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 Request for Reconsideration PERB Decision No. 1479-S PERB Decision No. 1479a-S October 21, 2002

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

Before Baker, Whitehead and Neima, Members.

DECISION

WHITEHEAD, Member: This case is before the Public Employment Relations Board (PERB or Board) on a request by the California State Employees Association (CSEA) that the Board grant reconsideration of California State Employees Association (Hard, et al.) (2002) PERB Decision No. 1479-S (Hard, et al.). In Hard, et al., the Board reversed an administrative law judge's (ALJ) proposed decision. The Board found that it had jurisdiction to determine the reasonableness of CSEA's summary suspension procedures under section 3515.5 of the Ralph C. Dills Act (Dills Act)[1] and that its summary suspension of Ron Landingham (Landingham) interfered with Landingham's protected rights in violation of section 3519.5(b). The Board

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

also held that Landingham did not demonstrate the effect of his protected activities on the employer-employee relationship to show retaliation under section 3519.5(b).

After reviewing the entire record in this matter, including CSEA's request for reconsideration, the Board denies the request for reconsideration based upon the following discussion.

DISCUSSION

PERB Regulation 32410(a)[2] allows any party to a decision of the Board itself, because of extraordinary circumstances, to request the Board to reconsider the decision. Section 32410(a) states, in pertinent part:

> The grounds for requesting reconsideration are limited to claims that: (1) the decision of the Board itself contains prejudicial errors of fact, or (2) the party has newly discovered evidence which was not previously available and could not have been discovered with the exercise of reasonable diligence.

CSEA's arguments in its request for reconsideration will be addressed in the order raised.

First, CSEA claims that the Board misinterpreted CSEA's bylaws covering discipline of CSEA officers, thus creating a prejudicial error of fact. Article XIX , Section 1 of CSEA's bylaws provides:

> 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.

Article IV, section 1(d) of the CSEA Bylaws, Discipline, provides:

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[2]PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

> Association officers and directors may be disciplined by the Board of Directors in accordance with rules established by the Board of Directors, which shall provide for, but not be limited to: causes for disciplinary action; prior notice in writing; right to counsel; written specification of charges; types of disciplinary action that may be taken; suspension during investigation; hearing prior to disciplinary action becoming effective; and right of appeal. (Emphasis added.)

CSEA Policy File, Division 10, section 1001.03, Suspension of Membership provides, in pertinent part:

> 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.

Reading the above provisions together, we disagree with CSEA's assertion that the Board misconstrued CSEA's bylaws. CSEA Bylaws, Article IV, section 1(d) does indeed allow for suspension during investigation "in accordance with rules established by the Board of Directors." In the CSEA Policy File, section 1001.03, the CSEA board of directors set forth those rules, requiring "an immediate threat to the welfare of the Association" before instituting a summary suspension during investigation of a charge, but before hearing and due process. (Emphasis added.) Therefore, the CSEA Policy File, section 1001.03 implements the Bylaws, Article IV, section 1(d), rather than conflicts with it. As the Board properly concluded, there was no such showing of an immediate threat to the welfare of CSEA in the instant matter. Indeed, CSEA's suspension of Landingham, without evidence of an immediate threat to the welfare of CSEA, was inconsistent with the dictates of Bylaws Article XIX, section 1 and Article IV, section 1(d). As a result, CSEA has not shown a prejudicial error of fact in the Board's interpretation of CSEA's bylaws and policy file.

Second, CSEA alleges that the Board improperly used "motive" as a factor for its holding that CSEA interfered with Landingham's rights. CSEA, unfortunately, misunderstands the Board's holding. What the Board did is evaluate various factors in order to conclude that CSEA's internal discipline policy as applied to Landingham was unreasonable in violation of Dills Act section 3515.5. Such factors included CSEA's violation of its own internal discipline rules, as discussed above, and its animosity toward Caucus for a Democratic Union (CDU) as revealed by statements in its motion to dismiss. (Hard, et al., p. 21.)

