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

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| FRANK D. JANOWICZ,<br><br>Charging Party,<br><br>v.<br><br>STATE OF CALIFORNIA (DEPARTMENT OF YOUTH AUTHORITY),<br><br>Respondent. | ) | Case No. LA-CE-257-S<br><br>PERB Decision No. 1080-S<br><br>January 12, 1995 |

Appearances: Frank D. Janowicz, on his own behalf; State of California (Department of Personnel Administration) by Joan E. Branin, Labor Relations Counsel for State of California (Department of Youth Authority).

Before Blair, Chair; Garcia and Johnson, Members.

DECISION

GARCIA, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Frank D. Janowicz (Janowicz) of an administrative law judge's (ALJ) proposed decision (attached) dismissing an unfair practice charge on the basis of collateral estoppel. In his charge, Janowicz alleged that the State of California (Department of Youth Authority) (DYA) retaliated against him by denying him work opportunities in violation of section 3519(a) of the Ralph C. Dills Act (Dills Act).[1] After review of the entire record, including Janowicz's

[1]The Dills Act is codified at Government Code section 3512 et seq. Unless otherwise indicated, all statutory references are to the Government Code. Section 3519 provides, in part, that:

> It shall be unlawful for the state to do any of the following:

exceptions and DYA's response, the Board hereby affirms the ALJ's proposed decision.

JURISDICTION

PERB has jurisdiction over this case for the following reasons: Janowicz is an employee and DYA is an employer under the Dills Act; Janowicz's unfair practice charge alleges a violation of the Dills Act; the unfair practice charge was timely filed; and the disputed conduct was not subject to a grievance agreement between the exclusive representative representing Janowicz (California State Employees' Association, Local 1000 (CSEA)) and DYA.[2]

JANOWICZ'S EXCEPTIONS

Janowicz filed a statement of exceptions that bears a surface resemblance to the format required by PERB Regulation 32300,[3] by mentioning specific page numbers in the proposed

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> (a) 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. For purposes of this subdivision, "employee" includes an applicant for employment or reemployment.

[2]In a letter dated January 22, 1993, a Board regional attorney denied DYA's request for deferral to arbitration, based on State of California, Department of Youth Authority (1992) PERB Decision No. 962-S.

[3]PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq. PERB Regulation 32300 provides, in pertinent part:

> (a) . . . The statement of exceptions or brief shall:

decision. However, most of Janowicz's exceptions are simply attempts to revisit earlier phases of the case or re-argue the merits without addressing the collateral estoppel issue central to the proposed decision.[4] Most of the exceptions fail to comply with the requirement to state "specific issues of procedure, fact, law or rationale." The Board does not consider the exceptions which do not comply with PERB Regulation 32300.

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> (1) State the specific issues of procedure, fact, law or rationale to which each exception is taken;
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> (2) Identify the page or part of the decision to which each exception is taken;
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> (3) Designate by page citation or exhibit number the portions of the record, if any, relied upon for each exception;
>
> (4) State the grounds for each exception.

[4]One such category is the "Court Cases Exceptions" referred to by DYA in its response. Challenges to a civil court judgment are outside PERB's jurisdiction and do not qualify as proper exceptions under our regulation. (Examples of this type of "exception" include statements that the courts held Janowicz in "disdain" since he was not an attorney, and statements that Janowicz could not appeal one of the state court decisions because he did not have enough money.) We do not consider these exceptions.

Another category of exceptions, the "PERB Exceptions," addresses many subjects but fails to address the collateral estoppel issue. This group also does not conform to the regulation and is not considered herein. Examples of this category include Janowicz's claim that the PERB regional attorney refused to allow him to amend his charge, without offering evidence how this transpired, and claims that go to the merits of the underlying charge.

The "CSEA exception" is not considered since it is clearly outside the scope of this case.

