STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

JULIA R. ZANCHI, Charging Party, v. STATE OF CALIFORNIA (DEPARTMENT OF CORRECTIONS), Respondent.	Case No. LA-CE-599-S PERB Decision No. 1826-S March 3, 2006

Appearances: Law offices of Richard J. Papst by Richard J. Papst, Attorney, for Julia R. Zanchi; State of California (Department of Personnel Administration) by Linda Nelson, Labor Relations Counsel, for State of California (Department of Corrections).

Before Duncan, Chairman; McKeag and Neuwald, Members.

DECISION

DUNCAN, Chairman: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by Julia R. Zanchi (Zanchi) to an administrative law judge's (ALJ) proposed decision (attached). The unfair practice charge alleged that the State of California (Department of Corrections) (DOC) violated section 3519 of the Ralph C. Dills Act (Dills Act)[1] by retaliating against Zanchi because she filed a grievance. Zanchi alleges that DOC began investigations (criminal and civil) into claims she presented in a grievance requesting reimbursement for airline tickets she did not use while in the position of acting sergeant. She also alleges that she was denied an extension of a limited term assignment and denied a promotion to the position of correctional sergeant on a permanent basis.

[1]The Dills Act is codified at Government Code section 3512, et seq.

The original unfair practice charge was dismissed by a Board agent on February 25, 2003. Zanchi appealed to the Board and the dismissal was reversed in State of California (Department of Corrections) (2003) PERB Decision No. 1579-S (Corrections). PERB issued a complaint and the case proceeded to hearing before an ALJ. The ALJ concluded that Zanchi had met her burden to state a prima facie case, but that DOC also met its burden in presenting its defense and did not violate the Dills Act. In her proposed decision the ALJ found the case should be dismissed. Zanchi then filed exceptions to the proposed decision.

We have reviewed the complete record including, but not limited to, the unfair practice charge and amended charge, the warning and dismissal letters, the appeal of the dismissal, the response to the appeal, the decision reversing the Board agent's dismissal, the complaint, Zanchi's post hearing brief, the closing brief of DOC, the ALJ's proposed decision, Zanchi's exceptions to the proposed decision and DOC's response to the exceptions. We find the proposed decision cannot be adopted as to the issue of whether or not Zanchi established a prima facie case. We agree with the result of the ALJ's proposed decision in dismissing the charges, but not the analysis of the case. We find the initial Board agent warning and dismissal letters were correct in stating that Zanchi did not establish a prima facie case.

We vacate the decision in Corrections and adopt the warning and dismissal letters of the Board agent as the decision of the Board itself for the reasons stated below.

BACKGROUND

In August 2001, Zanchi and her husband (who is also an employee of DOC) purchased airline tickets for a trip to Paris, France, that was to commence October 29, 2001, with return to the United States November 5, 2001. Zanchi had approved leave for this time period.

At the end of September 2001, Zanchi was offered an assignment as acting sergeant. The assignment started October 1, 2001. She accepted the assignment and began work. She

then interviewed for a permanent sergeant position. She received a one year limited term assignment but was not promoted to a permanent position. The limited term was not extended beyond one year. At the time she started the acting sergeant assignment it was the policy of the institution where she worked for those serving in out-of-class assignments to forfeit any vacation scheduled during that period.[2] She inquired of the personnel department as to how long she would be in the acting sergeant position and asked if she would be able to take the trip to Paris. She was told the assignment would take three to six months and that she would not be able to take the vacation because of the cost of overtime in covering her shifts. At some point, she applied for and received a one year limited term assignment as a sergeant and then applied for a permanent position. She served one year in the limited term assignment. It was not renewed and she did not receive a promotion to sergeant.

Zanchi did not take her vacation. She filed a grievance for loss of vacation and requested reimbursement for the airline tickets that had been purchased. After the fourth level grievance was denied Zanchi filed the unfair practice charge with PERB. She also charged that as a result of DOC animus against her she was denied promotional opportunities.

The Board agent advised Zanchi in the February 25, 2003, dismissal letter that Zanchi had not established a prima facie case. The Board agent said,

> . . . the charge does not state a prima facie case. Zanchi's claim is that her exercise of the statutorily protected right of filing grievances caused her to be investigated for conspiracy to commit fraud against the State and negatively impacted her future job opportunities. In her grievance, Zanchi asked that the department vacation policy be changed and [for] reimbursement for non-refundable airplane tickets. The investigation of the grievance necessarily entailed inquiry regarding the truth of the information she provided, and the department determined that the grievance had no merit. [Fn. omitted.] The criminal and administrative

[2]The policy was changed May 31, 2002. As of that date employees were no longer required to give up scheduled vacations to be selected for out-of-class assignments.

