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. 2830-S August 10, 2022

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 Shiners, Krantz, and Paulson, Members.

DECISION

KRANTZ, Member: This case is before the Public Employment Relations Board (PERB) on exceptions filed by Professional Engineers in California Government (PECG) to a proposed decision of an administrative law judge (ALJ). In the underlying charge, PECG asserted that the State of California, State Water Resources Control Board (Water Board) refused to provide PECG with information about alleged wrongdoing by a PECG-represented Water Board employee, Rosalyn Fleming. PECG claimed that, without this information, it was unable to meaningfully represent Fleming in an investigatory interview. The complaint alleges that the Water Board refused to provide this information on the date of the investigatory interview, March 12, 2020, thereby failing to meet and confer in good faith with PECG and interfering with union

and employee rights protected under the Ralph C. Dills Act (Dills Act).[1]

The ALJ found that the Water Board established a statute of limitations defense to PECG's bad faith bargaining claim. The ALJ then dismissed the entire complaint, treating the interference claims as purely derivative of the bad faith bargaining claim. However, for the reasons explained below, the ALJ should have analyzed the interference claims as independent unfair practice allegations. We therefore reverse the proposed decision in part and remand to the ALJ to determine whether the Water Board interfered with protected rights on March 12, 2020.[2]

FACTUAL AND PROCEDURAL BACKGROUND[3]

The Water Board is a State employer within the meaning of Dills Act section 3513, subdivision (j). PECG 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). At all relevant times, Fleming worked with Environmental Scientist Emma McCorkle. Senior

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

[2] No party has excepted to the ALJ's dismissal of the bad faith bargaining claim, 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.)

[3] Neither party excepted to the ALJ's factual findings, and our factual description draws largely from the ALJ's proposed decision.

Environmental Scientist Nadim Shukry-Zeywar supervised Fleming and McCorkle.

I. The January 2020 Incident

On January 30, 2020, Fleming went to McCorkle's cubicle to discuss a work-related conference that required travel. Shukry-Zeywar had directed McCorkle, but not Fleming, to attend the conference.[4] Fleming and McCorkle dispute the details of their discussion, but we need not resolve that dispute to resolve this case. After the encounter, Fleming filed an internal complaint alleging that Shukry-Zeywar discriminated based on race and age in permitting McCorkle to attend the conference while not permitting Fleming to attend. The following day, McCorkle filed an internal complaint alleging that during the January 30 encounter, Fleming acted aggressively, blocked McCorkle's egress from her cubicle, and ignored her request that Fleming raise her concerns with Shukry-Zeywar.

On February 6, Shukry-Zeywar e-mailed Fleming, in part to explain why he selected McCorkle to attend the conference. The e-mail continued as follows:

> "Also, it was brought to my attention that on January 30, 2020, you approached Emma McCorkle twice at her cubicle and demanded that she forward you the conference information. Although, she provided you with the information, she wasn't comfortable doing so and asked you several times to get the information from me. In the future, please refrain from contacting Emma regarding any topic, and if you have any work-related questions make sure you direct them to me."

[4] All further dates refer to 2020, except where otherwise indicated.

II. Events Leading up to Fleming's Investigative Interview

The Water Board assigned Equal Employment Opportunity Officer Shyla Hoffman to investigate the two complaints. Fleming first learned of Hoffman's investigation on February 6, when Fleming received an e-mail from Hoffman. In the e-mail, Hoffman stated that on February 11, she would interview Fleming "first as a Complainant and for the second part as a Respondent." Hoffman's e-mail also informed Fleming that she had the right to have a representative at the interview, and Fleming responded that she planned to have a representative accompany her. PECG assigned Labor Relations Counsel Jesse Rodriguez as Fleming's representative. Rodriguez advised Hoffman that he was unavailable on February 11, and the Water Board accordingly postponed the interview.

