

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



MARY KATHERINE CUPP,)
)
Charging Party,) Case No. S-CO-59-S
)
v.) PERB Decision No. 612-S
)
AMERICAN FEDERATION OF STATE,) February 6, 1937
COUNTY AND MUNICIPAL EMPLOYEES,)
LOCAL 2620, AFL-CIO,)
)
Respondent.)
_____)

Appearances: Mary Katherine Cupp, on her own behalf; Leonard Potash, Representative for American Federation of State, County and Municipal Employees, Local 2620, AFL-CIO.

Before Hesse, Chairperson; Porter and Craib, Members.

DECISION

HESSE, Chairperson: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Charging Party Mary Katherine Cupp of a regional attorney's dismissal, attached hereto, of her unfair practice charge against the American Federation of State, County and Municipal Employees, Local 2620, AFL-CIO (AFSCME). In her charge, Cupp alleged that AFSCME violated the State Employer-Employee Relations Act (SEERA or Act) section 3519.5(b)¹ by: (1)

¹SEERA is codified at Government Code section 3512 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code. Section 3519 states, in pertinent part:

It shall be unlawful for an employee

overcharging her on her monthly membership dues for two months in which she worked part-time; (2) failing to keep financial transaction records as required by SEERA section 3515.7(e), infra; (3) refusing to file grievances on Cupp's behalf; (4) failing to provide sufficient training for AFSCME stewards; (5) failing to negotiate improved wages; and (6) failing to establish reasonable procedures for members to receive fair share fee refunds.

The regional attorney dismissed the entire charge on the grounds that it failed to state a prima facie case in that no evidence was presented that AFSCME breached the duty of fair representation, the failure to process grievances charge is time-barred, and the proper manner to seek compliance with SEERA section 3515.7(e) is by filing a petition to compel compliance, not by filing an unfair practice charge.

Cupp appealed the regional attorney's dismissal of three of her allegations: the overcharging of dues; the failure to maintain adequate financial records; and AFSCME's alleged failure to process Cupp's grievance.

organization to:

.....

(b) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.

We have reviewed the regional attorney's dismissal in light of Cupp's appeal and AFSCME's response thereto, and we find his determination should be affirmed and adopted consistent with the discussion below. However, we refer Cupp's complaint regarding the insufficiency of AFSCME's financial statement to the regional office, to be processed as a Petition to Compel Compliance.

DISCUSSION

Overcharging of Dues

The regional attorney analyzed this allegation as a breach of the duty of fair representation. To establish a prima facie violation of such a breach, charging party must allege facts that would demonstrate the employee organization has acted arbitrarily, discriminatorily, or in bad faith. The regional attorney found that Charging Party failed to state a prima facie violation of the Act, and based this conclusion solely on a duty of fair representation analysis. However, Cupp has alleged a violation of SEERA section 3519.5(b), which encompasses interference and reprisal as well as the duty of fair representation. Since the charge does not contain allegations that would support a claim of interference or reprisal, the regional attorney's failure to consider these theories is non-prejudicial to Charging Party.

The dues AFSCME charges its members are a set percentage of the members' gross monthly income. Based on the employer's report, the State Controller deducts that percentage from the

employee's paycheck each month. In Cupp's case, the employer apparently erred in authorizing the payment of her full salary for October and November 1985, while she was on partial leave. Since Cupp received full-salary paychecks, the full amount of dues was deducted, and AFSCME was sent a copy of the employer's Payroll Deduction Report. Cupp notified AFSCME of the error. She does not dispute the regional attorney's statement that AFSCME made three attempts to reach her. AFSCME later followed up with a letter to Cupp, explaining the procedure for the dues deduction and asking Cupp for more information, since the only official documents AFSCME had relating to the dues deduction were the employer's reports that showed Cupp received full wages. At the time Cupp filed her unfair practice charge, she had not yet presented documentation to AFSCME that would support her claim. Based on these facts, Cupp has failed to sufficiently show AFSCME acted in an arbitrary, discriminatory, or bad faith manner.