The only exception that is properly before the Board involves Janowicz's allegation that the ALJ failed to mention that the 1988-1991 Memorandum of Understanding (MOU), which expired on or about July 11, 1991, had been extended through December 31, 1991. Janowicz asserts that the ALJ omitted this fact to "conceal her ineptness."

DYA'S RESPONSE TO EXCEPTIONS

DYA responded to Janowicz's exceptions by category: those involving the court cases filed by Janowicz; those related to PERB's handling of the unfair practice charge; and the one alleging that CSEA mishandled Janowicz's grievance.

DYA contends that Janowicz's exceptions pertaining to the court cases contain inaccuracies and do not justify reversing the ALJ's decision.

With respect to Janowicz's exceptions involving PERB's handling of the unfair practice charge, DYA responds that some of the exceptions contain inaccurate statements; others attempt to address the merits of the case; and none adequately explain why the ALJ's decision on the main issue (collateral estoppel) was erroneous.

Regarding Janowicz's assertion that CSEA was negligent in representing him, DYA responds that this issue has no place in this case.[5]

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[5]The Board notes that Janowicz filed an unfair practice charge (Case No. LA-CO-52-S) against CSEA, alleging that CSEA failed to assist him in eliminating unfair practices directed against him by his employer. The Board upheld a Board agent's dismissal of that charge in California State Employees

## DISCUSSION

As stated above, the sole exception that is properly before the Board is Janowicz's allegation regarding the ALJ's failure to mention that the 1988-1991 MOU expired but was extended through December 31, 1991. Despite Janowicz's belief that the ALJ omitted such a reference to "conceal her ineptness," Janowicz offers no evidence to substantiate the statement that the MOU was extended, nor, more importantly, why the omission would affect the collateral estoppel ruling. Therefore, the Board finds that this exception lacks merit.

After reviewing the doctrine of collateral estoppel, we agree that it is properly applied in this case, and there is no need to relitigate the same issues before PERB.

## ORDER

The complaint and unfair practice charge in Case No. LA-CE-257-S are hereby DISMISSED.

Chair Blair and Member Johnson joined in this Decision.

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Association (Janowicz) (1994) PERB Decision Nos. 1043-S and 1043a-S.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

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| FRANK D. JANOWICZ,<br><br>Charging Party,<br><br>v.<br><br>STATE OF CALIFORNIA (DEPARTMENT OF YOUTH AUTHORITY),<br><br>Respondent. | ) | Unfair Practice Case No. LA-CE-257-S<br><br>PROPOSED DECISION (9/9/94) |

Appearances: Frank D. Janowicz, on his own behalf; Joan E. Branin, Labor Relations Counsel, for State of California (Department of Youth Authority).

Before W. Jean Thomas, Administrative Law Judge.

## PROCEDURAL HISTORY

On April 7, 1992, Frank D. Janowicz (Janowicz), filed an unfair practice charge with the Public Employment Relations Board (PERB or Board) against the State of California (Department of Youth Authority) (DYA). The charge alleged that DYA, acting through several of its agents, retaliated against Janowicz, in violation of the Ralph C. Dills Act (Dills Act),[1] by denying him work opportunities because he filed grievances, complaints, and lawsuits against his supervisor and her subordinates.

On January 22, 1993, the Office of the General Counsel of PERB issued a complaint alleging that DYA, through its agents, Rachel McCoy (McCoy), Tony Lombardo (Lombardo), and Bernard Cadle (Cadle) took adverse action against Janowicz by failing to call

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

him in for teaching assignments beginning on or about December 9, 1991, which had the effect of laying him off. These actions allegedly were taken because of Janowicz's exercise of his right to file grievances in 1991, and therefore violated section 3519(a)[2] of the Dills Act.

DYA answered the complaint on February 16, 1993, denying all material allegations of unfair conduct and asserting a number of affirmative defenses.

An informal conference on February 25, 1993, failed to resolve the dispute.

A formal hearing was held before the undersigned on April 27, 1993. The hearing was bifurcated to take evidence on the procedural issue presented by DYA's motion to dismiss on the basis of collateral estoppel filed on April 22, 1993.

