STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

JIM HARD, CATHY HACKETT, RON LANDINGHAM, MARC BAUTISTA, ADRIENNE SUFFIN & WALTER RICE, Charging Parties, v. CALIFORNIA STATE EMPLOYEES ASSOCIATION, Respondent.	Case No. SA-CO-225-S PERB Decision No. 1479-S May 2, 2002

Appearance: Catherine Kennedy, Attorney, for California State Employees Association.

Before Baker, Whitehead and Neima, Members.

PROCEDURAL HISTORY

WHITEHEAD, Member: This case comes before the Public Employment Relations Board (PERB or Board) on appeal by the California State Employees Association (CSEA) from the proposed decision of a PERB administrative law judge (ALJ).

On February 3, 2000,[1] Jim Hard (Hard), Cathy Hackett (Hackett), Ron Landingham (Landingham), Marc Bautista (Bautista), Adrienne Suffin (Suffin) and Walter Rice (Rice) filed an unfair practice charge against CSEA, alleging violations of the Ralph C. Dills Act (Dills

[1]Unless otherwise noted, all dates refer to the year 2000.

Act) sections 3515 and 3519.5(b).[2] They also requested that the Board seek injunctive relief against CSEA's suspension of their membership in CSEA, which would deny them their right to run for elected union office. On February 11, PERB denied the request for injunctive relief, without prejudice, over the dissent of Board Member Amador.

The six named parties filed an amended charge on February 15. On February 28, PERB's Office of the General Counsel issued a complaint alleging violations of Dills Act sections 3515.5[3] and 3519.5(b). The complaint specifically alleged that, during the period from January 28 to February 8, CSEA established unreasonable membership provisions and retaliated against the charging parties. An informal settlement conference was held on March 7, but the case was not resolved. CSEA filed an answer to the PERB complaint on March 20. On April 21, CSEA filed a motion to dismiss the complaint. In this motion CSEA

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[2]The Dills Act is codified at Government Code section 3512 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

Section 3515 states, in relevant part:

> Except as otherwise provided by the Legislature, state employees shall have the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations.

Section 3519.5(b) states:

> It shall be unlawful for an employee organization to:
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> (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.

[3]Section 3515.5 states, in relevant part:

> Employee organizations may establish reasonable restrictions regarding who may join and may make reasonable provisions for the dismissal of individuals from membership.

argued that PERB had no jurisdiction over this charge, in that it was a purely internal union matter which did not impact the employer-employee relationship. On April 24, the charging parties filed a motion to withdraw the portions of the complaint pertaining to five of the charging parties: Hard, Hackett, Bautista, Suffin and Rice. The claims involving Landingham were not withdrawn.

A formal hearing was held before a PERB ALJ on May 1-4 and June 6. At the start of the hearing, the partial motion to withdraw of the five of six charging parties was granted and CSEA's motion to dismiss was taken under submission. The case itself was submitted for decision on August 14.

In the proposed decision, the ALJ found that CSEA did not violate Dills Act section 3515.5 by summarily suspending the CSEA membership of the six charging parties, but that CSEA had violated the Dills Act by retaliating against CSEA member Landingham for engaging in protected activity, in violation of section 3519.5(b).

After reviewing the entire record, including the unfair practice charge, the proposed decision, the briefs of the parties, and CSEA's exceptions, the Board reverses the proposed decision, in accordance with the following discussion.

FACTUAL BACKGROUND

Landingham is a member and officer of CSEA.[4] He is also a leader of CDU. This case is the latest chapter in the long history of conflict between CSEA and CDU spanning the last

[4]Landingham is the only remaining Charging Party following the withdrawal of the other five CDU members from the case. The other five named individuals are also members and officers of CSEA, as well as leaders of the Caucus for a Democratic Union (CDU).

decade. Many of these cases have come before the Board.[5]

On January 28, an Executive Session of the CSEA Board of Directors passed a motion, recommended in an agenda item, which declared CDU to be a competing organization within CSEA, and that CDU was in violation of CSEA's policies.[6] The motion also gave CSEA President, Perry Kenny (Kenny), authority to suspend the membership of any CSEA/CDU member who had engaged in acts deemed incompatible with CSEA,[7] and to remove any director from the board who had engaged in any "fraudulent or dishonest acts or gross abuse of authority or discretion" with reference to the corporation.

The proponent of the January 28 agenda item was CSEA Secretary-Treasurer, Barbara Glass (Glass). Attached to the agenda item as "background information" were "summaries of

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[5]See California State Employees Association (Hackett, et al.) (1993) PERB Decision No. 979-S (Hackett); California State Employees Association (Hackett) (1993) PERB Decision No. 1012-S; California State Employees Association (Hackett, et al.) (1995) PERB Decision No. 1126-S; California State Employees Association (Hard, et al.) (1999) PERB Decision No. 1368-S (Hard); California State Employees Association (Hutchinson) (1999) PERB Decision No. 1369-S; State Employee Caucus for a Democratic Union (2000) PERB Decision No. 1399-S (CDU); California State Employees Association (Gonzales-Coke) (2000) PERB Decision No. 1411-S (Gonzales-Coke).