Typically, although not necessarily in all cases, the manner in which a union calculates and assesses its dues for its members is an internal union matter. In her charge, Cupp claims that AFSCME breached its duty to fairly represent her by charging dues in excess of the amount charged to other members. However, she has failed to allege facts reflecting that any overcharge was the result of conduct by AFSCME that was even arguably arbitrary, discriminatory, or in bad faith. Instead, as noted above, any overcharging appears to be the

result of a chain of events triggered by the inadvertent payment of a full salary to Cupp for October and November of 1985, and not the result of any improper conduct by AFSCME.

Financial Records

Cupp alleges that AFSCME violated the Act by not meeting the requirements of SEERA section 3515.7(e)³ by failing to make available to employees a record of AFSCME's financial transactions which are certified by the AFSCME president, treasurer, or comparable officer. Cupp claims the union is required to mail the financial statement to each employee, and that she did not receive a statement for 1984 until she made a request. In addition, she asserts the 1984 financial statement

²PERB's determination that Cupp failed to state facts showing a breach of AFSCME's duty of fair representation does not preclude Cupp from other means of seeking a refund. However, PERB is not the proper forum in which to seek such relief.

³SEERA section 3515.7(e) provides that:

Every recognized employee organization which has agreed to a fair share fee provision shall keep an adequate itemized record of its financial transactions and shall make available annually, to the board and to the employees in the unit, within 90 days after the end of its fiscal year, a detailed written financial report thereof in the form of a balance sheet and an operating statement, certified as to accuracy by its president and treasurer or comparable officers. In the event of failure of compliance with this section; any employee in the unit may petition the board for an order compelling this compliance; or the board may issue a compliance order on its own motion.

was not properly certified.

The regional attorney stated that, even if Cupp's claims were valid, violations of SEERA section 3515.7(e) could not be remedied through the unfair practice charge process. Relying on Service Employees International Union, Local 99 (Kimmett) (1979) PERB Decision No. 106, which held that the appropriate procedure for remedying such a violation is to file a petition to compel compliance, the regional attorney dismissed the charge by finding that Cupp failed to state a prima facie case.

The remedy for faulty financial records is to file a petition compelling compliance instead of filing an unfair practice charge. Nevertheless, we find the regional attorney did not treat this allegation properly. Rather than forwarding Cupp's complaint to the regional office for further action, he dismissed the allegation and suggested that Cupp file a petition to compel compliance pursuant to SEERA section 3515.7(e). PERB Regulation 32125(e)⁴ implements that section.

⁴PERB Regulations are codified at California Administrative Code, title 8, section 31001 et seq. PERB Regulation 32125(e) provides:

A petition to compel compliance with Government Code section 3546.5 or 3587 may be filed by any employee belonging to the organization. A petition to compel compliance with Government Code section 3515.7(e) may be filed by any employee in the unit. Such petition shall be filed in the regional office and shall include the names, addresses and telephone numbers of the exclusive representative, the employer, and the petitioning party.

The main requirement to invoke this regulation is that an employee in the unit notify PERB that the union's financial record is inadequate. Cupp has done this, and the regional office should have treated her complaint as a petition to compel compliance. We, therefore, transfer Cupp's complaint to the Sacramento Regional Office with instructions to process it in accordance with this discussion.

Failure to Process Grievances

In her charge, Cupp alleged that AFSCME refused to process grievances on her behalf. The specific incidents she recited occurred more than six months prior to the March 3, 1986 filing of Cupp's unfair practice charge.⁵ The regional attorney stated in his April 10 warning letter to Cupp that she "acknowledge[d] that [she had] not requested representation from AFSCME in the six months immediately preceding the filing of [her] charge on March 3, 1986." Although given an opportunity to do so, Cupp did not respond to the regional attorney's conclusion and this allegation was dismissed. The

⁵SEERA section 3514.5(a) provides, in pertinent part:

Any employee . . . shall have the right to file an unfair practice charge, except that the board shall not do either of the following: (1) issue a complaint in respect of any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge; (2) . . . However, when the charging party demonstrates that resort to contract grievance procedure would be futile, exhaustion shall not be necessary. . . .

regional attorney also found that there was no allegation of a "continuing violation," nor had it become "futile" to request AFSCME's representation. SEERA section 3514.5(a) prohibits PERB from issuing a complaint based upon conduct occurring more than six months prior to the filing of the unfair practice charge. Thus, the regional attorney properly dismissed Cupp's allegation.