> investigations were a natural outgrowth of the grievance investigation when a question arose regarding reimbursement of funds under possible false pretenses. These events did not transpire solely due to the filing of the grievance itself. Had Zanchi not sought reimbursement, the fraud issue would not have surfaced and the resulting investigations not been initiated. In addition, there was no evidence presented that the employer retaliated against her for filing a grievance versus seeking monetary reimbursement under possible false pretenses.
>
> The allegation that she suffered further retaliation by being denied a permanent appointment to correctional sergeant or the assignment of a second limited term also fails. Zanchi has not shown any nexus between the denial of promotional opportunities and the filing of her grievance. In fact, she completed her limited term assignment which was for a specific one year period during the grievance process, and continued to serve in the position even after she had been placed under criminal investigation. Employees in the first three ranks are all 'reachable' to receive permanent positions. As such, there was no showing that the failure to promote Zanchi or to receive a second limited term assignment were in retaliation for the filing of her grievance.

DISCUSSION

Contrary to the Board agent findings, in Corrections the Board found that Zanchi presented a prima facie case of a violation of the Dills Act by alleging that DOC investigated her because of the claims she made in her grievance. The Board said, "In evaluating whether a prima facie case has been established, the charging party's essential allegations are deemed true." (Golden Plains Unified School District (2002) PERB Decision No. 1489 (Golden Plains); San Juan Unified School District (1977) EERB[3] Decision No. 12.)[4] While facts are taken as true, there must also be a nexus between protected activity and the employer's actions to establish a prima facie case. As the Board agent correctly noted, there was no nexus.

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[3]Prior to 1978, PERB was known as the Educational Employment Relations Board (EERB).

[4]Under Golden Plains, the charging party must allege facts in support of a prima facie case not merely conclude that nexus is established.

The Board found the investigation was an adverse action even though the allegations against Zanchi were sustained. The Board found further that a complaint should issue based on DOC's refusal to extend Zanchi's limited term assignment and refusal to promote her to sergeant.

To determine a violation of Dills Act section 3519(a) the charging party must show that: (1) the employee exercised rights under the Dills Act; (2) the employer had knowledge of the exercise of those rights; and (3) the employer imposed or threatened to impose reprisals, discriminated or threatened to discriminate, or otherwise interfered with, restrained or coerced the employee because of the exercise of those rights. (Novato Unified School District (1982) PERB Decision No. 210.)

After the Board ordered a complaint issue, the case was heard by an ALJ. The ALJ found that Zanchi had established a prima facie case, based on the Corrections decision, but determined Zanchi did not meet her burden of disproving her misconduct. The ALJ said:

> [Zanchi] denies having done anything wrong. However, her denial is not supported by any other evidence, most notably her husband's failure to appear at the hearing, and is contradicted by Mosher's[5] unrebutted testimony and by OIA, which investigated the matter and sustained the allegations against her.

The ALJ also looked at the facts in light of the Pittsburg Unified School District (1978) PERB Decision No. 47 case. There, employees were disciplined for distributing a union flyer that included personnel attacks and sexual innuendo about various employees of the district. The Board found the district was not motivated by the protected activity of the employees but by the inflammatory and inappropriate content of the flyers. The inappropriate content was not

[5]Patricia Mosher (Mosher) was a co-worker of Zanchi's husband. Mosher advised her supervisor that Zanchi's husband told her about planning to cancel the trip to Paris after the September 11, 2000, attacks and encouraging his wife to file for reimbursement of the airline tickets.

protected. Here, the ALJ found DOC was motivated by the unprotected contents of the grievance which was a fraudulent claim for reimbursement. She then determined there was insufficient nexus between the denial of Zanchi's promotional opportunities and the protected activity of filing a grievance. The problem with Zanchi was not that she filed a grievance but that a portion of what she said in it was fraudulent. She was investigated not because she filed the grievance but because a co-worker of her husband indicated she was making a fraudulent claim for reimbursement of funds.

We agree with the ALJ that there is insufficient nexus and that a fraudulent claim is not protected activity. We do not agree with the ALJ that Zanchi established a prima facie case. There must be a nexus between the protected activity and the employer's action for there to be a prima facie case. Filing a grievance is protected activity. Making a fraudulent claim is not. As noted above, Zanchi was not investigated because she filed a grievance. She was investigated because of statements her husband made to a co-worker which lead to the discovery of fraud. Whether she had filed the grievance or not, she would have been investigated for making a fraudulent claim.

We also agree with the ALJ that there was no unlawful animus toward Zanchi by DOC that could have led to her being denied promotional opportunities.