[6]Although CSEA has tried unsuccessfully for years to persuade the Board that CDU is a competing employee organization, this is apparently the first time that CSEA has formally declared CDU to be a competing organization.

[7]These acts were listed as those which:

> (1) violate any of CSEA's bylaws or policies; (2) usurp any CSEA resources for use by CDU or any members thereof to promote CDU; (3) attempt or result in the representation of CSEA members in matters of wages, hours, or working conditions before the State Personnel Board, the Board of Trustees, the Board of Regents, or any policy-making body with the intent to supplant the Association in its role as the exclusive representative for state employees; and/or (4) has engaged in any other incompatible act as proscribed by Association bylaws or policy.

the activities of CDU," including a list of CDU-related PERB and court cases. The 32-item list covered the period from June 30, 1992 through November 18, 1999, and included 27 PERB charges filed against CSEA, which had led to the issuance of at least 11 PERB complaints against CSEA, and 5 court cases filed against CSEA.

On January 30, Kenny sent Landingham a letter which stated in part that his actions "pose an immediate threat to the Association." These actions included Landingham's "improper use of CSEA's electronic information systems on behalf of and for the benefit of CDU and in violation of CSEA's policy," and his various activities on behalf of CDU that had been deemed detrimental to CSEA. The letter informed Landingham that his CSEA membership was suspended effective February 15, and would remain in effect until the CSEA disciplinary procedure had been concluded. Upon the suspension of his membership, Landingham would not be eligible to run for CSEA office, to be a steward, nor would he be eligible for union leave. Kenny sent similar letters to Hard, Hackett, Bautista, Suffin and Rice, the other named CDU members in this action. The February 15 date for the summary suspensions coincided with the day nominations would open for CSEA offices.

On February 1, Kenny sent Landingham a second letter, stating in part that Landingham would remain a CSEA director and officer during his suspension "until appropriate legal action concludes otherwise." Kenny sent similar letters to the other five named CDU members.

On February 4, Landingham and the five other CDU members, filed a formal complaint with the Service Employees International Union (SEIU), with which CSEA is affiliated. SEIU appointed a hearing officer, who conducted a hearing on February 12, and issued a report on February 14. With regard to the summary suspensions of Jim Hard, Cathy Hackett, Ron Landingham, Marc Bautista, Adrienne Suffin and Walter Rice, the hearing officer stated in part

that "I am unable to find any place in the CSEA Bylaws where the CSEA President is given the authority to summarily suspend a person from membership." The hearing officer found that the SEIU complaint was "legitimate" and appropriate for investigation, and that "summary suspensions of members prior to a hearing does not comport with democratic internal procedures and is not consistent with CSEA Bylaws." CSEA took the position that SEIU had no jurisdiction to conduct any hearing or investigation. However, on March 1, CSEA rescinded the summary suspensions of all six charging parties.

On February 8, Glass filed charges against Landingham, alleging that he had utilized the CSEA e-mail system "to further the efforts of CDU while on union paid release time." Attached to the charges were approximately 37 e-mail messages which concerned CDU business, apparently sent or forwarded by Landingham between August 5, 1999 and February 2.[8] The 37 e-mail messages had also been attached to the January 28 agenda item. They had been printed-out by CSEA Controller Patrick Haagensen (Haagensen), who gave them to CSEA's General Manager, Frank Guilelmino.

Charges were also filed against Hard, Hackett, Bautista, Suffin, and Rice, alleging violations of the CSEA Policy File. Glass filed three of these charges, in addition to the charge she filed against Landingham. All of the charges went before hearing panels, which ultimately recommended that the CSEA Board discipline Landingham, but rejected the claims against the other five individuals. Landingham's panel found that he had produced a significant number of e-mails while on union paid release time that directly related to the promotion and activity of CDU. The CSEA panel found that Landingham's personal use of the e-mail system extended

[8]Landingham testified that he sent "probably about 16,200" or more e-mails during this period, the vast majority of which concerned CSEA business. The e-mails involving CDU represented about .01 percent of the total e-mails sent.

beyond minimal and incidental, and was a direct misuse of CSEA's equipment as prohibited in the CSEA Policy File. It further found that the Board of Directors had passed a motion declaring CDU a competing organization with CSEA and in violation of CSEA policies, and that Landingham's promotion of CDU via CSEA computer system directly usurped CSEA resources in order to promote a competing organization.

On March 23, the CSEA Board of Directors considered the report of the hearing officer panel assigned to investigate the charges filed against Landingham. On March 28, Kenny sent Landingham a letter stating that the CSEA board had accepted the panel's findings that Landingham should be disciplined for violation of the CSEA Policy File. It further informed him that the CSEA board adopted a motion imposing as disciplinary action the suspension of Landingham's membership for the period from February 15 through March 1. This was the period of time that Landingham had previously been suspended pending a hearing on the charges. The CSEA board took no disciplinary action against the other charging parties.