In an e-mail thread that began February 6, Fleming asked Hoffman: "Please provide the details of the allegations made against me." Fleming copied Rodriguez on this e-mail. Hoffman responded to Fleming and Rodriguez three minutes later, stating: "You are a complainant for part of the interview, so I am assuming you have most of the details regarding the investigation. I will not be providing further details of allegations made against you until we meet." Still on February 6, Rodriguez replied to Hoffman by e-mail, as follows:

> "The department has an obligation 'to provide sufficient information regarding alleged wrongdoing to enable a union representative to represent an employee in a meaningful manner during an investigatory interview.' See attached.[5]

[5] Rodriguez attached to his e-mail a copy of *Contra Costa Community College District* (2019) PERB Decision No. 2652 (*Contra Costa*), which discusses an employer's obligation to provide information sufficient to allow a union to provide

> The department is violating this right. Therefore, PECG objects to the holding of an investigatory interview until this violation is cured."

In this e-mail reply, Rodriguez copied Water Board Labor Relations Officer Audra Debenedetti and her supervisor, Lucia Neri.

On February 7, Hoffman replied to Rodriguez, copying Debenedetti and Neri: "Ms. Fleming should have all the details regarding the complaint since she is also a Complainant, I am not sure what else you need. Additionally, you have submitted this case [*Contra Costa*, *supra*, PERB Decision No. 2652] to my office several times and I have previously advised you that we are not obligated to comply with your request. I will schedule an interview for Ms. Fleming and she will be expected to participate."

Rodriguez then e-mailed Debenedetti and Neri, asking to discuss PECG's request and Hoffman's response. Debenedetti and Rodriguez spoke a few days later. In this conversation, Rodriguez again asked about the nature of the allegations against Fleming, and he again referenced the *Contra Costa* decision. Debenedetti told Rodriguez the Water Board did not have to provide such information.

On February 28, Hoffman e-mailed Fleming and Rodriguez, stating that she was rescheduling the interview to March 11 by telephone conference. On March 10, Rodriguez responded by e-mail, stating in relevant part: "PECG, once again, requests information regarding the allegations against Ms. Fleming prior to tomorrow's investigatory interview. Without this information, our ability to represent her effectively will be significantly hampered." Still on March 10, Hoffman responded by e-mail but did not acknowledge or reference PECG's renewed request and instead indicated only

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meaningful representation at an investigatory interview.

that Hoffman would move the interview to March 12.

III. The Investigative Interview

When Hoffman convened the interview on March 12, she first instructed Fleming that she had to answer all of Hoffman's questions truthfully. Hoffman testified that she next read aloud McCorkle's allegations against Fleming and asked Fleming for her response. According to Hoffman, she "essentially . . . asked [Fleming] if she was in Ms. McCorkle's cubicle blocking the exit or entry and if she stayed there until she had received the [travel document]." Hoffman did not affirmatively offer an opportunity for Fleming and Rodriguez to take a break and meet privately, but she testified that she would have allowed a break upon request.

Fleming and Rodriguez both dispute Hoffman's account of the interview. According to Fleming, Hoffman never explained the allegations against her during the interview, although by the end of the interview she understood the gist of the complaint. Fleming characterized Hoffman's questions as deceptive and designed to get Fleming to incriminate herself. Rodriguez similarly testified that Hoffman neither explained McCorkle's allegations nor said that the Water Board considered its investigation to involve alleged workplace violence. Rodriguez denied that Hoffman indicated what allegations she was investigating prior to questioning Fleming. Rodriguez described Hoffman's questions as "piecemeal," "unorthodox," and "disjointed," leaving Fleming and Rodriguez to have to piece together the allegations. Neither Fleming nor Rodriguez requested a break during the interview.[6]

[6] The ALJ did not resolve the conflicting evidence as to what, if anything, Hoffman said regarding the nature of the allegations before she began questioning