DYA argues that Janowicz is barred by the doctrine of collateral estoppel from bringing the same charge of retaliation before PERB that was part of his claim in lawsuits brought in both the Superior Court of the State of California, the County of Los Angeles, and in the United States District Court for the

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[2]Section 3519 provides, in relevant part, as follows:

> It shall be unlawful for the state to:
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> (a) 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. For purposes of this subdivision, "employee" includes an applicant for employment or reemployment.

Central District of California. DYA further alleges that Janowicz's claim in both suits were identical to his complaint before PERB and that judgments were against Janowicz in both actions. It is further asserted that since the issues were previously litigated in judicial actions and final judgments have been entered in both cases, under the doctrine of collateral estoppel, Janowicz's charges before PERB should be dismissed.

During the hearing, Janowicz did not offer either oral or written objections to the motion. Both parties did, however, present documentary evidence pertaining to both the state and the federal actions. The formal hearing was thereafter recessed pending a ruling on the motion to dismiss.

On July 2, 1993, Janowicz filed a motion to amend the complaint to substantiate his allegations in a more definite manner. DYA filed an opposition to this motion on July 12, 1993. No ruling was issued on the motion to amend pending a ruling on the threshold procedural matter presented by DYA's motion to dismiss.

On December 23, 1993, the record of the formal hearing was re-opened to receive additional evidence relevant to a ruling on the motion to dismiss. In lieu of witness testimony, the parties agreed to submit additional evidence via stipulations of fact and additional exhibits. This documentation was filed on January 26, 1994, and the case was resubmitted for proposed decision.

## FINDINGS OF FACT

### Stipulations

The following findings of fact are based on the parties' stipulations which are set forth verbatim as follows:

1. At all times relevant to the Complaint in this case Frank D. Janowicz was a state employee within the meaning of Government Code section 3513(c).

2. At all times relevant to the Complaint in this case Frank D. Janowicz was a member of [State of] California Bargaining Unit 3.

3. A Collective Bargaining Agreement (CBA) or Memorandum of Understanding (MOU) existed between the State of California and Bargaining Unit 3 and was effective for the dates between July 1, 1988 and June 30, 1991. A copy of that CBA is attached and marked Exhibit A.

4. Frank D. Janowicz filed a grievance on January 8, 1991, complaining that he was not given teaching assignments though he possessed a teaching credential. A copy of that grievance and the State's responses to it are attached and marked as Exhibit B.

5. Frank D. Janowicz filed a grievance on August 27, 1991, complaining that he was denied vacation time and not given teaching assignments though he possessed a teaching credential. A copy of that grievance and the State's responses to it are attached and marked as Exhibit C.

6. Frank D. Janowicz filed a grievance on December 26, 1991, complaining about diminishing work hours and

discrimination. A copy of that grievance and the State's responses to it are attached and marked as Exhibit D.

7. Frank D. Janowicz filed a grievance on January 27, 1992, complaining about diminishing work hours and discrimination. A copy of that grievance and the State's responses to it are attached and marked as Exhibit E.[3]

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[3]In addition to the instant charge, Janowicz also filed an unfair practice charge (Case No. LA-CO-52-S) against California School Employees Association, Local 1000 (CSEA), his exclusive representative, on April 7, 1992. That charge alleged that CSEA failed to assist him in "eliminating unfair practices" directed against him by his employer.

Following a hearing, the complaint and the charge were dismissed by the undersigned in a proposed decision issued December 30, 1993. The dismissal was upheld by the Board in Frank D. Janowicz v. California State Employees Association, Local 1000 (1994) PERB Decision Nos. 1043-S and 1043a-S.

It is appropriate to take official notice of the record of that case to explain the procedural posture of this case.

At the time that Janowicz filed his charges against CSEA and the State, the 1988-91 MOU had expired on or about July 11, 1991. Following protracted successor contract negotiations, in about May or June 1992, CSEA and the State reached agreement for a successor MOU with an effective term from November 1, 1992, through June 30, 1995.