The nominating period for CSEA office that had opened on February 15 closed on March 27. All charging parties were nominated for CSEA offices, and their names were placed on the ballots.

The PERB complaint alleged that CSEA had "established unreasonable restrictions regarding who may join and unreasonable provisions for the dismissal of individuals from membership" in violation of Dills Act section 3515.5. The complaint additionally alleged that CSEA retaliated against Landingham, through the actions of Kenny and Glass, because of Landingham's protected activities. These activities were described as being a member of CSEA as well as a member and supporter of CDU, an organization of CSEA members whose supporters had, inter alia, filed unfair practice charges against CSEA. It went on to catalogue

Landingham's activities as the Civil Service Division's Alternate Deputy Director for Bargaining, his efforts "to strengthen CSEA in relation to [the] employer," and his campaigning for CSEA office on a platform of "building a strong, rank-and-file union that could significantly improve the wages, benefits and working conditions of rank-and-file state workers." It additionally listed his work with CSEA's State Bargaining Advisory Committee, and his advocating that CSEA units bargain at a master table rather than separately.

At the PERB hearing Landingham testified that he had been "involved" in the filing of unfair practice charges against CSEA, but he did not specifically remember which ones. He also testified that he had been a Unit 1 bargaining representative, and had run for alternate deputy director on a platform of building a strong rank-and-file union. Landingham had done "[a] lot of picketing" during bargaining, had been actively involved in bargaining himself, had influenced CSEA's bargaining positions, and had specifically advocated that CSEA units bargain at a master table rather than separately.

Haagensen testified at the formal hearing that he had reviewed the e-mail messages of Landingham and the other five charging parties, looking for references to CDU. Haagensen testified that, in his judgment, Landingham's use of the e-mail system violated a CSEA policy allowing only minimal and incidental personal use and forbidding any use for internal CSEA politics. Haagensen testified that this decision was made by applying his own standard, and that there was no written standard, in that "[m]inimal and incidental defies such definition."

The CSEA e-mail policy described by Haagensen was not put into evidence during the PERB hearing. Haagensen acknowledged that it was not in the CSEA Bylaws or Policy File, and that he had no personal knowledge of whether Landingham had ever even received the policy. Landingham had never been warned that he was using the e-mail system improperly.

Although CSEA owned and maintained the e-mail system, it did not incur any additional costs for individual e-mail messages.

PROPOSED DECISION

In addressing the question of whether CSEA had established unreasonable membership provisions, the ALJ noted that in California School Employees Association and its Shasta College Chapter #381 (Parisot) (1983) PERB Decision No. 280 (Parisot), the Board determined that it had "some jurisdiction over the membership rules and procedures of employee organizations."

Although the ALJ indicated that he was disposed towards finding CSEA's summary suspension procedures unreasonable under Dills Act section 3515.5, he found that he was barred from doing so by the Board's decision in Hackett.

In Hackett, which was decided in 1993, some of the named individuals in the instant proceeding alleged that they had been summarily suspended from membership, in violation of the Dills Act. There the Board reviewed the alleged facts and the underlying Policy File language, which was the same language in question in the instant case, and concluded that there was no showing that CSEA's membership procedures violated Dills Act section 3515.5. Finding that the decision in Hackett was precedential, and that he was bound to follow it, the ALJ in the instant case dismissed the allegations that CSEA's summary suspension procedures were unreasonable, in violation of Dills Act section 3515.5. The ALJ never addressed the merits of CSEA's motion to dismiss, which had been taken under submission at the start of the formal hearing.[9]

[9]As to the finding by CSEA that CDU was a competing organization, the ALJ held that this appeared to be an internal union matter outside of PERB's jurisdiction. The ALJ went on to note that, although CSEA has never persuaded the Board that CDU is in fact a competing

The ALJ analyzed the alleged discrimination and retaliation by CSEA against Landingham under the tests set forth in Novato Unified School District (1982) PERB Decision No. 210, Carlsbad Unified School District (1979) PERB Decision No. 89 (Carlsbad), and Hard.[10]

In reviewing the question of whether Landingham was engaged in protected activity the ALJ noted that under Hard, the union activities set forth in the complaint were protected only if they had some impact on employer-employee relations. He thereafter concluded that Landingham's claims of holding union office, or running for office on a platform of building a strong rank-and-file union, would have too remote an impact on employer-employee relations to be protected activity for the purposes of the Dills Act.

The ALJ did find that Landingham's other proven or admitted union activities had an impact on employer-employee relations, because they were directly related to the bargaining process that is at the heart of employer-employee relations under the Dills Act. Landingham had been actively involved in the bargaining process himself, had influenced bargaining positions, had advocated a master bargaining table, and had participated in picketing that appeared to be in direct support of bargaining. The ALJ concluded that these bargaining-related union activities were protected for purposes of the Dills Act. However, the ALJ did not

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employee organization (see CDU, Gonzales-Coke), that did not mean PERB had jurisdiction to prohibit CSEA from taking that position for internal union purposes.