CSEA further argues that the Board's ruling contradicts its holding in California State Employees Association (Hard) (1999) PERB Decision No. 1368-S (Hard). In Hard, the Board, referring to the limitation in Service Employees International Union, Local 99 (Kimmett) (1979) PERB Decision No. 106, explained that it has "refused to intervene in matters involving the solely internal activities or relationships of an employee organization which do not impact employer-employee relations" (Hard, pp. 24-25) and that "PERB's function is to interpret and administer the statutes which govern the employer-employee relationship, not to police internal relationships among various factions within employee organizations." (Hard, p. 28.)

However, the Board has not surrendered its power to review internal union activities for which the Legislature has given the Board the power to act. In fact, the Board, in footnote 15, noted that the author of Hard stated that he "did not intend for the case to be used as a license to abrogate rights protected by the Dills Act."[3] Such rights include reasonable membership and dismissal provisions for union members under Dills Act section 3515.5. In this case, the Board confirmed its authority to adjudicate disputes over the statutory rights of union

[3]This quote is taken from Board Member Amador's dissent from the denial of the request for injunctive relief in the present case.

members. In so doing, the Board cited precedent interpreting Section 3515.5 and parallel statutes under the Board's jurisdiction. (California School Employees Association and its Shasta College Chapter #381 (Parisot) (1983) PERB Decision No. 280 and California Correctional Peace Officers Association (Colman) (1989) PERB Decision No. 755-S (Colman).) Thus, under this analysis, Landingham has a protected right to reasonable internal disciplinary procedures and the reasonable application of those procedures.

The test for whether a respondent has interfered with the rights of employees under the Dills Act does not require that unlawful motive be established, only that some slight harm to employee rights results from the conduct. The standard for interference is as follows:

> [I]n order to establish a prima facie case of unlawful interference, the charging party must establish that the respondent's conduct tends to or does result in some harm to employee rights granted under EERA. (State of California (Department of Developmental Services) (1983) PERB Decision No. 344-S, citing Carlsbad Unified School District (1979) PERB Decision No. 89; Service Employees International Union, Local 99 (Kimmett) (1979) PERB Decision No. 106.)

Under the above-described test, a violation may only be found if the Dills Act provides the claimed rights. For example, in Clovis Unified School District (1984) PERB Decision No. 389, the Board held that a finding of coercion does not require evidence that the employee actually felt threatened or intimidated or was in fact discouraged from participating in protected activity. The failure of CSEA to establish or follow reasonable disciplinary procedures violates Dills Act section 3515.5 and thus interferes with Landingham's protected rights under Dills Act section 3519.5(b).[4]

[4]CSEA disputes the applicability of Colman to this matter by stating that the facts showing an interference violation are distinguishable from the facts in this matter. According to CSEA, unlike Colman, Landingham's participation in CDU or his running for CSEA elective office is not a protected activity and should not have been the basis for a finding of

On this issue, CSEA is arguing in substance that the Board has made a legal, not a factual error, in interpreting Board precedent. Purported errors of law are not grounds for reconsideration. (Apple Valley Unified School District (1990) PERB Order No. Ad-209a (Apple Valley), citing South Bay Union School District (1990) PERB Decision No. 791a, p. 7, and State of California (California Department of Forestry and Fire Protection) (1989) PERB Decision No. 734a-S, pp. 2-3.) We therefore hold that the Board's reference to circumstances surrounding Landingham' suspension, in order to find interference with Landingham's protected rights under Dills Act Section 3515.5, does not constitute a prejudicial error of fact.

Third, CSEA argues that it was inappropriate for the Board to rely upon the Service Employees International Union (SEIU) hearing officer's report as evidence that CSEA's discipline of Landingham was unreasonable and that such reliance is prejudicial error,[5] citing Evidence Code 1200,[6] PERB Regulation 32176, and the CSEA/SEIU Affiliation Agreement found in CP Exhibit 27.[7] PERB Regulation section 32176 provides, in pertinent part:

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interference. Furthermore, Landingham was ultimately not deprived of his ability to run for elected office. (Note that in Hard, et al., p. 22, fn. 26, the Board disposes of this argument.) So, CSEA argues, there is no evidence of actual interference with Landingham's rights under the Dills Act. As stated above, under Section 3515.5, Landingham has a protected right to reasonable disciplinary policies or the reasonable application of those policies. Landingham's both potential and actual inability to run for union office at the time of the suspension as well as CSEA's failure to follow its own internal disciplinary procedures are evidence of the unreasonable application of CSEA's disciplinary procedures. Conversely, CSEA interfered with Landingham's protected right to reasonable membership and disciplinary procedures.