During the interim between MOUs, CSEA and the State had an ongoing dispute about processing grievances subsequent to the expiration of the 1988-91 MOU. Thus, no motion to dismiss and defer to the contractual grievance procedure was filed by the respondents to either cases based on any of Janowicz's grievances filed between January 1991 and January 1992.

This circumstance, coupled with the Board's adoption of the rule in December 1992, that arbitration clauses do not survive after expiration of a collective bargaining agreement, with certain exceptions, made it inappropriate for PERB, sua sponte, to defer this charge to the grievance procedure. (See Pierce Johnson, Jr. and Steve Bornstedt v. State of California (Department of Youth Authority) (1992) PERB Decision No. 962-S.)

8. On September 19, 1991, Frank D. Janowicz filed a complaint with the United States District Court of the Central District of California, Case No. CV 91-5045. A copy of that complaint is attached and marked as Exhibit F.

9. Between April 20, 1992 and May 6, 1992, Frank D. Janowicz filed a First Amended Complaint in Case No. CV 91-5045. A copy of the amendment has been filed with the Public Employment Relations Board.

10. On January 30, 1992, Frank D. Janowicz filed a second complaint with the United States District Court for the Central District of California, Case No. CV 92-0614. A copy of that complaint has been filed with the Public Employment Relations Board.

11. On January 9, 1992, Frank D. Janowicz filed a complaint with the Superior Court of the State of California for the County of Los Angeles, Case No. VC 008246. A copy of that complaint has been filed with the Public Employment Relations Board.

Additional Background

In February 1987, Janowicz began his employment with DYA as a permanent intermittent (PI) vocational instructor (industrial arts) at the Fred C. Nelles School (FCN). FCN is a DYA correctional facility for boys located in Whittier, California. It has a population of 850 wards. FCN is responsible for the wards' education by providing an educational program that meets the requirements of the State Department of Education.

Since mid-1988, McCoy has been supervisor of the Correctional Education Program (SCE) at FCN and serves as its school principal. As SCE, McCoy has overall administrative and supervisory responsibility for the program, including the hiring and assignments of teachers to both the academic and vocational classes offered at FCN. The teaching staff includes full-time and PI teachers. PI teachers are generally assigned on a day-to-day substitute basis.

At all times relevant, Lombardo was the supervisor of academic instruction (SAI), and Janowicz's immediate supervisor. Cadle, who is a subordinate to both McCoy and Lombardo, sometimes serves as acting SAI on behalf of Lombardo.

Janowicz's 1991-92 Court Actions

a. The September 1991 Federal Lawsuit

On September 19, 1991, Janowicz filed a complaint with the United States District Court for the Central District of California (Case No. CV 91-5045) against named defendants McCoy, I. R. Schulman (Schulman), the assistant superintendent at FCN, and B. T. Collins (Collins), the director of DYA, alleging discrimination under Title VII of the Civil Rights Act of 1964.

More specifically, the complaint alleged discrimination by McCoy on the basis of Janowicz's race (white) and sex (male) beginning in January 1991, because Janowicz (1) filed an adverse action request against McCoy with Schulman; (2) filed two discrimination complaints against McCoy, one in-house and one with the Equal Employment Opportunity Commission (EEOC);

(3) applied for workers' compensation in March 1991; and (4) sent a complaint letter to Collins in May 1991.

On April 20, 1992, U.S. District Judge Edward Rafeedie issued an order granting the defendants' motion to dismiss for failure to state a claim upon which relief can be granted under applicable federal law. The motion was granted with leave for Janowicz to amend his complaint within 20 days.

Subsequently, Janowicz filed a first amended complaint (FAC) on or about April 29, 1992, alleging race and sex discrimination. Janowicz filed an amendment to the FAC on or about June 27, 1992, adding DYA as a new defendant.