[10]Under this analysis, in order to prevail on a claim of discrimination or retaliation, the charging party must establish: (1) that they engaged in protected activity; (2) that the activities were known to the employee organization; and (3) that the employee organization took the retaliatory action because of such activity. This is basically the same analysis PERB uses in cases of alleged discrimination or retaliation by an employer in violation of Dills Act section 3519(a), which contains the same language as Dills Act section 3519.5(b).

find that the adverse actions against Landingham were motivated by his bargaining-related union activities, noting that the record as a whole did not support this inference.

The complaint also alleged that Landingham had engaged in protected activity by being "a member and supporter of CDU, an organization . . . whose supporters have . . . filed unfair practice charges against CSEA." Filing an unfair practice charge with PERB is a protected activity. (California State Employees Association (Garcia) (1993) PERB Decision No. 1014-S (Garcia).) The question here was whether that activity could be attributed to Landingham. Landingham testified that he had been "involved" in filing unfair practice charges, but he could not remember which ones, and he apparently was not an actual charging party in any proceeding other than the present case.[11]

The ALJ, citing to Cupertino Union Elementary School District (1986) PERB Decision No. 572 (Cupertino), found that the Board has held the protected activities of some employees could be attributed to other employees in the same group, if adverse action against the group was unlawfully motivated by those protected activities. Here the evidence of Landingham's actual participation in the filing of unfair practice charges was weak. However, the ALJ concluded that this protected activity could be attributed to him, if the adverse action against Landingham and his group, CDU, was unlawfully motivated by the protected activity.[12]

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[11]A search of PERB case law reveals no proceeding against CSEA in which Landingham was a charging party.

[12]In its answer to the complaint, CSEA denied that the actions taken by Glass and Kenny against Landingham and the others were "adverse actions." The ALJ rejected these denials. Kenny's January 30 letter summarily suspended Landingham's membership effective February 15, 2000, making him ineligible to run for office, serve as a steward, or take union leave. Glass' February 8 charges requested Landingham's "[i]mmediate and permanent removal from membership." Given the CSEA Board's pre-authorization of such actions in its January 28 motion, the ALJ found these actions would reasonably be perceived as potentially adverse to Landingham's ability to participate in CSEA, by any objective standard.

Turning to the question of whether the adverse actions were unlawfully motivated by the protected activity of filing unfair practice charges, the ALJ concluded that they were unlawfully motivated. The January 28 agenda item for the motion authorizing the actions against Landingham and others had as an attachment, a list of 32 "CDU-related PERB and court cases" of which 27 were unfair practice charges filed against CSEA. The ALJ found that the January 28 motion had referred to CDU's "long history of attacking" CSEA, and that this reference included the unfair practice charges filed against CSEA by CDU members.

CSEA argued that the actions against Landingham were dictated by his "misuse" of CSEA's e-mail system. The ALJ found that CSEA had not met its burden of proof on this issue. The evidence showed that the CSEA controller reviewed the e-mail messages sent by Landingham and other CDU leaders specifically looking for references to CDU. CSEA made no apparent attempt to look more widely for possible "abuse." The e-mail policy the controller claimed to apply was not put into evidence, was not in the CSEA Bylaws or Policy File, and may not have even been received by Landingham. The ALJ found that the "misuse" of the CSEA e-mail system was not proven to be a valid reason for the adverse actions against Landingham, independent of his CDU-connection with the filing of unfair practice charges. The ALJ concluded that the adverse actions against Landingham by Kenny and Glass were taken in retaliation for protected activity, in violation of Dills Act section 3519.5(b).

EXCEPTIONS TO THE PROPOSED DECISION

CSEA excepted to the ALJ's findings that Landingham participated in a protected activity merely by his association with CDU, and that Landingham was retaliated against based on his membership in CDU. CSEA additionally excepted to the ALJ's use of Cupertino to support the holding that Landingham had engaged in protected activities, and that the ALJ

erred in finding that no adverse action would have occurred to Landingham but for CSEA's retaliation for his participation in protected activity.

DISCUSSION

I. Interference With Membership in CSEA

Regarding the issue of whether CSEA had established unreasonable membership provisions, no exceptions were filed to the ALJ's dismissal of this claim. PERB Regulation 32300(c)[13] states that "An exception not specifically urged shall be waived."

However, the Board may review issues that have not been raised in a party's exceptions, sua sponte, in order to avoid a "serious mistake of law." (Mount Diablo Unified School District (1984) PERB Decision No. 373b.) A serious mistake of law has occurred here with regard to the application of the Board's decision in Hackett, an error which justifies Board review.

A. PERB's Jurisdiction Over Membership Provisions

As was previously noted, the ALJ never addressed the merits of CSEA's motion to dismiss.[14] In this motion CSEA argued that the Board had no jurisdiction to hear this charge, in that the dispute between the members of CDU and CSEA was a purely internal union matter that did not substantially impact the employer-employee relationship. CSEA cited to Service Employees International Union, Local 99 (Kimmett) (1979) PERB Decision No. 106 (Kimmett) and Hard, in support of this claim.

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[13]PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq. and may be found on the Internet at www.perb.ca.gov.