After concluding her investigation, Hoffman prepared an undated report finding that Fleming's conduct was unprofessional, rude, and violated the Water Board's workplace violence prevention policy. Hoffman forwarded her findings to Water Board management for further action. On August 25, Hoffman e-mailed Fleming a one-page Findings Memorandum, which notified Fleming of Hoffman's findings and that she had referred the matter to management for further handling.[7]

IV. Fleming's Discipline

On September 20, the Water Board issued Fleming a Notice of Adverse Action (NOAA) based on Hoffman's findings regarding Fleming's conduct in January 2020, as well as other allegations that fell outside of Hoffman's investigation. Regarding the January 2020 incident, the NOAA stated that Fleming's behavior was intimidating, unprofessional, and violated the Water Board's workplace violence prevention policy.

V. PECG's Unfair Practice Charge

PECG filed this charge on September 3, 2020. The Water Board did not respond to the charge. In June 2021, Rodriguez wrote to PERB's Office of the General Counsel (OGC) and stated that, pursuant to telephone discussions between Rodriguez and OGC, PECG was modifying its charge by removing reference to certain allegations. The day after PECG filed this modification, OGC issued the complaint in this matter. We discuss these events at greater length, *post*.

Fleming. As we discuss *post*, the ALJ should resolve this dispute on remand.

[7] At some point, Hoffman also notified Fleming that she concluded Fleming's discrimination complaint was unsubstantiated.

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.) For the following reasons, we partially reverse and remand this matter.

I. Applicable Law

A. Interference with Representational Rights

A union has the right to represent an employee it exclusively represents in an investigatory interview, and the employee has a corresponding right to union representation. (*Contra Costa*, *supra*, PERB Decision No. 2652, p. 7; *Capistrano Unified School District* (2015) PERB Decision No. 2440, pp. 10-14; *Sonoma County Superior Court* (2015) PERB Decision No. 2409-C, pp. 13-14.) Under the Dills Act and the other labor relations statutes we enforce, an employer interferes with union and employee representational rights if it does not allow meaningful representation during an investigative interview. (§ 3519, subds. (a) & (b); *Contra Costa*, *supra*, PERB Decision No. 2652, p. 26, citing *State of California (Department of Corrections)* (1998) PERB Decision No. 1297-S, adopting proposed decision at p. 12.)

As part of these protected rights, the union and the represented employee have the right to receive information about the nature of any alleged wrongdoing sufficiently in advance of the investigative interview to allow for consultation before, and thus meaningful representation during, the interview. (*Contra Costa*, *supra*, PERB Decision No. 2652, pp. 26-30.) The employer must provide more than merely a vague summary such as “a vehicle accident you were involved in on [a specific date],” or “insubordination and/or sabotaging of the [employer’s] mission.” (*Id*. at p. 27.) After

receiving sufficient information, the union and employee have the right to consult for an amount of time that is reasonable given the nature of the allegations and the information provided. (*Id*. at pp. 29-30.) Assessing such issues is typically fact intensive. (*Id*. at p. 30.)

Here, for instance, there is no dispute that on February 6, Shukry-Zeywar e-mailed Fleming as follows: "[Y]ou approached Emma McCorkle twice at her cubicle and demanded that she forward you the conference information. Although, she provided you with the information, she wasn't comfortable doing so and asked you several times to get the information from me." This e-mail, standing alone, did not provide Fleming with notice that she had allegedly violated the Water Board's workplace violence prevention policy, much less information as to how she was alleged to have done so.[8]

B. Bad Faith Bargaining By Refusing to Provide Necessary Information

In addition to prohibiting interference with protected rights, the Dills Act also prohibits an employer from failing or refusing to meet and confer in good faith. (§ 3519, subd. (c).) Pursuant to this duty, an employer must normally provide an exclusive representative with "all information that is necessary and relevant to its right