The bulk of the allegations in the FAC essentially raised a disparate treatment cause of action in which Janowicz alleged that he was given insufficient amounts of teaching time at FCN in 1990 and 1991 because of his race and sex. Other allegations included (1) denial of vacation time, (2) failure to assist him in obtaining an emergency academic teaching credential, (3) failure to properly investigate discriminatory practices, grievances, and complaints about violations of sections 5.5 and 18(j) of the MOU and violations of the California Education and Labor Codes.

On or about August 17, 1992, the defendants filed a memorandum of points and authorities in support of a motion for summary judgment.

The matter was heard before Judge Rafeedie on September 21, 1992. He issued an order granting defendants' motion for summary

judgment and dismissing the plaintiff's claims on September 29, 1992. Janowicz did not appeal this judgment.

b. The January 1992 Federal Lawsuit

Janowicz filed a second complaint (Case No. CV 92-0614) with the United States District Court of Central California on January 20, 1992. This complaint was against defendants McCoy, Lombardo, Cadle, Schulman, Henry C. Vander Weide, the superintendent of FCN, and Francisco Alarcon, the chief deputy director of DYA.

This complaint alleged violations of Title VII of the Civil Rights Act of 1964, citing four causes of action, namely, (1) retaliation, (2) conspiracy, (3) blacklisting, and (4) intentional infliction of emotional distress. The complaint specifically alleged retaliation by McCoy, Cadle and Lombardo because he (Janowicz) filed a state discrimination complaint in April 1991; sent a complaint letter to Collins in May 1991; filed an adverse action request against McCoy with the State Commission on Teaching Credentialing in August 1991; complained to Lombardo by letter on September 11, 1991, about the rotational work schedule for PI teachers; filed a federal retaliation complaint on September 24, 1991; filed a grievance and a complaint against McCoy on December 26, 1991; and filed a civil lawsuit in state court against all named defendants on January 9, 1992. The complaint also alleged that on January 29, 1992, Janowicz received an answer to his (August 27, 1991) grievance from Alarcon, dated October 22, 1991, in which Alarcon accused him of

filing grievances, discrimination complaints, and lawsuits against McCoy as a form of harassment against her.

The complaint of this civil action was served on the defendants on or about April 14, 1992, and subsequently amended at an unrevealed time. In response, the defendants filed a motion to dismiss the FAC.

On October 13, 1992, in a hearing before U.S. District Judge Richard Gadbois, he granted defendants' motion to dismiss the FAC for lack of subject matter jurisdiction, and denied Janowicz's motion to amend the FAC.

The lawsuit was dismissed in its entirety by entry of judgment on November 4, 1992. This judgment was not appealed.

c. The January 1992 State Lawsuit

On January 9, 1992, Janowicz filed a complaint for damages (Case No. VC 008246) with the Superior Court of the State of California, County of Los Angeles (Norwalk), against the same defendants that were named in the second federal lawsuit. His damage claim was based on four causes of action, namely, (1) reprisals, (2) conspiracy, (3) blacklisting, and (4) intentional infliction of emotional distress. In this case, Janowicz sought damages in excess of $5,500,000.

In his reprisals cause of action, Janowicz set forth substantially the same course of wrongful conduct by McCoy, Lombardo, and Cadle from February 1991 through January 2, 1992, that was alleged in the second federal lawsuit. These allegations included, among other things, references to the

defendants' discriminatory practices because he filed the August 27 and the December 1991 grievances. The allegations also claimed diminished working hours and loss of income in December 1991 as a result of McCoy's alleged discriminatory practices against Janowicz. At some unrevealed date, this complaint was amended.