We therefore find there was no prima facie case. We also find that committing fraud is not a protected activity. Because the fraudulent claim is not protected activity and there was no nexus between the non-fraudulent portion of the grievance and the employer's activity, the complaint should not have issued and the charge should have been dismissed.

ORDER

The Board VACATES State of California (Department of Corrections) (2003) PERB Decision No. 1579-S; and the unfair practice charge filed in Case No. LA-CE 559-S is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Member McKeag joined in this Decision.

Member Neuwald's concurrence and dissent begins on page 8.

NEUWALD, Member, concurring and dissenting: Based upon the facts and the entire record in this matter, I believe that State of California (Department of Corrections) (2003) PERB Decision No. 1579-S (Corrections) should not be vacated. I believe it was properly decided and should stand. To overturn this decision would not be instructive. The greater Public Employment Relations Board (Board) community would be left wondering what unique or novel distinction the Board wished to eliminate in determining a prima facie case of retaliation. Therefore, I dissent to Chairman Duncan's decision that Corrections should be vacated.

However, I concur with Chairman Duncan that Julia R. Zanchi (Zanchi) failed to demonstrate an unfair practice occurred. The State of California (Department of Corrections) (DOC) did not initiate the investigation because Zanchi filed a grievance. Rather, the fraudulent claim for reimbursement motivated DOC to conduct the investigation. Filing a grievance, a protected activity, does not shield Zanchi's unprotected conduct. Thus, the complaint and underlying unfair practice charge in Case No. LA-CE-599-S are without merit and should be dismissed.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

JULIA R. ZANCHI, Charging Party, v. STATE OF CALIFORNIA (DEPARTMENT OF CORRECTIONS), Respondent.	UNFAIR PRACTICE CASE NO. LA-CE-599-S PROPOSED DECISION (April 21, 2005)

Appearances: Law Offices of Richard J. Papst by Gael G. Mueller, Attorney, and Richard J. Pabst, Attorney, for Julia R. Zanchi; State of California (Department of Personnel Administration) by Linda Nelson, Labor Relations Counsel, for State of California (Department of Corrections).

Before Ann L. Weinman, Administrative Law Judge.

PROCEDURAL HISTORY

An unfair practice charge was filed on January 8, 2003, by Julia R. Zanchi (Zanchi) against the State of California (Department of Corrections) (DOC) alleging that the DOC initiated a criminal and an administrative investigation against her, denied her a promotion to sergeant, and denied an extension of her limited term assignment, all in retaliation for her protected activity of filing a grievance. The charge was dismissed by an agent of the Public Employment Relations Board (PERB or Board) on February 25, 2003. Zanchi appealed, and on December 31, 2003, the dismissal was reversed in Zanchi v. State of California (Department of Corrections) (2003) PERB Decision No. 1579-S (Zanchi). Thereafter, on

January 9, 2004, the General Counsel of PERB issued a complaint[1] alleging that by the above conduct the DOC violated the Ralph C. Dills Act (Dills Act) section 3519(a).[2]

In its answer, DOC denied any wrongdoing. An informal conference held on March 12, 2004, at PERB's Los Angeles office failed to resolve the matter. A formal hearing was held before me on August 9 and 10, 2004. A review of the record after the hearing revealed that there was insufficient evidence to make a fair and reasoned determination as to whether the DOC's conduct was unlawfully motivated. In a telephone conference call which I initiated on October 14, 2004, I offered Respondent the opportunity to move to reopen the record in order to call additional witnesses to testify as to DOC's motivation. Thereafter, counsel for the DOC filed an unopposed motion to reopen the record, which I granted by order of November 17, 2004. The record was reopened and an additional day of formal hearing was held before me on February 10, 2005.

After the submission of post-hearing briefs, the matter was submitted for decision on April 11, 2005.

FINDINGS OF FACT

Zanchi is a state employee within the meaning of Dills Act section 3513(c). She has been a correctional officer since January 2001 and has worked at the California Correctional Institute (CCI) facility at Tehachapi since July 1998. She is a member of a bargaining unit

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[1] The complaint alleges that the investigations were unlawfully initiated by the DOC through its agent Paul Burgess (Burgess), senior special agent, Office of Internal Affairs (OIA).

[2] The Dills Act is codified at Government Code section 3512 et seq. Section 3519(a) makes it unlawful for a state employer to:

> 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.

represented by the California Correctional Peace Officers Association (CCPOA). The DOC is an employer within the meaning of section 3513(j).