[14]It appears that the ALJ did not rule on the motion because he resolved the membership question based upon his reading of Hackett, and because he found that CSEA had unlawfully retaliated against Landingham under Garcia and Cupertino.

In its post-hearing brief, CSEA renewed its Kimmett argument. Additionally, citing Novato Unified School District (1982) PERB Decision No. 210 (Novato), CSEA maintained that because suspension can be a reasonable form of discipline available to employee organizations, "Landingham must specifically prove in this case that the suspension imposed by CSEA was in retaliation for his exercise of rights under the Dills Act." (Emphasis added.)

Kimmett and its progeny are based upon PERB's finding that employees do not have protected rights in the organization of the exclusive representative. Under Kimmett, PERB will not interfere in purely internal union matters that do not impact the employer-employee relationship. (Kimmett, p. 16; Hard, p. 28.[15]) However, even in those cases where the Board has found it does not have authority to intercede in internal union matters which do not impact the employer-employee relationship, it has been careful to note that there are other union matters over which the Legislature has given it the power to act. One such area is that of "reasonable restrictions regarding who may join" unions and "reasonable provisions for the dismissal of individuals from membership." None of the cases cited by CSEA stands for the proposition that the Board lacks jurisdiction in these matters. Rather, the Board has consistently recognized that the Legislature conferred this area upon PERB as a separate and distinct grant of jurisdiction, and for this reason, denies CSEA's motion to dismiss. (See Dills

[15]The author of the Hard decision subsequently made it clear that the "internal union matter" standard should not be misinterpreted. In his dissent from the denial of the request for injunctive relief in the present case, Board Member Amador stated in part:

> I continue to believe that the activities described in CSEA (Hard) including participation in CDU rallies, distributing CDU literature or buttons, or wearing a CDU button or t-shirt were unprotected because they lacked the required impact on employer-employee relations. However, I did not intend for the case to be used as a license to abrogate rights protected by the Dills Act.

Act section 3515.5; Parisot; United Teachers Los Angeles (Malin) (1991) PERB Decision No. 870; California State Employees Association (Roberts) (1993) PERB Decision No. 1005-S; California State Employees Association (Hutchinson) (1998) PERB Decision No. 1304-S, p. 6; Hard, p. 27, fn. 8.)

In Parisot, the Board distinguished its unwillingness under Kimmett to interfere in internal union affairs unless there is a substantial impact on employer-employee relations with its authority under the Educational Employment Relations Act (EERA)[16] over the membership rules and procedures of employee organizations, noting:

> In Kimmett, we did not intend to abdicate our jurisdictional power to determine whether an employee organization has exceeded its authority under subsection 3543.1(a)[17] to dismiss or otherwise discipline its members.

Parisot specifically recognized PERB's authority to review the reasonableness of procedures for the suspension of individuals from membership. In California Correctional Peace Officers Association (Colman) (1989) PERB Decision No. 755-S (Colman), PERB exercised that authority over member-suspension procedures.[18]

In Colman the Board adopted the proposed decision of the ALJ which found that a union's suspension of a former officer from membership violated the Dills Act. The exclusive representative, citing to Kimmett and Parisot, argued that the Board's inquiry was limited only to those cases which had a substantial impact on the employer-employee relationship.

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[16]EERA is codified at Government Code section 3540 et seq.

[17]EERA section 3543.1(a) contains language identical to the language of Dills Act section 3515.5.

[18]Although Dills Act section 3515.5 specifically refers to the "dismissal" of individuals from membership, PERB has jurisdiction over suspensions as well. (Parisot, p. 9.)

(Colman, proposed dec., p. 18.) The exclusive representative further argued that an employee challenging union discipline "must demonstrate either that the discipline was motivated by conduct designed to thwart the right to select a bargaining representative or that the discipline was in retaliation for protected activities." (Id. at p. 19.) Both of these arguments have been revived by CSEA in the instant proceeding.

In rejecting these claims in Colman, the Board found:

> A showing of unlawful motivation is appropriate for discrimination or retaliation cases. . . But the facts alleged by Mr. Colman do not raise an issue of discrimination. Rather they set out an issue of interference. Proof of unlawful motivation is unnecessary to demonstrate interference with protected activities.[19]
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> Nor is the Association convincing in its contention that PERB review of union discipline is precluded except where the discipline has a substantial impact on the employee's relationship with the employer. The PERB review of union disciplinary procedures is rooted in Section 3515.5 of the Dills Act. . . . A fair reading of Parisot and Stewart[20] makes it evident that the PERB does not believe itself restricted in the review of union discipline to only those situations which substantially impact the employer-employee relationship. The Kimmett limitation on review, which the Respondent cites, is rooted in the duty of fair representation questions presented there. Neither Parisot nor the present case involves the duty of fair representation.
> (Id. at pp. 19-20; citations omitted.)

[19]See Carlsbad. Under Carlsbad, in order to prevail on an interference claim, the conduct alleged to constitute an unfair practice must tend to or actually result in some harm to employee rights granted under the EERA. Once such right has been established, the respondent must show that there was a compelling reason for its actions. Novato modified Carlsbad by adding unlawful motive as the specific nexus required in establishing a prima facie case of discrimination or retaliation.