Pursuant to the provisions of the California Code of Civil Procedure, section 1141.10, and Rule 1065 of the California Rules of Court, the case was submitted to court-ordered arbitration. A hearing was held before Arbitrator Kemp A. Richardson (Richardson) on November 5, 1992. On November 7, Richardson issued an award in favor of the defendants. The award stated as follows:

> The source of plaintiff's alleged contract rights, the MOU, does not appear to give any particular employee a right to an assignment. Art. 18, section j does state factors to be considered in scheduling. However, the section does not say that the most qualified PI must be given an assignment over another qualified instructor.
>
> Assuming, arguendo, that the plaintiff's diminished work hours does establish personal favoritism in violation of section j, the arbitrator finds that defendants introduced sufficient evidence to conclude that the CYA's [sic] operational needs were such that the decrease and the eventual elimination of plaintiff's hours were justified.
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> As a final matter, plaintiff introduced no proof of damages sufficient to render damages, if appropriate. Judgment in favor of all defendants against Frank Janowicz.

Subsequent to this decision, Janowicz rejected the award and requested a trial de novo as provided for by state law. Before

the trial in this matter, the defendants filed a motion for summary judgment with supporting documentation to which Janowicz filed a response in opposition.

In his response, Janowicz asserted, among other things, that (1) McCoy, Lombardo, and Cadle violated the California Education Code by limiting his hours of employment after September 1991; (2) he was illegally laid off by McCoy on December 9, 1991, in retaliation for engaging in protected activities which included filing grievances in 1991, filing discrimination complaints and lawsuits against her, and filing a request for adverse action with the State Commission on Teaching Credentialing which notified McCoy in November 1991 that it would not take action against her; and (3) finally violations by these employees of various other provisions of the contractual MOU. Janowicz also argued a causal action between his protected activities and the layoff by McCoy.

He also mentioned in the complaint that because CSEA failed to assist him in regaining his teaching position at FCN, he filed a complaint (unfair practice charge) with PERB in April 1992 against CSEA. However, no mention was made of the instant unfair practice charge also pending against DYA at that time.

The defendants filed a reply memorandum of points and authorities in support of their motion for summary judgment, on January 20, 1993, arguing, among other things, that there were no triable issues of material fact concerning an essential element of Janowicz's prima facie case of retaliation, namely, an adverse

employment action, for engaging in activities protected by the relevant statutory provisions under which the complaint had been filed.[4]

On January 25, 1993, in a proceeding before Superior Court Judge Daniel Pratt, the judge denied the defendants' motion. Thereafter, the defendants filed a motion for reconsideration and the parties were ordered to brief the issue of "constructive discharge."

In a second proceeding before Judge Pratt on February 26, 1993, he granted the defendants' motion, concluding that "not enough time [had] passed for constructive discharge to occur. Plaintiff worked 1575 hours in 1991." The latter comment undoubtedly referred to the language in Article 18(a) of the 1988-91 MOU that allowed PI employees to work up to 1500 hours per calendar year. Although Janowicz argued during the hearing in this case that the ruling in the state court action was inappropriate, he did not appeal the judgment.

ISSUES

Whether any or all of the prior federal and state lawsuits by Janowicz against the DYA, and/or its agents, should be given collateral estoppel effect and thus bar litigation of the discrimination/retaliation issue raised before PERB in this case?

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[4]California Fair Employment and Housing Act, Government Code section 12940 et seq and Equal Employment Opportunity Act of 1964, Title VII, 29 U.S.C., section 2000e(b).

## CONCLUSIONS OF LAW

### The Test for Collateral Estoppel

The doctrine of collateral estoppel precludes a party to an action from relitigating in a second proceeding, matters litigated and decided in a prior proceeding. (People v. Sims (1982) 32 Cal.3d 468, 477 [186 Cal.Rptr. 77].) Collateral estoppel is an aspect of, but not coextensive with, the broader concept of res judicata. As stated by the court in Lockwood v. Superior Court (1984) 160 Cal.App.3d 667, 671 [206 Cal.Rptr. 785],

> . . . Where res judicata operates to prevent relitigation of a cause of action once adjudicated, collateral estoppel operates . . . to obviate the need to relitigate issues already adjudicated in the first action.