[8] The Water Board cites *Pacific Telephone and Telegraph Co.* (1982) 262 NLRB 1048 (*Pacific Telephone*) and argues that an employer need only provide "a general statement as to the subject matter of the interview" in advance of an investigatory interview. In *Contra Costa*, however, we specifically noted that PERB precedent protects representational rights to a greater extent than National Labor Relations Board precedent, and that we disagree with *Pacific Telephone* to the extent it arguably allows an employer to provide very general notice of alleged misconduct. (*Contra Costa*, *supra*, PERB Decision No. 2652, p. 27.) Instead, "our touchstone is what is necessary to allow meaningful representation." (*Ibid*.)

to represent bargaining unit employees regarding mandatory subjects of bargaining." (*City and County of San Francisco* (2020) PERB Decision No. 2698-M, p. 6.) Because discipline is a mandatory subject of bargaining, information pertaining to actual or potential discipline is presumptively relevant, even if the only contemplated disciplinary forum is extra-contractual.[9] (*Contra Costa*, *supra*, PERB Decision No. 2652, p. 9.) Thus, while a charging party can allege a state employer violated Dills Act section 3519, subdivisions (a) and (b) by denying a request for sufficient information to allow meaningful representation at an investigatory interview, a charging party can independently allege the employer violated its duty to meet and confer in good faith.

In this context, bad faith bargaining and interference can be alleged as independent claims, because proving one does not necessarily prove the other.[10] For instance, because an investigatory interview can occur with minimal lead time (*Contra*

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[9] In *Contra Costa*, *supra*, PERB Decision No. 2652, Member Shiners disagreed that an exclusive representative has a statutory right to request and receive information from the employer solely for the purpose of representing an employee in an extra-contractual disciplinary appeal. (*Id*. at pp. 34-36 (conc. opn. of Shiners, M.).) Because neither party excepted to the ALJ's dismissal of the bad faith bargaining allegation, he expresses no opinion on whether the Water Board's refusal to provide the requested information violated Dills Act section 3519, subdivision (c).

[10] If a charge or complaint alleges interference based upon the same conduct giving rise to another claim, the interference claim is independent if it can be established without the other claim being established. (*County of San Joaquin* (2021) PERB Decision No. 2761-M, p. 18 [judicial appeal pending] (*San Joaquin*).) In contrast, if it is impossible to establish interference without establishing the other claim, then the interference claim is a derivative one. (*Ibid*.; *County of Santa Clara* (2021) PERB Order No. Ad-485-M, p. 9.) In cases in which a charging party accuses an employer of providing too little information to allow meaningful representation, interference with representational rights is independent, as it can be established even in the absence of bad faith bargaining or any other violation.

Costa, *supra*, PERB Decision No. 2652, p. 31, fn. 19), there may be no information request until just before or even after the interview begins, and such a request may be in the form of an employee's question, e.g., "what are the accusations against me?" Failing to answer that question sufficiently can violate Dills Act section 3519, subdivisions (a) and (b) without violating subdivision (c). In other cases, an employer may schedule an investigatory interview on a slower track, as in this case. In such an instance, an employer may violate its duty to meet and confer in good faith if it refuses, without an adequate basis, a union's information request. And while failure to provide information always constitutes at least derivative interference with protected rights, it can also constitute an independent interference violation, for instance if it leaves a union and employee without sufficient information to allow meaningful representation at an investigatory interview.[11]

II. Application to This Case

On February 7, the Water Board repeatedly stated that it need not comply with the obligations explained in *Contra Costa*, *supra*, PERB Decision No. 2652. However, February 7 was more than six months before PECG filed this charge, and PECG has