On appeal, Cupp states that she did request that the union file a grievance for the over-collection of dues, and that it was AFSCME's failure to grieve that "triggered this complaint." Cupp does not claim that she informed the regional attorney that she had requested representation in this matter, nor did she amend her charge after receiving the warning letter. This is an allegation not raised with the regional attorney, and it may not be raised for the first time on appeal. The regional attorney's dismissal of this allegation is affirmed.

Other Allegations Dismissed

The balance of Cupp's appeal chastises the regional attorney for siding with "the power," i.e., AFSCME, and claims the dismissal is unfair to union members. Cupp fails to specify any errors made by the regional attorney. PERB Regulation 32360(c) states:

The appeal must be in writing and must state the specific issue(s) of procedure, fact, law or rationale that is appealed and state the grounds for the appeal.

Thus, the remainder of Cupp's appeal is insufficient to raise further issues before this Board.

ORDER

Based on the foregoing, we AFFIRM the regional attorney's dismissal. We also refer Cupp's complaint regarding the sufficiency of AFSCME's financial records to the Sacramento Regional Office to be processed as a Petition to Compel Compliance.

Members Porter and Craib joined in this decision.

PUBLIC EMPLOYMENT RELATIONS BOARD

Headquarters Office
1031 18th Street
Sacramento, California 95814
(916) 322-3088



April 18, 1986

Mary Katherine Cupp

Re: Mary Katherine Cupp v. American Federation of State, County
and Municipal Employees, Local 2620, AFL-CIO.
Case No. S-CO-59-S

Dear Ms. Cupp:

On March 3, 1986, you filed the above-captioned charge alleging that the American Federation of State, County and Municipal Employees, Local 2620, AFL-CIO (AFSCME) violated section 3519.5(b) of the State Employer-Employee Relations Act (SEERA or Act) by (1) overcharging you on your monthly dues for the months October and November 1985; (2) failing to keep a certified itemized financial record as required by section 3515.7(e) of the Act; (3) failing to represent you in grievances against the State of California, Department of Developmental Services (State or Employer); (4) failing to provide proper steward training; (5) failing to negotiate improved wages; and (6) failing to have reasonable procedures for fair share reimbursement to employees.

I indicated to you in my letter dated April 10, 1986, that the above-referenced charge did not state a prima facie case, and that unless you amended the charge to state a prima facie case, or withdrew it prior to April 11, 1986, it would be dismissed. More specifically, I informed you that if there were any factual inaccuracies or additional facts which would correct the deficiencies explained in that letter, you should amend the charge accordingly.

I have not received either a request for withdrawal or an amended charge and am therefore dismissing this charge based on the facts and reasons contained in my April 10, 1986, letter which is attached as Exhibit 1.

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 (California Administrative Code; title 8. section 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 (5:00 p.m.) on May 8. 1986. or sent by telegraph, certified or Express United States mail postmarked not later than May 8. 1986 (section 32135). The Board's address is:

Public Employment Relations Board
1031 18th Street
Sacramento. CA 95814

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 calendar days following the date of service of the appeal (section 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 section 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 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 (section 32132).

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Final Date

If no appeal is filed within the specified time limits, the dismissal will become final when the time limits have expired.