The purpose of the doctrine is

> . . . to promote judicial economy by minimizing repetitive litigation, to prevent inconsistent judgments which undermine the integrity of the judicial system, [and] protect against vexatious litigation. . . .
> (Ibid.)

Collateral estoppel traditionally has barred relitigation of an issue if "(1) the issue is identical to one necessarily decided at a previous proceeding; (2) the previous [proceeding] resulted in a final judgment on the merits; and (3) the party against whom collateral estoppel is asserted was a party or in privity with a party at the prior [proceeding]. [Citation.]" (People v. Sims, supra, 32 Cal.3d at p. 484.)

It is implicit in this three-prong test that only issues actually litigated in the initial action may be precluded from the second proceeding under the collateral estoppel doctrine. An issue is actually litigated

> [W]hen [it] is properly raised, by the pleadings or otherwise, and is submitted for determination, and is determined . . . . A determination may be based on a failure of . . . proof . . . . [Citation.] (Ibid.)

The above test will be applied in the analysis to the facts of this case in determining whether to grant collateral estoppel effect to the judgements in any or all of Janowicz's prior lawsuits.

A. Identicalness of Issues

The issue of discrimination/retaliation was raised by Janowicz in all three lawsuits. However, in the first federal action, the complaint of alleged discriminatory conduct by DYA and its agents was not based on conduct that would have presented a cognizable claim under the Dills Act. Even after Janowicz amended the complaint in April 1992, the allegations essentially claimed disparate treatment, namely, insufficient amounts of teaching time at FCN in 1990 and early 1991 because of his race and sex. Hence, this case stemmed from a different set of facts than those presented in the unfair practice case. Since the issue of reprisals in October and December 1991 for filing grievances and employment-related complaints was not "properly raised" nor submitted for a "determination," the retaliation

claim in this action is not identical to the issue adjudicated in the first federal action.

Although the issue of retaliation for filing grievances and employment-related complaints in 1991 was raised in the second federal action, the second case did not result in an adjudication of the issue on its merits. Instead, the trial judge concluded that the complaint was defective as to its form, and dismissed it, in response to the defendants' motion, in November 1992 for lack of subject matter jurisdiction.

In Janowicz's 1992 state lawsuit, he raised the issue of reprisals in the form of diminished working hours and, in effect, a layoff in December 1991 because he engaged in protected activities, including the filing of grievances in 1991. This issue was addressed in subsequent pleadings and supporting papers filed by both parties to the action. Further, the issue was submitted for determination and was determined in two separate proceedings.

First, in a court-ordered arbitration hearing, the arbitrator found that Janowicz's decreased hours and the eventual elimination of his work hours was justified by DYA's operational needs. He also found that Janowicz had established no proof of damages because of this circumstance.

Then, in response to Janowicz's request for a trial de novo, the trial judge eventually granted defendants' motion for summary judgment, concluding that Janowicz was not "constructively discharged" since he worked 1575 hours in 1991.

Even though this case was adjudicated by the judge without a trial on the facts, a judgement entered after granting a motion for summary judgment is as final and conclusive a determination of the merits as a judgment after trial. (See Code Civ. Proc., sec. 437c and 7 Witkin, Cal. Proc. (3d ed. 1985) Judgment, sec. 219, p. 655.)

In the state lawsuit, the same factual allegations were in issue as have been raised in this unfair practice case. No relevant new facts or changed circumstances have occurred since the judgment was rendered in the state lawsuit.

Though the purpose of the state civil action was different from an unfair practice hearing, the retaliation issue is identical. In the civil action, the parties had to meet the preponderance of evidence standard as to triable issues of facts presented by the case. (7 Witkin, Cal. Proc. (3d ed. 1985), Trial, sec. 280, p. 284.) The same evidentiary standard is used in PERB hearings. When the issue of retaliation was submitted first to the arbitrator and then to the trial judge, the arbitrator and the judge "necessarily decided" factual issues identical to the ones Janowicz seeks to relitigate in this PERB proceeding. (See People v. Sims, supra, 32 Cal.3d at p. 485.)