[11] In *Contra Costa*, *supra*, PERB Decision No. 2652, the union did not allege that the employer interfered with representational rights by refusing to provide sufficient information about the accusations to allow meaningful representation. (*Id*. at p. 30.) Rather, its only claim was for failure to meet and confer in good faith based on the employer's refusal to provide copies of written complaints against two accused employees. (*Ibid*.) We found no right to obtain such complaints at the investigatory interview stage, though we noted that after the investigatory interview stage and in advance of any pre-deprivation hearing pursuant to *Skelly v. State Personnel Bd.* (1975) 15 Cal.3d 194, the employer must normally work with the union on any necessary redactions or other privacy accommodations and normally must provide such records. (*Contra Costa*, *supra*, pp. 9, 17 & 25.)

not at any stage of this case asserted any exception to the six-month statute of limitations set forth in Dills Act section 3514.5. Indeed, the complaint alleges violations on March 12, and PECG's exceptions do not ask us to consider any potential violations before that date. PECG's exceptions also abandon any claim under Dills Act section 3519, subdivision (c). Accordingly, we address only the allegation that the Water Board interfered with union and employee representational rights on March 12 by failing to afford an opportunity for meaningful representation. Before discussing that allegation, however, we first consider whether the case processing history in this case precludes any potential finding of liability.

A. Case Processing History

PECG summarized its charge in the opening paragraph, alleging that the Water Board violated Dills Act sections 3515 and 3515.5 when it refused to provide PECG and Fleming sufficient information to permit PECG to meaningfully represent her at an investigatory interview. Sections 3515 and 3515.5, along with section 3519, subdivisions (a) and (b), give rise to the protected union and employee representational rights discussed above. On June 3, 2021, Rodriguez wrote OGC as follows: "Pursuant to our telephone discussions on Friday, May 28, 2021, and Thursday, June 3, 2021, Complainant PECG is modifying its Unfair Practice Charge to remove reference to allegations concerning violations of section 3515 and 3515.5 of the Dills Act, without prejudice." This partial withdrawal did not mention the Dills Act prohibitions on interference found at section 3519, subdivisions (a) and (b). One day after receiving the partial withdrawal, OGC issued a complaint alleging the Water Board violated those provisions, as well as section 3519, subdivision (c).

It is unclear from the record why OGC solicited a partial withdrawal. If OGC believed the subdivision (a) and (b) allegations were solely derivative of the bad faith bargaining allegation, this belief was erroneous because on the facts alleged in PECG's charge, interference with representational rights can be established independently from a bad faith bargaining violation. (See *San Joaquin*, *supra*, PERB Decision No. 2761-M, pp. 18-22 [complaint alleges independent interference violation unless liability for interference cannot be established independently of another violation].)[12]

In any event, the parties did not treat the partial withdrawal as curtailing PECG's ability to litigate its interference allegations. The parties continued litigating whether the Water Board interfered with representational rights by failing to allow meaningful representation on March 12. For instance, in its opening statement, PECG specifically argued that the Water Board's failure to provide sufficient information regarding Fleming's alleged wrongdoing prevented it from representing Fleming in a meaningful manner at her investigatory interview. The Water Board did not object to PECG treating the complaint as asserting interference with representational rights by failing to allow meaningful representation on March 12. Indeed, the Water Board largely followed the same framing. For example, in its opening statement, the Water Board specifically

[12] OGC must issue a complaint based on all legal theories for which the alleged facts state a prima facie case. (*San Jose/Evergreen Federation of Teachers, AFT Local 6157, and American Federation of Teachers, AFL-CIO (Crawford et al.)* (2020) PERB Decision No. 2744, p. 23; *Hartnell Community College District* (2015) PERB Decision No. 2452, pp. 53-54.) Thus, even if PECG did not assert a bad faith bargaining allegation, OGC had to consider that theory if it believed the facts presented such a claim. However, that does not explain why OGC would solicit the above-described partial withdrawal.

argued that the evidence would show that it "fully complied with the Dills Act and provided Ms. Fleming and the Union with all of the information they needed to prepare for and to participate in the investigative interview." The parties proceeded to litigate this issue, particularly disputing whether Hoffman, at the outset of the March 12 investigatory interview, provided sufficient details about the allegations that PECG could have requested a break and thereafter adequately represented Fleming. Each party examined and cross-examined witnesses on that question.