[5]Hard, et al., p. 19.

[6]Evidence Code section 1200 provides: (a) "Hearsay evidence" is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated. (b) Except as provided by law, hearsay evidence is inadmissible. (c) This section shall be known and may be cited as the hearsay rule.

[7]CP Exhibit 27 includes, among other documents, a letter from CSEA legal counsel to the SEIU hearing officer that under the Affiliation Agreement, SEIU had no jurisdiction to

> Compliance with the technical rules of evidence applied in the courts shall not be required. . . . Hearsay evidence is admissible but shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions.

We disagree that the Board's reliance upon the SEIU hearing officer's report was in error, let alone prejudicial error. This is the first time that CSEA has raised this issue, although the ALJ had alluded to this report in his proposed decision. In the proposed decision, the ALJ indicated that he would find CSEA's summary suspension procedures unreasonable under Dills Act section 3515.5 for the same reasons expressed by the SEIU hearing officer. Assuming that the report is hearsay under Evidence Code section 1200, it is only one factor, among others, considered by the Board in its finding that CSEA's summary suspension of Landingham was unreasonable. The Board also looked at the timing of the suspension, which occurred during the nomination period for candidates for CSEA office, the evidence of CSEA's animosity toward CDU, and the Board's finding that CSEA violated its own bylaws and policy file. The Board, on its own, merely reached the same conclusions as the SEIU hearing officer. Thus, the Board's reference to the SEIU hearing officer's findings is not inconsistent with the requirements of PERB Regulation 32176.

In addition, CSEA asserts that it challenged SEIU's jurisdiction under the Affiliation Agreement for investigations of compliance with CSEA internal dispute procedures. However, a reading of the Affiliation Agreement, as cited by CSEA legal counsel in its letter to the SEIU hearing officer, seemingly allows CSEA members appeal to the international president and/or executive board solely to determine whether or not CSEA has complied with its internal

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conduct an investigation, hearing or fact-finding involving CSEA's internal dispute resolution procedures, including discipline of its members. Also, included in Exhibit 27 is the SEIU hearing officer's report and a letter from CSEA President Perry Kenny to SEIU President Andy Stern, again disputing SEIU's assumption of jurisdiction in this matter.

dispute resolution procedures. (See CP Ex. 27.) Article 7, section 8 of the Affiliation Agreement states, in pertinent part, that "CSEA affirms that it has a responsibility to its members to ensure that . . . . It maintains democratic internal procedures." Article 7, section 11 of the Affiliation Agreement provides in pertinent part:

> INTERNAL CSEA DISPUTES. Notwithstanding the provisions of Article 3 of this Agreement, SEIU waives jurisdiction to adjudicate disputes arising within CSEA, including, but not limited to, those concerning election to office in CSEA or its subordinate bodies; grievances and appeals; discipline of its members; and granting or revoking its chapter charters with respect to those actions arising under the constitution and bylaws of CSEA.
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> SEIU hereby finds that CSEA's Internal (sic) dispute-resolution procedures contained in its constitution and bylaws as they now exist are in substantial compliance with SEIU requirements of due process and fair play. CSEA retains the right to interpret and apply the provisions of its Constitution and Bylaws.
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> CSEA members may appeal to the International President and/or Executive Board solely for determination whether CSEA adhered to its internal dispute resolution procedures. The President and the International Executive board may uphold CSEA's adherence to those procedures or may remand the dispute to CSEA for adherence to those procedures.

Arguably, these provisions are internally consistent and may be construed to allow SEIU to investigate and make a determination on a complaint by a CSEA member regarding whether CSEA adhered to its internal disciplinary procedures, and if not, remand the complaint to CSEA for compliance with those procedures.[8] Seemingly, all the SEIU hearing officer did

[8]The SEIU hearing officer construed the Affiliation Agreement to reach a similar conclusion. He added that the history of the Affiliation Agreement would explain any possible inconsistency. This current agreement is the second negotiated Affiliation Agreement, as revised in December 1988. The 1988 revision added the language in Article 7, section 8 conferring authority to the international president to investigate a complaint regarding "the maintenance of democratic procedures." It also added the language in Article 7, section 11, which allowed the international president, upon receipt of a complaint, to determine whether

in his report was to find the complaints to be legitimate and recommend postponing the suspensions. The SEIU hearing officer found, and the parties do not dispute, that the suspensions occurred before hearing and without a CSEA board of directors vote on each suspension. After investigation and hearing, the SEIU hearing officer concluded that the "summary suspensions of members prior to a hearing does (sic) not comport with democratic internal procedures and is not consistent with the CSEA bylaws."