The events herein began in late 2001.[3] Pursuant to CCI practices, Zanchi obtained approved vacation leave for the weeks of October 29, December 10, and December 17. She and her husband Tracy, who was also employed by CCI at Tehachapi, were planning a trip to Paris from October 30 to November 5, for which they had purchased airline tickets on US Airways in August through Expedia.com, an internet website, for a total cost of just under $800.[4] The printed reservation confirmation read: "[T]icket is nonrefundable, non-exchangeable and nontransferable." Zanchi testified that after 9/11, her husband initially wanted to cancel the trip. Zanchi therefore called US Airways and was told she had to abide by the Expedia.com policy. In her unfair practice charge, Zanchi alleged that she also called Expedia.com; however, at the hearing she could not recall whether she herself contacted Expedia.com. She testified that Tracy had called Expedia.com, but she could not recall what he told her about the conversation. According to Zanchi, she and Tracy ultimately decided not to reschedule or cancel the trip. However, they did not take the trip because of subsequent events described below.

On September 27 or 28, Zanchi was offered an assignment as acting sergeant as of October 1. She began the assignment, and on October 2 she interviewed for a permanent position as sergeant. Unwritten CCI policy at that time required an employee serving in an

[3] All dates hereafter refer to the year 2001 unless otherwise specified.

[4] The Zanchis had incurred other costs, e.g., securing passports, purchasing luggage, and applying for an international driver's license, but had not yet made hotel reservations.

out-of-class assignment to forfeit any vacation scheduled during that period.[5] Thus, on October 3, Zanchi contacted Sergeant George Katsakaris (Katsakaris) of CCI's Personnel Assignments Office and asked him how long her acting assignment would be and if she would still be able to take her October/November vacation. She claims that she also told him about the non-refundable airline tickets.[6] In this regard, the Memorandum of Understanding (MOU) between the Association and the DOC, of which Zanchi became aware at some time during the events herein, contained the following provision:

> If the State cancels a scheduled vacation or CTO leave and the employee suffers an economic loss, the State shall reimburse the employee for all reasonable and documented economic loss of the employee provided the employee:
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> 1. Notifies the employer at the time he/she is told of the vacation/CTO leave cancellation that economic loss will result;
>
> 2. Makes all reasonable attempts to recover his/her expenses; and,
>
> 3. Provides the employer documentation of the economic loss.

Katsakaris told Zanchi that her acting assignment would be from three to six months and she would forfeit her vacation unless Lisa Stradley (Stradley), CCI's captain of operations, decided otherwise. Zanchi then phoned Stradley, who also told her she could not take her vacation, principally because of the overtime CCI would incur in replacing her during her absence. According to Zanchi, Stradley said that if she decided to turn down the acting

[5] On May 31, 2002, a memo from the warden notified CCI employees that they would no longer forfeit their vacations while serving out-of-class assignments. It is undisputed that this change in policy was due to Zanchi's grievance at issue herein.

[6] In his testimony, Katsakaris said he did not recall that Zanchi mentioned the airline tickets.

assignment in favor of the vacation, she would harm her promotional abilities and her career. Zanchi claims she told Stradley about the airline tickets.[7] Stradley said she would look into it.

Stradley testified that if she made any remark at all to Zanchi regarding her career, it was that she would be more likely to be promoted to sergeant from an acting position. Stradley adamantly denied that Zanchi mentioned anything about purchasing airline tickets. However, Katsakaris testified that shortly after he spoke with Zanchi, Stradley called and told him Zanchi had airline tickets. Zanchi next contacted Dan Walker (Walker) of CCI's Employment Relations Office, who explained her right to file a grievance and sent her grievance forms.

Zanchi accepted the acting assignment and did not take the vacation.

On November 19 Zanchi filed a grievance against CCI for loss of her vacation and for reimbursement of the airline expense.[8] She claims she did not file it earlier because she did not know what the filing deadline was; further, she wanted to wait until the week of the scheduled vacation, in case Stradley's decision was overturned and she would be allowed to take the vacation after all. The grievance accused CCI of "practicing a double standard policy in regards to whom they allow or disallow to take a Vacation while in an acting assignment," and of failing "to show any empathy for staff's economic losses or morale." She also complained that "the lack of concern from CCPOA is intolerable." The response of CCI's then-Warden M. Yarborough (Yarborough) stated that notwithstanding its untimeliness, the grievance had been

[7] Zanchi could not recall whether she was aware at that time of the MOU's provision regarding reimbursement, but acknowledged that she did not discuss the possibility of reimbursement of the tickets with Stradley.

[8] Zanchi did not seek reimbursement for the costs of passports or luggage, as she felt these could be used in the future.

reviewed and was denied, as the acting assignment "was a competitive and personal choice" and there was no "financial reimbursement obligation by the State."

