

STATE OF CALIFORNIA  
DECISION OF THE  
PUBLIC EMPLOYMENT RELATIONS BOARD



MICHAEL MENASTER,

Charging Party,

v.

UNION OF AMERICAN PHYSICIANS &  
DENTISTS,

Respondent.

Case No. SF-CO-50-S

PERB Decision No. 1918-S

August 9, 2007

Appearance: Michael Menaster, on his own behalf.

Before Duncan, Chairman; Shek and McKeag, Members.

DECISION

DUNCAN, Chairman: This case comes before the Public Employment Relations Board (Board) on appeal by Michael Menaster of a Board agent's partial dismissal (attached) of his unfair practice charge. The charge alleged that the Union of American Physicians & Dentists (UAPD) violated the Ralph C. Dills Act (Dills Act)<sup>1</sup> by violating its duty of fair representation.

We have reviewed the entire record in this case including the unfair practice charge and amended charge, the response from UAPD, the warning and partial dismissal letters, and the appeal of the partial dismissal. We find the Board agent's warning and partial dismissal letters to be without prejudicial error and adopt them as the decision of the Board itself.

ORDER

The partial dismissal of the unfair practice charge in Case No. SF-CO-50-S is hereby AFFIRMED.

Members Shek and McKeag joined in this Decision.

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<sup>1</sup>The Dills Act is codified at Government Code section 3512, et seq.



**PUBLIC EMPLOYMENT RELATIONS BOARD**

Sacramento Regional Office  
1031 18th Street  
Sacramento, CA 95814-4174  
Telephone: (916) 327-8384  
Fax: (916) 327-6377



December 20, 2006

Michael Menaster

Re: Michael Menaster v. Union of American Physicians & Dentists  
Unfair Practice Charge No. SF-CO-50-S, First Amended Charge  
**PARTIAL DISMISSAL**

Dear Mr. Menaster:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on July 19, 2006. Michael Menaster alleges, inter alia, that the Union of American Physicians & Dentists (UAPD) violated the Ralph C. Dills Act (Dills Act). The charge consists of a fifty-page, single-spaced narrative and seventy-nine exhibits. Menaster filed an Addendum to the charge, which consists of a five-page, single-spaced narrative and five exhibits.

On November 27, 2006, I issued Menaster a Partial Warning Letter which explained that many of the charge's allegations did not state a prima facie violation. Following Menaster's receipt of the Partial Warning Letter, I discussed with him, inter alia, the letter's contents, which of his allegations were not subject to the Partial Warning Letter, and PERB's process.

The Partial Warning letter summarized the allegations that were subject to dismissal as follows: the Department violated the Act; the UAPD's conduct violated statutes other than the Dills Act; the UAPD's conduct before January 19, 2006 violated the Act; the UAPD violated Dills Act §§ 3515 and 3516; the UAPD retaliated against Menaster by refusing to help him when the Department did not rehire him; the UAPD failed to negotiate in good faith; the UAPD denied Menaster his duty of fair representation with regard to ADA violations, unemployment insurance benefits, and a bid to be rehired.

Menaster did not withdraw any of the allegations listed in the Partial Warning Letter and filed an amended charge. The amended charge includes sixty-eight pages and eighty-four exhibits.

The amended charge notes that Menaster is filing in pro per and sets forth a page of information and case citations regarding the legal standards for reviewing the pleadings of pro se litigants. The amended charge also sets forth a "facts" section which essentially reiterates the facts stated in his original charge. Within this recitation Menaster indicates that he is aware of the statute of limitations period and that he is aware that because this charge is filed against the exclusive representative a complaint cannot be issued regarding the Department's

conduct.<sup>1</sup> Following the “facts” section, the charge set forth the following “discussion” headings: UAPD breached its fiduciary duty; UAPD breached its duty of fair representation; Admission against interest; UAPD materially contributed to and failed to respond to tangible, adverse employment action; UAPD failed to file a grievance or complaint when the Department denied progressive discipline; UAPD failed to file a complaint or grievance when the Department violated Article 12.6 of its Agreement with UAPD; UAPD failed to file a grievance when the Department violated the right to union representation; UAPD failed to file a grievance or complaint in response to the Department’s acts of discrimination and retaliation.

As the amended charge does not correct the deficiencies noted in the Partial Warning Letter, the allegations in the Amended Charge which were addressed in the Partial Warning Letter are dismissed without further discussion here. The Partial Warning Letter set forth general legal standards regarding PERB’s limited jurisdiction, the statute of limitations period, and the UAPD’s lack of agency relationship for the Department’s conduct. To the extent that the amended charge includes new allegations that the UAPD violated laws other than the Dills Act, new events occurring outside the statute of limitations period, and new allegations of Department conduct these allegations are dismissed for the same reasons stated in the Partial Warning Letter and will not be addressed further. The remainder of this letter will only specifically address the amended charge’s new allegations that are not addressed by the above discussion.

To review, the State of California, Department of Social Services hired Menaster as Medical Consultant I (Psychiatrist) on October 31, 2005. Menaster was exclusively represented by the Union of American Physicians and Dentists. Menaster resigned after the Department placed him on administrative leave. Menaster was a probationary employee at the time and the Department was planning to reject him on probation.