CSEA's objections on this issue involve interpretation of legal documents and the rules of evidence. There is no issue of fact argued. Again, citing to Apple Valley, we therefore conclude that the Board's reference to the SEIU hearing officer's report does not constitute a prejudicial error of fact.

Fourth, CSEA argues that the Board's sua sponte review of the ALJ's reliance upon California State Employees Association (Hackett, et al.) (1993) PERB Decision No. 979-S (Hackett) constitutes a prejudicial error of fact. CSEA asserts that the Board's citation to Mt. Diablo Unified School District (1984) PERB Decision No. 373b (Mt. Diablo) was inappropriate as that case is factually distinguishable from the instant matter. CSEA contends that since neither party excepted to or argued these issues, it had no notice that the Board wanted to "revisit" Hackett. If it had received such notice, CSEA contends that it could have clarified various "factual" errors, such as the Board's inappropriate reference to the SEIU hearing officer's report.[9]

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internal dispute procedures have been followed. According to the SEIU hearing officer, the international did not possess such authority in the original Affiliation Agreement.

[9]CSEA states that Landingham agrees with its view that SEIU lacks authority to adjudicate disputes arising out of CSEA's implementation of its internal disciplinary procedures. In his testimony, Landingham acknowledged SEIU's inability "to do anything other than do an investigation and issue a report, which it would send to the Board of Directors

According to CSEA, the Board, instead, could have requested oral argument under PERB Regulation 32315[10] for exceptions filed under PERB Regulation 32300, but did not. CSEA concludes therefore that due process requires reconsideration.

However, it is clear that Board precedent allows such "sua sponte" review. In Apple Valley, the Board held that a reversal of precedent by the Board does not constitute grounds for reconsideration.[11] The Board further held in Apple Valley that the Board is not constrained from applying legal analysis not urged by the parties, or from considering sua sponte legal issues not raised by the parties when necessary to correct a serious mistake of law, citing Mt. Diablo and Fresno Unified School District (1982) PERB Decision No. 208.

In addition, to avoid a "serious mistake of law," the effect of which would derogate Landingham's rights under the Dills Act, the Board properly distinguished this case from Hackett in finding that, unlike Hackett, there was no showing of immediate threat to the welfare of CSEA under CSEA Policy File section 1001.03. The argument that the Board's sua sponte review creates a "prejudicial error of fact" is thereby strained at best. Under Apple

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[of CSEA] for their possible action." (RT, Vol. I, 18-20.) It appears that Landingham's understanding of SEIU's authority therefore corresponds with that of the Board, described above.

[10]PERB Regulation 32315 provides:

> A party desiring to argue orally before the Board itself regarding the exceptions to the proposed decision shall file with the statement of exceptions or the response to the statement of exceptions a written request stating the reasons for the request. Upon such request or its own motion the Board itself may direct oral argument.

[11]In Apple Valley, the Board was interpreting a previous version of PERB Regulation 32410(a), which included "newly discovered law" that "was not previously available or could not have been discovered with the exercise of reasonable diligence" as grounds for granting

Valley and cases cited, the Board has appropriately exercised its authority to engage in sua sponte review of the application of Hackett to this matter.

We therefore conclude that CSEA has not shown the existence of extraordinary circumstances either by proving that the decision in Hard, et al. contained prejudicial errors of fact or by meeting any of the limited criteria found in PERB Regulation 32410(a). As a result, the Board denies CSEA's request for reconsideration.

ORDER

The California State Employees Association's request for reconsideration of the Board's decision in California State Employees Association (Hard, et al.) (2002) PERB Decision No. 1479-S is hereby DENIED.

Members Baker and Neima joined in this Decision.

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reconsideration. The phrase "newly discovered law" has since been deleted from that regulation.