[20]Union of American Physicians and Dentists (Stewart) (1985) PERB Decision No. 539-S.

CSEA's argument that Kimmett and Novato bar relief on the membership question is not well taken. The relevant portion of the instant charge was not based on the retaliation or discrimination provisions of Dills Act section 3519.5. It was based on the interference provisions of Section 3519.5, and the reasonable restriction provisions of Section 3515.5. Parisot and Colman, not Kimmett and Novato, control its disposition.

B. California State Employees Association (Hackett)

The ALJ recognized that in Parisot the Board found it had the power to determine the reasonableness of the membership rules and procedures of employee organizations. The ALJ additionally stated that he might be inclined to find CSEA's summary suspension procedures unreasonable under Dills Act section 3515.5, but that he was precluded from doing so by Hackett.

The ALJ erred in his application of Hackett to this case. As the Board noted in Hackett:

> . . . Charging Parties were suspended because they, after being warned not to interfere with the ratification votes for other bargaining units, distributed fliers, criticized the agreements that had been reached in other bargaining units and disrupted ratification meetings in an effort to discourage Bargaining Units 4, 15, 20 and 21 members from voting to accept and ratify the tentative agreements in their respective bargaining units. (Id. at p. 6, warning letter.)

Hackett is distinguishable from the instant proceeding. In Hackett, the Board's decision regarding the reasonableness of the suspension procedure was predicated upon the charging parties' disruption of the orderly contract ratification process. No such emergency situation appears in the case presently before the Board.

The CSEA Bylaws Article XIX, Section 1, states:

> These Bylaws shall be the supreme law of the Association, subject only to the Articles of Incorporation and the provisions of the laws of the State of California and the United States of America. Any inconsistent provision of the Policy File, or contrary act of the General Council, the Board of Directors, divisions/affiliate(s), or the officers, employees, or agents of the Association is void.

Division 10 of CSEA's Policy File governs CSEA's discipline of its members. Policy File section 1001.01 authorizes disciplinary action, inter alia, for the following reasons:

> (c) Activity by an Association officer actively working for or supporting any other organization that violates the Bylaws and/or Policy File of the Association;
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> (f) Violation of the Association's or chapter's Bylaws or the Policy File;
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> (g) Taking an active part in promoting another organization which is undermining the objectives or the existence of the Association or is seeking its decertification;
>
> (n) Misuse of Association or chapter funds, equipment, supplies or other assets.[21]

CSEA Policy File section 1001.03 in turn states:

> When, in the opinion of the president, the actions of a member are such as to pose an immediate threat to the welfare of the Association, the president may summarily suspend the member until the procedure established in Division 10 of the Policy File is concluded. If written charges are not filed within 10 working days, the suspension is terminated.

If the summary suspension provisions of CSEA Policy File section 1001.03 are not invoked, Division 10 otherwise provides that suspension or other discipline is effective only upon a three-fourths vote of the CSEA Board of Directors, acting on the report of a hearing officer or panel, after a full hearing on specific charges.

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[21]The January 28 agenda item specifically quoted Policy File section 1001.01(c) and (g).

The report of the SEIU hearing officer, held pursuant to the claims filed by the charging parties, addressed these summary suspension procedures and stated, in part:

> I am unable to find any place in the CSEA Bylaws where the CSEA President is given the authority to summarily suspend a person from membership. Instead, the Bylaws at Article III, Section 12, require a "hearing prior to disciplinary action being effective." In addition, they require a "three-fourths vote of the Board of Directors" to impose discipline upon a member. The Board of Directors may neither delegate its authority to discipline members to the President, nor may it authorize the President to do what the Bylaws did not authorize him or her to do. The complaint here alleges that the suspensions of membership are being imposed prior to a disciplinary hearing by the CSEA President, and Mr. Kenny himself acknowledges that the six individuals are being suspended from membership ". . . pending the completion of the internal discipline process . . ."
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> . . . . . .
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> Mr. Kenny has pointed to the CSEA Policy File as authority for his summary pre-hearing suspensions. . . . However, it does not appear that the policies to which he refers are authorized by, or consistent with, the Bylaws of the organization. The Bylaws are "the supreme law of the Association," and it is specifically provided at Article XIX of the Bylaws that '[a]ny inconsistent provision of the Policy File . . . is void.' The provision of the Policy File which allows for summary suspension by the CSEA President prior to a hearing is inconsistent with the Bylaws, which provide that only the Board may impose discipline on a member and only after a hearing. The Policy File, which is adopted only by the CSEA Board of Directors, and not by the General Council, may not grant authority that the Bylaws have not conferred.

The SEIU hearing officer went on to find that the charging parties' complaint was "legitimate" and appropriate for investigation, and that "summary suspensions of members prior to a hearing does not comport with democratic internal procedures and is not consistent with CSEA Bylaws."

