decision No. 2809, pp. 14, 31-32 [judicial appeal pending]; *Oxnard Union High School District* (2022) PERB Decision No. 2803, p. 3; *County of Santa Clara* (2021) PERB Decision No. 2799-M, p. 28, fn. 14; *Regents of the University of California* (2021) PERB Decision No. 2755-H, p. 56; *Sacramento City Unified School District, supra*, PERB Decision No. 2749, p. 15; *City and County of San Francisco* (2020) PERB Decision No. 2691-M, p. 51, fn. 32; *City of Palo Alto* (2019) PERB Decision No. 2664-M, p. 8, fn. 6.) Here, the Water Board's unfair practice may have increased PECG's costs before SPB in that the unfair practice included not apprising Fleming it was investigating her for violating its violence prevention policy—an allegation SPB later rejected. However, we do not consider this potential make-whole theory given that PECG has not pursued it and neither party litigated it.

Hoffman's unlawful investigatory interview; or (2) Fleming's conduct during the interview. While the record does not show that the Water Board has so far relied on any such information, admission, or conduct, in order to compensate for the harm caused by the unfair practice it is important to ensure that the Water Board does not do so in the future.

ORDER

Based upon the foregoing factual findings and legal analysis, and the record in this case, the Public Employment Relations Board (PERB) finds that the State of California (State Water Resources Control Board) (Water Board) failed to provide Professional Engineers in California Government (PECG) with sufficient information for it to meaningfully represent a Water Board employee in an investigatory interview, thereby interfering with protected rights under the Ralph C. Dills Act, Government Code Section 3512 et seq. (Dills Act).

Pursuant to Dills Act section 3514.5, subdivision (c), we hereby ORDER that the Water Board and its representatives shall:

A. CEASE AND DESIST FROM:

1. Interfering with bargaining unit employees' right to meaningful representation at investigatory interviews.
2. Interfering with PECG's right to represent bargaining unit employees in a meaningful manner.
3. Relying, for any purpose, on: (a) information or admissions obtained during the investigatory interview the Water Board conducted on March 12, 2020; or (b) employee conduct during that interview.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS TO EFFECTUATE THE POLICIES OF THE DILLS ACT:

1. Within 10 workdays after this decision is no longer subject to appeal, post at all work locations where notices to Water Board employees are posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the Water Board, indicating that the Water Board will comply with the terms of this Order. Such postings shall remain in place for a period of 30 consecutive workdays. The Water Board shall take reasonable steps to ensure that the Notice is not altered, defaced, or covered with any other material. In addition to physically posting this Notice, the Water Board shall post it by electronic message, intranet, internet site, and other electronic means the Water Board uses to communicate with Water Board employees.⁵

2. Notify OGC of the actions the Water Board has taken to follow this Order by providing written reports as directed by OGC and concurrently serving such reports on PEGG.

Chair Banks and Member Paulson joined in this Decision.

⁵ Either party may ask PERB's Office of the General Counsel (OGC) to alter or extend the posting period, require further notice methods, or otherwise supplement or adjust this Order to ensure adequate notice. Upon receipt of such a request, OGC shall solicit input from all parties and, if warranted, provide amended instructions to ensure adequate notice.

**NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD
An Agency of the State of California**



After a hearing in Unfair Practice Case No. LA-CE-704-S, *Professional Engineers in California Government v. State of California (State Water Resources Control Board)*, in which the parties had the right to participate, the Public Employment Relations Board (PERB) has found that the State of California (State Water Resources Control Board) (Water Board) failed to provide Professional Engineers in California Government (PECG) with sufficient information for it to meaningfully represent a Water Board employee in an investigatory interview, thereby interfering with protected rights under the Ralph C. Dills Act, Government Code Section 3512 et seq. (Dills Act).

As a result of this conduct, PERB has ordered us to post this Notice, and we will CEASE AND DESIST FROM:

1. Interfering with bargaining unit employees' right to meaningful representation at investigatory interviews.
2. Interfering with PECG's right to represent bargaining unit employees in a meaningful manner.
3. Relying, for any purpose, on: (a) information or admissions obtained during the investigatory interview we conducted on March 12, 2020; or (b) employee conduct during that interview.

Dated: _____

STATE OF CALIFORNIA (STATE WATER
RESOURCES CONTROL BOARD)

By: _____

Authorized Agent

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR AT LEAST 30 CONSECUTIVE WORKDAYS FROM THE DATE OF POSTING AND MUST NOT BE REDUCED IN SIZE, DEFACED, ALTERED OR COVERED WITH ANY OTHER MATERIAL.