Ultimately, it is appropriate to consider independent interference claims for two reasons. First, the complaint adequately alleged both bad faith bargaining and independent interference claims. In the alternative, even were we to find that PECG withdrew without prejudice its independent interference allegations, we would still consider those interference claims under the unalleged violation doctrine given that: (1) the Water Board had adequate notice and opportunity to defend against these claims based on PECG's opening statement; (2) the acts or omissions at issue are intimately related to the subject matter of the complaint and are part of the same course of conduct; (3) the parties fully litigated the allegations; and (4) the parties had the opportunity to examine and cross-examine witnesses regarding the acts or omissions at issue.[13] (*San Joaquin*, *supra*, PERB Decision No. 2761-M, p. 22.)

The Water Board also rests a procedural defense on the words "prior to" in the complaint's central allegation: "On March 12, 2020, Respondent failed and refused to

[13] Although we believe the interference allegations were fully litigated, in an abundance of caution we direct the ALJ to offer the Water Board an opportunity to reopen the record. If the Water Board chooses to do so, the ALJ shall afford both parties an opportunity to present further evidence.

provide the information described in paragraph 4 ***prior to*** an investigatory interview of Fleming." (Emphasis supplied.) The Water Board asks us to read this phrase as strictly focusing on what occurred only before Hoffman met with Rodriguez and Fleming. But determining what occurred at the outset of the interview is our only means of evaluating the Water Board's defense that Hoffman provided PECG and Fleming with sufficient information and an (unstated) opportunity to consult before questioning commenced. The Water Board nonetheless claims the words "prior to" prevent us from considering whether Hoffman conducted the interview without providing sufficient information. These notions depart significantly from notice pleading principles, and we reject them. (*San Joaquin*, *supra*, PERB Decision No. 2761-M, p. 21.) The words "prior to" do not preclude us from analyzing evidence regarding the outset of the investigatory interview to determine whether Hoffman provided sufficient information and whether PECG could then have meaningfully represented Fleming after taking a break to consult with her.

B. Resolving the Independent Interference Allegations

The ALJ found that the Water Board established a statute of limitations defense to PECG's bad faith bargaining claim.[14] The ALJ then dismissed the entire complaint, treating the interference claims as purely derivative. We reverse and remand for consideration of the independent interference allegations discussed above.

As noted, determining whether an employer failed to allow meaningful representation involves a fact-intensive inquiry. Here, that inquiry may turn, at least in part, on a credibility determination the ALJ left unresolved. Specifically, Hoffman

[14] We express no opinion on that issue, as PECG has abandoned the bad faith bargaining claim that OGC pleaded in the complaint.

testified that at the outset of the investigative interview she read aloud McCorkle's allegations against Fleming and would have permitted Rodriguez and Fleming to take a break to consult before Fleming provided her side of the story. In their testimony, Rodriguez and Fleming disputed that Hoffman read McCorkle's allegations to them or otherwise informed them of those allegations before questioning began. Liability thus could turn, in part, on whether the ALJ credits Hoffman over Rodriguez and Fleming. (*Contra Costa*, *supra*, PERB Decision No. 2652, pp. 29-30 [timing and substance of employer's disclosures, together with amount of time thereafter afforded for consultation, are relevant considerations].) On remand, therefore, the ALJ should consider witness credibility, among other relevant record components, in determining whether the Water Board provided PECG and Fleming with the opportunity for meaningful representation during the March 12, 2020 investigative interview.

ORDER

The Government Code section 3519, subdivision (c) allegation in Case No. LA-CE-740-S is DISMISSED. The Government Code section 3519, subdivisions (a) and (b) allegations are REMANDED to the Division of Administrative Law for further proceedings consistent with this Decision.

Members Shiners and Paulson joined in this Decision.