On November 26, Zanchi was offered, and accepted, a twelve-month limited-term assignment as sergeant.

On January 1, 2002,[9] Zanchi submitted a third-level grievance rebuttal, claiming that the grievance was timely and reiterating her vacation and reimbursement arguments. The February 21 response from DOC's Labor Relations Office reiterated CCI's position. Zanchi then submitted a fourth-level rebuttal, claiming that Walker had "mislead" her and "intentionally or negligently" failed to inform her of the proper procedure and the filing deadline. Zanchi further alleged that "the Labor Relations Branch did not fully or thoroughly review the grievances that were submitted to your office."

On June 10, Zanchi submitted a memo to the California Department of Personnel Administration (DPA) describing her entitlement to a vacation and to reimbursement for the airline tickets. DPA denied her request by letter of July 8, which stated, inter alia: "[I]t is Captain Stradley's contention that she would have made an allowance in order for you to take your vacation, if she had known that you had nonrefundable Airline tickets. She freely admitted to making similar types of allowances for other staff." The July 8 letter also informed Zanchi that DPA received a memo from another staff member, alleging that after 9/11 Zanchi and her husband decided not to take their trip to Paris and that Tracy encouraged his wife to file a grievance and seek reimbursement for the tickets, and therefore the matter was being referred to Dave Goodman (Goodman) of the CCI Employment Relations Office.

The author of that memo was Patricia Mosher (Mosher), a coworker of Tracy, who testified at the hearing that she and Tracy had a history of "personnel differences" because he

[9] All dates hereafter refer to the year 2002 unless otherwise specified.

was a compulsive talker and would talk to her daily about subjects on which he was "adamant," e.g., Christianity. Mosher would complain to her supervisor but apparently no action was taken. According to Mosher, within days after 9/11 Tracy said he and his wife had canceled their trip to Paris due to the danger of flying, bemoaned the fact that the airline tickets were non-refundable, and talked about encouraging his wife to file a grievance complaining that CCI forced her to cancel the trip because of her acting assignment and requesting reimbursement for the tickets. At one point, Mosher claimed, Tracy said he was getting closer to his wife "seeing it his way." Mosher also reported these comments to her supervisor and, at Goodman's request, documented them by memo dated July 3.[10]

As noted above, Zanchi admitted that after 9/11 she and Tracy initially considered canceling the Paris trip, but insisted that they ultimately decided not to reschedule or cancel it. Neither Zanchi nor Tracy, who did not testify, rebutted Mosher's testimony.

On July 13, Zanchi wrote to the California Office of Inspector General (OIG) alleging that DOC violated the MOU provision regarding reimbursement for cancelled travel expenses; OIG responded that alleged contract violations should be handled through the CCPOA's grievance procedures. On August 21, Zanchi submitted a fourth level grievance response accusing DPA Labor Relations Officer Tim Virga (Virga) of being "so engrossed with finding a reason to deny my grievance that he never attempted to address the issue at hand," i.e.,

[10] In support of its suspicions of fraud, DOC also presented as exhibits two memos and one e-mail from three CCI employees to Labor Relations documenting their phone conversations with US Airways and Expedia.com in August 2004. According to these memos, Expedia.com said it worked closely with its suppliers to accommodate customers requesting post-9/11 reschedules and cancellations. US Airways allegedly said that it allowed ticket holders to reschedule their post-9/11 flights although additional costs would be incurred, that passengers "in such circumstances" are "always" notified that they may reschedule, and that the Zanchis did not reschedule or cancel their flight. I do not credit this evidence, as the conversations and memos took place long after the events herein.

DOC's contract violation, and requesting further review. Virga responded by memo of August 28 denying further review.

On October 15, CCI's then-Warden Arthur Calderon (Calderon)[11] informed Zanchi that her limited-term assignment was about to end and that she would return to her permanent position as correctional officer on November 25. She has remained in that position since that time. Zanchi contends that other correctional officers had received permanent positions as sergeant at the end of their limited-term assignments and that she was denied a promotion because of her grievance. In support, she presented a CCI document entitled "Personnel Movement" showing that five correctional officers were promoted to sergeant on October 31, four of them from temporary positions. Zanchi claims that she had more seniority than one of the four, and almost as much seniority as the other three.