Sincerely,

JEFFREY SLOAN
Acting General Counsel

By _____
Michael Terris
Staff Attorney

Attachment

4530d

PUBLIC EMPLOYMENT RELATIONS BOARD

HEADQUARTERS OFFICE
1031 18TH STREET
SACRAMENTO, CALIFORNIA 95814
(916) 322-3088



April 10, 1986

Mary Katherine Cupp

Re: Mary Katherine Cupp v. American Federation of State,
County and Municipal Employees, Local 2620, AFL-CIO,
Case No. S-CO-59-S

Dear Ms. Cupp:

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Overcharge of Monthly Dues and Failure to Reimburse

The investigation revealed the following facts. During the months of October and November 1985, you were required for personal reasons to take an unpaid leave of absence and, accordingly, you worked approximately 11 days in each month. However, for the month of October, you received, by mail, a paycheck for your regular monthly salary. On your return to work in late November, you were told by the Employer that the check had been issued in error and that you were required to reimburse the Employer. When you subsequently reimbursed the Employer, you did not receive a revised pay stub. On December 1, 1985, you received your November paycheck. However, the check was again in error, paying you in full, even though you were on unpaid leave status for approximately one-half of the month. On receipt of the check, you returned it and requested a payroll correction. You have a pay stub reflecting the subsequent correction.

For the months of October and November 1985, AFSCME assessed you and had withdrawn through payroll deduction, full monthly

EXHIBIT I

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dues. AFSCME charges members a fixed percentage of the member's gross monthly salary. You contend that the assessment by AFSCME was improper because you did not actually receive your full gross salary for those months.

On or about December 10, 1985, after realizing that you had been fully assessed on your dues by AFSCME, you telephoned AFSCME, spoke with a secretary, and requested reimbursement for the overpayment. According to you, AFSCME never returned your telephone call. AFSCME acknowledges that it received your phone message but claims it was unsuccessful in attempting to return your call on three separate occasions. On March 12, 1986, after the above-captioned charge was filed, AFSCME sent you a letter explaining its dues deduction procedures and the amounts deducted for the months of October and November. The letter explained that the dues were computed from the State Controller's monthly payroll deduction reports and that the reports for the months of October and November indicated that you received your full salary. The letter requested that if you believed that there was a discrepancy in the Controller's reported figures, you should forward a copy of your payroll check stubs to AFSCME for review and that, if there was indeed an error, a refund would be made.

In phone conversations with this office you have stated that you have been unable to obtain from the State a copy of your October paycheck stub and that you consequently have been unable to forward it to AFSCME for review. On March 14, 1986, you requested that an AFSCME shop steward, Harry Gaskins, assist you in obtaining the pay stub from the Employer. To date you have not received it.

Based on the foregoing facts, the allegation that AFSCME has violated SEERA by overcharging you on your monthly dues for the months of October and November 1985 fails to state a prima facie violation of the Act. To establish a prima facie violation for a breach of the duty of fair representation, the Charging Party must set forth a clear and concise statement of the facts demonstrating that the employee organization has acted arbitrarily, discriminatorily or in bad faith. Fremont Unified School District Teacher's Association, CTA/NEA (King) (4/21/80) PERB Decision No. 125; PERB Rule Section 32615(a)(5). No evidence has been presented that AFSCME has

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acted in such fashion. To the contrary, the evidence appears to indicate that AFSCME reasonably relied upon the State Controller's payroll deduction reports in good faith. While AFSCME may have been remiss in only attempting to reach you by telephone, and not in writing, prior to the filing of the charge, mere negligence or poor judgment fail to constitute a breach of the duty of fair representation. See United Teachers of Los Angeles (Collins) (1/17/83) PERB Decision No. 258.

Failure to Keep Itemized and Certified Financial Records

The charge alleges that AFSCME breached its duty of fair representation by not meeting the statutory requirements of SEERA section 3515.7(e) by failing to make available to employees an itemized record of the employee organization's financial transactions, which were certified as to accuracy by the organization's president, treasurer or comparable officer. You claim that the phrase "make available" used in section 3515.7(e) requires AFSCME to mail the financial statement to each and every employee within the bargaining unit. The investigation revealed that AFSCME mailed to you an itemized - financial record for 1984, but only after you made a request.