It is thus concluded that the first prong of the test has been satisfied.

B. Finality of Judgment on the Merits

For purposes of issue preclusion, "final judgment includes any prior adjudication of an issue in another action that is

determined to be sufficiently firm to be accorded conclusive effect." This concept of finality for collateral estoppel was invoked in Sandoval v. Superior Court (1983) 140 Cal.App.3d 932 [190 Cal.Rptr. 29]. A judgment or order may be final in nature, but it does not become res judicata until it is final in the other sense of being free from direct attack. Hence, while an appeal is pending, or though no appeal has yet been taken, the time for appeal has not expired, the judgment is not conclusive.

In this case, the judgment in the state lawsuit was entered on February 26, 1993. When the unfair practice hearing in this matter commenced on April 27, 1993, no appeal of the judgment had been filed nor did Janowicz indicate an intent to file an appeal.[5] In fact, according to the timelines established by California Code of Civil Procecure section 437c(1), the period for a timely appeal had expired. Thus, the final judgment in the state action was a conclusive determination of the retaliation issue raised in that case.

C. Privity of the Parties

As stated earlier, McCoy, Lombardo and Cadle were individually-named defendants in Janowicz's state civil action. In that case they were alleged to be employees of the DYA, acting within the scope and course of their employment, and thus serving as agents of the DYA.

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[5]Code of Civil Procedure section 437c(1) states that a summary judgment entered thereunder is an appealable judgment.

In the current unfair practice charge, the DYA is charged with engaging in unlawful conduct through its agents McCoy, Lombardo and Cadle. It is further noted in the record that all the employees of the DYA who were named defendants in the state action were defended by representatives acting on behalf of the DYA.

This difference in the moving party is inconsequential. The employees named as parties in the state lawsuit have a clear identity of interest with DYA in the case before PERB. They also have a personal stake in the outcome of the defense that DYA is asserting to avoid repetitive litigation. (See California Union of Safety Employees v. State of California (Department of Developmental Services) (1987) PERB Decision No. 619-S, pp. 21-22.)

Given this analysis of the relationship between the DYA and its employees in both cases, it is found that the privity requirement has been satisfied.

CONCLUSION

For all of the reasons discussed above, it is concluded that the technical prerequisites to applying collateral estoppel to the PERB proceeding have been satisfied. Moreover, estopping Janowicz from asserting before PERB that the DYA unlawfully retaliated against him for engaging in protected activities would further the traditional public policies underlying application of the doctrine. Giving conclusive effect to the state court judgment exonerating DYA and its employees from a charge of

unlawful retaliation would promote judicial economy by minimizing repetitive litigation. It is thus concluded that Janowicz is barred by collateral estoppel from asserting before PERB that DYA took adverse action against him in October and December 1991 in retaliation for his filing of grievances and employment-related complaints in 1991.

PROPOSED ORDER

Based upon the foregoing findings of fact, conclusions of law, and the entire record in this matter, Unfair Practice Case No. LA-CE-257-S, Frank D. Janowicz v. State of California (Department of Youth Authority), is hereby DISMISSED.

Pursuant to California Code of Regulations, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the Board itself at the headquarters office in Sacramento within 20 days of service of this Decision. In accordance with PERB regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. (See Cal. Code of Regs., tit. 8, sec. 32300.) A document is considered "filed" when actually received before the close of business (5:00 p.m.) on the last day set for filing ". . . or when sent by telegraph or certified or Express United States mail, postmarked not later than the last day set for filing . . ." (See Cal. Code of Regs., tit. 8, sec. 32135; Code Civ. Proc., sec. 1013 shall apply.) Any statement of exceptions and supporting brief must be served

concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or filed with the Board itself. (See Cal. Code of Regs., tit. 8, secs. 32300, 32305 and 32140.)

W. JEAN THOMAS
Administrative Law Judge