By memo of December 21 to DOC's Personnel Office, Zanchi complained about not being promoted and requested a review of CCI's illegal hiring and promotion practices. In early 2003, Zanchi made the same request to DOC's Office of Personnel Management. That office responded by letter of March 4, 2003, stating that three of the four correctional officers promoted to sergeant had more seniority than Zanchi, and the fifth was a sergeant reinstated from a limited-term to a permanent appointment. On March 19, 2003, Zanchi appealed to the California State Personnel Board, asking that it investigate CCI's "continued and admittedly illegal hiring practices" and that she be promoted.

DOC presented no evidence as to why Zanchi did not receive an extension of her limited-term assignment, but argued that when Zanchi accepted the assignment she knew it would only last for one year. Regarding the promotion, DOC, in addition to its explanation of the five promotions which it granted, presented evidence that two other correctional officers

[11] Calderon replaced Yarborough in September 2002.

serving limited term assignments at the same time as Zanchi were also not promoted. However, the record reveals that these two officers were not yet qualified, as Zanchi was, for a permanent position as sergeant. Calderon, the sole witness to appear at the reopening of the record on February 10, 2005, testified that he considered more than six days' sick leave to be excessive and that Zanchi had exceeded that amount. He testified that when he becomes aware that an employee has used excessive sick leave, he holds a conference with the employee and his/her supervisor. However, he did not hold such a conference with Zanchi. Further, he could not recall whether Zanchi's absences, or any other reason, contributed to her not receiving a promotion.

In the meantime, on September 11, 2002, Zanchi received a letter from Burgess notifying her that OIA received a complaint alleging that she "may have conspired to commit fraud against the State" and that an investigation would be conducted. Burgess testified that OIA has no authority to either initiate an investigation or to take action upon finding merit; those decisions are within the purview of the hiring agency. In the instant case, he had received a fraud investigation request from the warden, whereupon Burgess ordered an investigation to be conducted under his supervision. In this regard, Calderon testified that by the time he took over as warden the Zanchi investigation was under way, having been initiated by his predecessor, Yarborough, and that he (Calderon) did not know why it was requested or implemented. Yarborough did not testify.

By letter of November 27, 2002, OIA notified Zanchi that the "criminal investigation" had been completed and that an "administrative investigation is now being initiated." This was Zanchi's first knowledge that the investigation was criminal in nature, and she was never told what the results of that investigation were. Burgess explained that a criminal investigation is conducted only if requested by the agency, and only if there is an alleged violation of the

Criminal Code; he was not asked what crime Zanchi allegedly committed. Burgess also stated that it is not OIA policy to inform the subject employee of the results of a criminal investigation. Apparently, OIA did not refer the criminal matter to the district attorney's office. As to the administrative investigation, OIA found that Zanchi had attempted to defraud CCI regarding the airline tickets.[12] Burgess reported this back to Calderon, who was then the warden, and by letter of January 21, 2003, from OIA, Zanchi was told that "the allegation against you has been sustained." However, no personnel action was taken against her, as reflected in a memo she received from Calderon dated July 1, 2003, entitled "Adverse Action Withdrawal" stating that the investigation was completed and that "[A]fter review of this case factors, it has been determined that no further action will be taken." Zanchi testified that CCI took adverse action against Tracy, but Tracy did not testify and there is no evidence as to what action was taken against him.

ISSUE

Did DOC retaliate against Zanchi because of her protected activities, in violation of Dills Act section 3519(a)?

CONCLUSIONS OF LAW

To demonstrate a violation of Dills Act section 3519(a), the charging party must show that: (1) the employee exercised rights under the Dills Act; (2) the employer had knowledge of the exercise of those rights; and (3) the employer imposed or threatened to impose reprisals, discriminated or threatened to discriminate, or otherwise interfered with, restrained or coerced the employees because of the exercise of those rights. (Novato Unified School District (1982) PERB Decision No. 210 (Novato); Carlsbad Unified School District (1979) PERB Decision No. 89.)

[12] During its investigation, OIA interviewed, inter alia, Mosher as well as Zanchi.

Although the timing of the employer's adverse action in close temporal proximity to the employee's protected conduct is an important factor (North Sacramento School District (1982) PERB Decision No. 264), it does not, without more, demonstrate the necessary connection or "nexus" between the adverse action and the protected conduct. (Moreland Elementary School District (1982) PERB Decision No. 227.) Facts establishing one or more of the following additional factors must also be present: (1) the employer's disparate treatment of the employee (State of California (Department of Transportation) (1984) PERB Decision No. 459-S); (2) the employer's departure from established procedures and standards when dealing with the employee (Santa Clara Unified School District (1979) PERB Decision No. 104); (3) the employer's inconsistent or contradictory justifications for its actions (State of California (Department of Parks and Recreation) (1983) PERB Decision No. 328-S); (4) the employer's cursory investigation of the employee's misconduct; (5) the employer's failure to offer the employee justification at the time it took action or the offering of exaggerated, vague, or ambiguous reasons; (6) employer animosity towards union activists (Cupertino Union Elementary School District) (1986) PERB Decision No. 572); or (7) any other facts which might demonstrate the employer's unlawful motive. (Novato; North Sacramento School District, supra, PERB Decision No. 264.)