You also claim that the 1984 financial statement was not properly certified by an appropriate representative of AFSCME. The investigation revealed that the financial statement was prepared by a certified public accountant and presented to the executive board of AFSCME on or about January 12, 1985. On or about March 16, 1985, the executive board decided that it was satisfied with the audit.

Assuming arguendo the validity of your claims that AFSCME has failed to make available and to properly certify its annual financial statements, the charge, nevertheless, fails to establish a prima facie violation of SEERA section 3519.5(b). In Kimmet v. Service Employees International Union, Local 99 (10/19/79) PERB Decision No. 106, PERB held:

. . . a statute clearly indicates that the appropriate procedures for remedying a violation of section 3546.5 [of the Education Employment Relations Act, a section analogous

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to SEERA section 3515.7(e)] is not to file an unfair practice charge against the employee organization, but to file a petition with PERB seeking an order compelling compliance.

The proper manner to seek compliance with section 3515.7(e) of SEERA is found in PERB regulation 32125(e) and (f), which reads in relevant part:

(e) A petition to compel compliance with Government Code section 3515.7(e) may be filed by any employee in the unit. Such petition shall be filed in the regional office and shall include the names, addresses, and telephone numbers of the exclusive representative, the employer, and the petitioning party.

(f) The petition to compel compliance shall be filed not later than 12 months following the end of the exclusive representatives preceding fiscal year.

Accordingly, the above allegation fails to state a prima facie case.

Failure to Process Grievances

The charge alleges that AFSCME has refused to process grievances on your behalf. Specifically, the charge alleges that AFSCME refused to process grievances regarding (1) the governor's reference in 1982-83 that public employees retirement funds would be used to revive California real estate; (2) a 1983 failure by the Employer to pay you a bonus for two accepted merit award suggestions; and, (3) a 1983 incident involving the Employer's alleged breach of section 4600 of the Labor Code, which provides for employee designation of personal physicians in work-related injuries.

You acknowledge that you have not requested representation from AFSCME in the six months immediately preceding the filing of your charge on March 3, 1986. You assert, however, that AFSCME's past pattern and practice of refusing your requests

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for representation have made such requests futile. Moreover, you claim that the Employer's breach of Labor Code Section 4600 is a continuing violation, and, thus, AFSCME's refusal in 1983 to represent you on the matter is a continuing breach of its duty of fair representation.

The above allegation fails to establish a prima facie violation of the Act. Under section 3515.5(a) of SEERA, the Board will not "issue a complaint in respect of any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge." With respect to the specific incidents raised in your charge, all of them occurred more than two years prior to the filing of the charge in the present case.

The nature of the unfair practice charge which you have alleged does not fall within the definition of "continuing violation." Even assuming arguendo that the State has committed a continuing violation by continually breaching Labor Code section 4600, this does not by itself establish that AFSCME has committed a continuing violation of section 3519.5(b) of SEERA. PERB has recognized that violative conduct occurring more than six months before a charge is filed may become the basis for the issuance of a complaint if the conduct is repeated within the six months of the filing date of the charge. However, where there is no identifiable repetition of the allegedly violative conduct within the six months preceding the filing of the charge, no complaint will issue. (San Diegito Onion High School District (2/25/82) PERB Decision No. 194.) The violation you allege does not appear to be "continuing" because there was no recurrence of any conduct on the part of AFSCME within the six months preceding the filing of the charge. As you acknowledged, you have not requested that AFSCME represent you during that six-month period.

Your failure to request representation during a statutory six-month period prior to the filing of the charge is not excused by your claim that it had become "futile" to make such requests because of AFSCME's past practice of refusing to represent you. There is no evidence that AFSCME's past refusals were made in bad faith or in an arbitrary or discriminatory manner nor that a reasonable person would have concluded that AFSCME's conduct made it futile to renew one's requests for representation on different matters.

Failure to Properly Train Shop Stewards

The charge alleges that AFSCME has breached its duty of fair representation by failing to properly train shop stewards. As evidence of this violation, the charge notes that the 1984 financial statement states that only \$1,013.65 was allocated for steward training during that fiscal year.