C. Application of Section 3515.5

A review of the exhibits filed in this case appears to confirm the findings of the SEIU hearing officer that the summary suspension procedures contained in the Policy File were in violation of CSEA Bylaws. Although this fact may cast serious doubt upon the reasonableness of this procedure, it is not necessary for the Board to reach the question of the reasonableness of the summary suspension procedures themselves.[22] PERB's authority to determine the reasonableness of a membership provision must include not just the reasonableness of the provision itself, but the reasonableness of the provision as it was applied in the case pending before the Board. (Colman, p. 21.) Here, even if the Board were to find that the summary suspension procedures were reasonable, a violation of the Dills Act will be found if their application in this case was not reasonable.

By its own language, the summary suspension proceedings can be invoked when the actions of a member "pose an immediate threat to the welfare of the Association." Unlike Hackett, where invocation of the summary suspension procedure appeared justified by an aggressive disruption of the contract ratification process, no such immediate threat was present here. The activities of CDU have been ongoing for almost a decade.[23] The letters of suspension nowhere indicated the need for immediate action prior to a hearing. Awaiting the conclusion of a due process hearing, under the CSEA Bylaws, would have required only a

[22]In Parisot the Board found that "A provision which permits suspension of a member who is engaged in decertification activities against the organization is reasonable." (Parisot, p. 9.) However, the Board went on to reverse the hearing officer's dismissal of the charges, finding that Parisot "has raised questions about the reasonableness of the procedures followed by CSEA in dealing with all of the charges." (Id. at p. 11.)

[23]See footnote 4, supra.

comparatively short, additional period. The actions of the CSEA Board and Kenny appear to furnish evidence of an unreasonable application of CSEA procedures.

CSEA's animosity toward CDU is revealed in its motion to dismiss. In the statement of facts to the motion to dismiss, counsel for CSEA wrote:

> On or about December 22, 1999,[24] CSEA received a copy of the decision in Hard, Hackett, et al v. CSEA, PERB Dec. No. 1368-S (the Hard decision). In this decision, PERB overruled its earlier decision, CSEA (Hackett, et al), PERB Dec. No. 1126-S[25], and concluded that the charging parties had failed to establish that their activities on behalf of Caucus for a Democratic Union (hereinafter "CDU") were protected activities under the Dills Act. For many years, CSEA had serious concerns about the unregulated and unfettered activities of CDU disparaging and attacking CSEA. During this time, CDU has operated outside of the governance of CSEA and had refused to abide by the regulations imposed on an employee organization. On January 28, 2000, the CSEA Board of Directors ("Board"), acting in Executive Session, adopted a motion which declared the CDU a competing organization under CSEA's policy and in violation of CSEA's policy. [Emphasis added.]

Futhermore, it stretches the bounds of credulity to assume it was merely accidental that the date the summary suspensions were to begin, February 15, coincided with the opening of nominations for CSEA office. Kenny stated in his letter to Landingham that his CSEA membership was to be suspended effective February 15, and would remain in effect until the CSEA disciplinary procedure had been concluded. Upon the suspension of his membership, Landingham would not be eligible to run for CSEA office, to be a steward, nor would he be eligible for union leave.

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[24]The Board decision in Hard issued on December 21, 1999.

[25]Hackett involved many of the same charging parties and activities which are the subject of this proceeding. In Hackett, the Board found that the conduct of the charging parties was protected under Dills Act section 3519.5(b), in that it was a challenge to the union leadership, not to the union itself.

Taking all of these facts together, the Board concludes that the actions of CSEA were undertaken in violation of its own Bylaws and Policy File for the unreasonable purpose of interfering with the right of the Landingham to run for CSEA elected office. The facts of this case, when contrasted with the facts of Hackett, show that the ALJ was not bound by precedent to find that no violation of the Dills Act had occurred. The Board hereby finds that CSEA's actions were violative of the provisions of Dills Act section 3515.5.[26]

II. Retaliation for Protected Activity

Regarding the retaliation claim, the ALJ addressed two theories of protected activity: (1) that Landingham's union activities had an impact on employer-employee relations because they were directly related to the bargaining process that is at the heart of employer-employee relations under the Dills Act; and (2) that under Cupertino, the filing of unfair practice charges by members of CDU brought Landingham under the protection of Garcia.

As to the first of these theories, Landingham catalogued numerous organizing and bargaining efforts in which he had been engaged on behalf of CDU. However, he did not show how his involvement in many of these acts specifically impacted the employer-employee relationship, thus making it a protected activity. In the abstract, any act undertaken to improve

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[26]The fact that Landingham was reinstated to membership on March 1, that he was able to run for union office, and that the internal charges against him resulted in his only receiving his pre-March 1 suspension as a penalty does not render this case moot. As the Board held in Amador Valley Joint Union High School District (1978) PERB Decision No. 74:

> A case in controversy becomes moot when the essential nature of the complaint is lost because of some superceding act or acts or the parties.