Evidence of adverse action is also required to support a claim of discrimination or reprisal under the Novato standard. (Palo Verde Unified School District (1988) PERB Decision No. 689.) In determining whether such evidence is established, the Board uses an objective test and will not rely upon the subjective reactions of the employee. (Ibid.) In a later decision, the Board further explained that:

> ...The test which must be satisfied is not whether the employee found the employer's action to be adverse, but whether a reasonable person under the same circumstances would consider the action to have an adverse impact on the employee's

> employment. [Newark Unified School District (1991) PERB Decision No. 864; emphasis added; footnote omitted.]

It is undisputed that Zanchi engaged in protected activity by filing a grievance (California State University (San Francisco) (1986) PERB Decision No. 559-H), and that DOC was fully aware of this activity. As to adverse impact, DOC witnesses testified that OIA investigations which do not result in adverse action would have no impact on an employee's career path. However, as the Board stated in Zanchi:

> . . . Zanchi is a peace officer and as such is held to a higher standard of conduct. [Citations.] Honesty and credibility are crucial to the proper performance of a peace officer's duties and dishonesty is generally never tolerated. . .The fact that the allegations against Zanchi were apparently sustained further supports a finding that her career was potentially damaged.

Accordingly, I find that the investigations constituted adverse action. I also find that DOC's failure to extend Zanchi's limited term assignment and to promote her to sergeant were adverse actions. (Lemoore Union High School District (1982) PERB Decision No. 271; Little Lake Industries (1977) 233 NLRB 1049 [75 LRRM 1101].)

As to nexus, PERB held in Zanchi that the charging party had established a sufficient prima facie case of nexus between the investigations and her grievance to warrant issuance of a complaint. PERB discussed the shifting burdens of proof:

> . . .[T]he legitimacy of the employer's proffered defense is not part of the charging party's prima facie case...In other words, the charging party is not required to refute an employer's proffered defense to establish a prima facie case. . . .
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> Zanchi has established direct evidence of motive since it is undisputed that the investigations were initiated because of the claims made in Zanchi's grievance. . . .
>
> In establishing a prima facie case, the charging party should not be required to establish the respondent's state of mind, or lack thereof. This is especially true where the respondent's state of mind is a fact placed in contention solely by the respondent. . . .

[Emphasis in original.]

PERB further stated that DOC's argument that it would have conducted the investigation regardless of Zanchi's grievance does not go to the issue of nexus or defeat the prima facie case, but rather goes to DOC's defense to be presented at the formal hearing.

As to Zanchi not getting a promotion, PERB stated in the same decision:

> . . .[V]iewed in isolation, the Board agrees that Zanchi has presented insufficient evidence of nexus between her grievance and the denial of promotional opportunities. However, these separate adverse actions should not be viewed in isolation, since they stem from the same protected activity. . . . the unlawful animus established as a result of the criminal and administrative investigations may also be used to establish unlawful animus for the denial of promotional opportunities. . . .

Accordingly, following Zanchi as the law of the case, I find that Zanchi has established a prima facie case.

Once the charging party has established a prima facie case, the burden of proof shifts to the employer. Normally in a retaliation case, the employer must establish that it would have taken the action complained of even in the absence of the employee's protected activity. (Healdsburg Union High School District (1997) PERB Decision No. 1885; Martori Brothers Distributors v. Agricultural Labor Relations Board (1981) 29 Cal. 3d 721 [175 Cal.Rptr. 626].) In the instant case, however, the adverse action arose directly from the employee's protected activity, i.e., Zanchi's grievance. In analyzing the burdens of proof in such a situation, NLRB v. Burnup & Sims, Inc. (1964) 379 U.S. 21 [57 LRRM 2385] (Burnup & Sims)[13] is instructive. There, the Court held that an employer acts unlawfully by discharging an employee for misconduct arising out of a protected activity when it is shown that the misconduct never

[13] PERB and the California courts have long held that federal decisions interpreting similar statutes, e.g., those prohibiting retaliation, may be persuasive. (Inglewood Teachers Association v. PERB (1991) 227 Cal.App.3d 767 [278 Cal.Rptr. 228].)

occurred. In its decision, the Court cites, inter alia, Rubin Bros. Footwear, Inc. (1952) 99 NLRB 610 [30 LRRM 1109] (Rubin Bros.), which "made a qualification as to burden of proof" by holding that the employer no longer needs to prove that the misconduct did in fact occur, but only that it had an honest belief in the misconduct, after which the burden shifts to the charging party to prove that the misconduct did not occur. The Burnup & Sims decision does not alter the respective burdens set forth in Rubin Bros.