In Kimmett v. Service Employees International Union, Local 99, supra, PERB Decision No. 106, the Board noted that the duty of

representation does not apply to "internal union activities that do not have a substantial impact on the relationships of the unit members to their employers" and that, "internal union activities that do not have such an impact are not subject to the duty of fair representation." The amount of money that an employee organization wishes to spend on steward training is an internal union activity. Although the amount of money spent on steward training may have an indirect impact on employer-employee relations, the impact is attenuated by the numerous other variables that affect a steward's ability to handle employer-employee relations.

Accordingly, the allegation fails to establish a prima facie violation.

Failure to Negotiate Reasonable Salaries

The charge refers to the low salaries negotiated by AFSCME and implies that AFSCME has breached its duty of fair representation by not negotiating better wages. The charge fails to present any evidence that AFSCME negotiated wages for unit employees in bad faith or in an arbitrary or discriminatory manner. In Rocklin Teachers Professional Association (3/26/80) PERB Decision No. 124, the Board stated:

A union's duty to fairly represent employees during negotiations does not encompass an obligation to negotiate any particular item and, in this case, the Charging Party has failed to demonstrate that the association's failure to negotiate benefits violated any affirmative duty it owed to the unit members. A prima facie case alleging arbitrary conduct violative of the duty of fair representation must, at a minimum,

include an assertion of sufficient facts from which it becomes apparent how or in what manner the exclusive representatives action or inaction was without a rational basis or devoid of honest judgment. [Citation omitted.] While the Board recognizes that it may be difficult to set forth with exactitude the irrational or arbitrary nature of the union's conduct toward the unit membership, its requirement is necessary in order to ensure that the bargaining agent, faced with the impossible task of pleasing all of the people all of the time, is afforded a broad range of discretion and latitude. The exclusive representatives obligation during the collective negotiating process necessarily involves a high degree of give and take, compromise and trade off and, therefore, cannot be subjected to a standard more rigid than is consonant with the realities of the bargaining process. Because the task of bargaining demands a balancing of benefits against burdens, a union should not be required to justify every decision it makes at the bargaining table.

The investigation has revealed no evidence that AFSCME's conduct in negotiating salaries for unit employees has exceeded "the bounds of reasonable latitude" set forth in Rocklin Teachers Professional Association and, accordingly, the charge fails to establish a breach of AFSCME's duty of fair representation.

Failure to Provide a Reasonable Fair Share Refund Procedure

The charge alleges that AFSCME has breached its duty of fair representation by failing to provide for a reasonable, uncomplicated refund procedure for fair share fee employees. The investigation revealed that you have been a member of AFSCME since January 20, 1982. Accordingly, you do not have standing to allege a violation of section 3515.8 of the SEERA regarding reimbursement of fair share fees. Section 3513(j) of the Act defines fair share fee and states:

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"Fair share fee" means the fee deducted by the State employer for the salary or wages of a State employee in an appropriate unit who does not become a member of and financially support the recognized employee organization. The fair share fee shall be used to defray the cost incurred by the recognized employee organization in fulfilling its duties to represent the employees in their employment relations with the State, and shall not exceed the standard initiation fee, membership dues, and general assessments of the recognized employee organization.

Only fair share fee paying employees have the limited right to demand and receive from the recognized employee organization certain reimbursement of payments under section 3515.8. There is no provision under the Act providing for reimbursement of fair share fees to voluntary members of an employee organization. Accordingly, the above allegation fails to state a prima facie violation of the Act.

For these reasons, charge number S-CO-59-S, as presently written, does not state a prima facie case. If you feel that there are any factual inaccuracies in this letter or any additional facts which would correct the deficiencies explained above, please amend the charge accordingly. 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 April 17, 1986, I shall dismiss your charge. If you have any questions on how to proceed, please call me at (916) 323-8015.

Sincerely,

Michael/Térris
Staff Attorney

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