The essential nature of this complaint, i.e., the reasonableness of CSEA's summary suspension procedures, has not been lost. This controversy could continue to arise if the Board does not address the question in this case. The Board is ruling on the underlying issues for the

employees wages and working conditions, including participation in rallies, distributing literature, wearing buttons or t-shirts, could be seen as meeting this test. However, as the Board made clear in Hard, that is not the case. As CSEA argued in its exceptions, membership in CDU is not protected per se. A more direct and cognizable impact on the employer-employee relationship must be shown in order to meet the standard set forth in Kimmet and Hard.[27] Although the ALJ did find that Landingham's prior bargaining process activities on behalf of CDU constituted protected activity, he also concluded that the adverse actions against Landingham were not motivated by his bargaining-related union activities. The ALJ correctly found that "The record as a whole does not support that additional inference." The finding of retaliation was therefore not based upon this theory of protected conduct.

As to the ruling that the filing by members of CDU of unfair practice charges against CSEA protected Landingham under Cupertino, the ALJ found that "In effect, [in Cupertino] PERB held that the protected activities of some employees could be attributed to other employees in the same group, if adverse action against the group was unlawfully motivated by those protected activities."

Cupertino is distinguishable from the instant case. In Cupertino the exclusive representative charged that management had implemented a layoff which targeted a specific department because of the high number of union activists in that department. Here, the Board

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express purpose of clarifying the application of Hackett to similar, but distinguishable, facts in the case at bar.

[27]For example, had Landingham's suspension occurred in the middle of negotiations with the State, and he was shown to be a key or integral part of the negotiating team and that the suspension was the result of the negotiating function he was performing, such acts might constitute a sufficient impact on the employer-employee relationship to justify action by the Board. (See Parisot, p. 11.)

reversed the regional attorney's partial dismissal of the charge, and ordered that a complaint issue. This order was based on the grounds that there was sufficient circumstantial evidence from which an inference could be drawn that there was a link between past aggressive union activity and the decision to lay off a particular group.

Cupertino found that if it was shown that the employer's decision was motivated by the protected acts of some members of the group, then the layoff is unlawful as to the entire group. Cupertino did not hold that the protected acts of some members of a group will automatically be attributed to all members of that group.[28] Cupertino held that protected activity can raise an inference of retaliation sufficient to justify the issuance of a complaint. It did not conclude that retaliation had occurred because of an unrelated protected activity.

There thus appears to be no protected activity upon which to base the retaliation claim. Accordingly, this portion of the charge is dismissed.

ORDER

Based upon the foregoing, and upon the entire record in this matter, it is found that the California State Employees Association (CSEA) violated the Ralph C. Dills Act (Dills Act), Government Code section 3515.5, by unreasonably dismissing Ron Landingham (Landingham) from membership in CSEA. All other allegations are hereby dismissed.

Pursuant to Dills Act section 3514.5(c), it is hereby ORDERED that CSEA and its representatives shall:

[28]If this were true, any group of employees could theoretically immunize themselves from union internal disciplinary procedures by banding together, giving themselves a name, and having one member file an unfair practice charge with PERB.

A. CEASE AND DESIST FROM:

The application of unreasonable provisions for the purpose of dismissing Landingham from membership in CSEA.

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

1. Withdraw and destroy the complaint filed against Landingham by the CSEA secretary-treasurer, along with all related documents, including the hearing panel's records and recommendation, the CSEA Board of Directors' adoption of that recommendation, and the Board of Directors' suspension of Landingham.

2. Within ten (10) workdays of the service of a final decision in this matter, post copies of the Notice attached hereto as an Appendix at all State of California work sites and all other work locations where notices to employees represented by CSEA are customarily posted. The Notice must be signed by an authorized agent of CSEA, indicating CSEA will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to ensure the Notice is not reduced in size, altered, defaced or covered with any other material.

3. Upon issuance of a final decision, make written notification of the actions taken to comply with the Order to the Sacramento Regional Director of the Public Employment Relations Board, in accord with the regional director's instructions. Written notification to the regional director must be served concurrently on the charging parties.

Members Baker and Neima joined in this Decision.

APPENDIX

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

After a hearing in Unfair Practice Case No. SA-CO-225-S, Jim Hard, Cathy Hackett, Ron Landingham, Marc Bautista, Adrienne Suffin & Walter Rice v. California State Employees Association, in which all parties had the right to participate, it has been found that the California State Employees Association (CSEA) violated the Ralph C. Dills Act (Dills Act), Government Code section 3515.5, by unreasonably dismissing Ron Landingham (Landingham) from membership in CSEA. All other allegations are hereby dismissed.

As a result of this conduct, we have been ordered to post this Notice and we will:

A. CEASE AND DESIST FROM:

The application of unreasonable provisions for the purpose of dismissing Landingham from membership in CSEA.

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

Withdraw and destroy the complaint filed against Landingham by the CSEA secretary-treasurer, along with all related documents, including the hearing panel's records and recommendation, the CSEA Board of Directors' adoption of that recommendation, and the Board of Directors' suspension of Landingham.

Dated:_____

CALIFORNIA STATE EMPLOYEES ASSOCIATION

By:_____
Authorized Agent

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