Here, I find that DOC has met its burden under these federal cases. Its defense rests on the unrebutted evidence that after 9/11 Tracy spoke to Mosher about canceling the Paris trip and encouraging Zanchi to file a grievance in order to get reimbursed for the airline tickets, which the Zanchis believed they were unable to do on their own as the tickets were nonrefundable. Mosher reported these comments to her supervisor and drafted a memo to CCI's Employment Relations Office; CCI passed this memo on to OIA and requested an investigation; OIA interviewed Mosher during its investigation and sustained the allegation of fraud against Zanchi. Thus, notwithstanding Yarborough's failure to testify and thereby produce evidence as to his own personal motivation, the evidence which DOC presented clearly establishes the basis for a reasonable good-faith belief in Zanchi's misconduct and for Yarborough's request for an OIA investigation.

I do not find that Zanchi has sustained her burden of disproving the misconduct. She denies having done anything wrong. However, her denial is not supported by any other evidence, most notably her husband's failure to appear at the hearing, and is contradicted by Mosher's unrebutted testimony and by OIA, which investigated the matter and sustained the allegations against her. Nor does the fact that no personnel action was taken against her necessarily prove her innocence; that decision may have been based on other factors, possibly

including a view that Tracy bore a heavier responsibility for the wrongdoing. I therefore cannot find that no misconduct occurred.

Also instructive is a PERB case, Pittsburg Unified School District (1978) PERB Decision No. 47 (Pittsburg). There, three employees were disciplined for distributing a union flyer which contained personal attacks and sexual innuendos against various employees of the school district. The administrative law judge, whose decision was adopted by the Board, did not use a Burnup & Sims or a Rubin Bros. analysis. Rather, he made a comprehensive analysis of the purpose for the statutory protection of union activities and of the factors necessary to find that an employer interfered with or retaliated against those activities, citing several NLRB cases. The administrative law judge determined that the school district was not motivated by the protected activity of distributing the flyers, but rather by the inflammatory and inappropriate content of the flyers themselves. Therefore, the discharges were not unlawful. By analogy, in the instant case, I find it clear that CCI, which initiated the investigation, was not motivated by Zanchi's protected activity in filing a grievance, but rather by the unprotected contents of the grievance itself, i.e., a fraudulent claim for reimbursement.

Thus, under either a Burnup & Sims, Rubin Bros., or Pittsburg analysis, I conclude that the DOC did not unlawfully retaliate against Zanchi by conducting an investigation of her conduct.

Once having come to this conclusion, pursuant to the reasoning in Zanchi, there is no longer a base upon which to find that DOC's denial of Zanchi's promotional opportunities was motivated by unlawful animus. Those actions must now be viewed in isolation. I therefore find insufficient nexus between DOC's actions in this regard and Zanchi's protected activity.

Accordingly, I conclude that DOC did not violate the Dills Act by initiating criminal and administrative investigations of Zanchi's claim for reimbursement of airline expenses, by

failing to extend her limited term assignment, or by failing to promote her to a permanent position as sergeant.

PROPOSED ORDER

Based upon the foregoing findings of fact and conclusions of law and the entire record in this matter, it is found that the complaint and underlying unfair practice charge in Case No. LA-CE-599-S, Julia R. Zanchi v. State of California (Department of Corrections), are without merit and they are 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 Public Employment Relations Board (PERB or Board) itself within 20 days of service of this Decision. The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95814-4174
FAX: (916) 327-7960

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. (Cal. Code Regs., tit. 8, sec. 32300.)

A document is considered "filed" when actually received before the close of business (5 p.m.) on the last day set for filing. (Cal. Code Regs., tit. 8, secs. 32135(a) and 32130.) A document is also considered "filed" when received by facsimile transmission before the close of business on the last day for filing together with a Facsimile Transmission Cover Sheet which meets the requirements of California Code of Regulations, title 8, section 32135(d), provided the filing party also places the original, together with the required number of copies

and proof of service, in the U.S. mail. (Cal. Code Regs., tit. 8, sec. 32135(b), (c) and (d); see also Cal. Code Regs., tit. 8, secs. 32090 and 32130.)

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 Regs., tit. 8, secs. 32300, 32305, 32140, and 32135(c).)

Ann L. Weinman
Administrative Law Judge