#### Duty of Fair Representation: Productivity Problems

Menaster alleges that, although UAPD union stewards assured Menaster that he would not be subject to discipline for his productivity problems, the Department used productivity as a basis for rejecting him on probation. Menaster alleges that UAPD violated its duty of fair representation by making those assurances and failing to file a grievance regarding these productivity expectations.

On January 19, 2006, UAPD Steward VM Meenakshi explained to Menaster that his supervisor was making an issue of productivity because that is the only way the supervisor could concretely complain about Menaster’s socializing.

On January 26, 2006, Menaster complained to Meenakshi about his supervisor’s productivity expectations.

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<sup>1</sup> Menaster did not, however, withdraw these allegations. Allegations regarding the State’s conduct are addressed separately in another charge. See SF-CE-240-S.

On January 27, 2006, in response to Menaster's concerns regarding productivity, Meenakshi wrote, in pertinent part:

i did talk to jim moore and they will not hold productivity against you, it is all of the other things we talked about yesterday that will decide your prob. report. to reiterate: no talking to anyone including mcs, you dont know who is going to squeal, and do not send e-mails to bob unless he ask you to reply, and if you have a question, give a tentative reply . . . [sic]

Meenakshi also told Menaster that she had spoken to his supervisor about this issue.

As stated in the Partial Warning Letter, in order to state a prima facie violation of the duty of fair representation, the Charging Party must show that the Respondent's conduct was arbitrary, discriminatory or in bad faith. In order to state a prima facie case of arbitrary conduct violating the duty of fair representation, a Charging Party:

" . . . must at a minimum include an assertion of sufficient facts from which it becomes apparent how or in what manner the exclusive representative's action or inaction was without a rational basis or devoid of honest judgment. (Emphasis added.)"  
[Reed District Teachers Association, CTA/NEA (Reyes) (1983) PERB Decision No. 332, p. 9, citing Rocklin Teachers Professional Association (Romero) (1980) PERB Decision No. 124.][<sup>2</sup>]

Here, the facts do not demonstrate that the UAPD engaged in arbitrary, discriminatory, or bad faith conduct. Instead the facts indicate that the UAPD stewards made a rational determination that the Department's concerns regarding Menaster's productivity were a peripheral issue only brought to the forefront by the Department's other concerns with Menaster's behavior. The charge does not demonstrate that UAPD's failure to file a grievance and UAPD's advice to concentrate on correcting those issues which it believed were more likely to affect Menaster's probationary report were devoid of honest judgment. As such, this allegation must be dismissed.

#### Duty of Fair Representation: Denial of Union Representation

On February 10, 2006, Menaster told Meenakshi that his supervisor had denied his request to have a union representative present during an investigatory meeting. Meenakshi told Menaster that he had the right to refuse to answer questions if his union representative was not present. Menaster alleges Meenakshi failed to file a grievance about his supervisor's failure to allow him union representation.

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<sup>2</sup> As the legal standards regarding the duty of fair representation were set forth in the Partial Warning Letter and here, they will not be repeated again in this letter.

The charge does not demonstrate that the collective bargaining agreement includes a provision regarding the right to union representation in investigatory meetings. As such, the charge does not demonstrate that filing a grievance regarding this issue was even possible. A charging party should allege the "who, what, when, where, and how" of an unfair practice. (United Teachers-Los Angeles (Ragsdale) (1992) PERB Decision 944.) Although a collective bargaining agreement could include a provision on this issue, the right to union representation is usually alleged as a violation of the Dills Act. Enforcement of the Dills Act is accomplished through the filing of unfair practice charges at PERB. The UAPD does not owe a duty of fair representation to Menaster in a forum over which the union does not exclusively control the means to a particular remedy. (California State Employees Association (Parisi) (1989) PERB Decision No. 733-S.) As such, this allegation must be dismissed.

#### Violation of Dills Act § 3519.5

The amended charge alleges that when UAPD Steward Sandra Clancey submitted a declaration regarding Menaster to the Unemployment Appeals Board hearing, UAPD violated 3519.5 by enabling the Department to violate Dills Act § 3519.

Dills Act § 3519.5 provides that it shall be unlawful for an employee organization to cause or attempt to cause the state to violate Dills Act § 3519. In order to state a prima facie violation, the charging party must allege facts showing how and in what manner the employee organization caused or attempted to cause the State to commit an unfair practice against the employee. (California State Employees Association (Hutchinson) (1999) PERB Decision No. 1355-S.)

Menaster resigned from state employment and then sought to receive unemployment insurance benefits. The charge does not demonstrate that the State unlawfully retaliated against Menaster by defending its position that Menaster was not entitled to receive unemployment insurance benefits because he had resigned. As such, the charge does not demonstrate that Clancey's act of submitting a declaration to the Unemployment Appeals Board caused the State to commit an unfair practice against Menaster. Thus, this allegation must be dismissed.

#### Duty of Fair Representation: Progressive Discipline, Professional Judgment, Retaliation, Advice to Resign

Menaster alleges that UAPD violated the duty of fair representation when UAPD Steward Jim Moore advised Menaster to resign rather than filing complaints or grievances regarding the State's conduct. More specifically, Menaster alleges the UAPD should have filed grievances regarding the Department's failure to use progressive discipline, allowing his professional judgment to be compromised and the Department's retaliatory conduct.

Menaster was a probationary employee. The charge indicates the Department received complaints regarding Menaster's behavior immediately after he was hired and that Unit Manager Robert Schoenfelder spoke with Menaster regarding his behavior on several

occasions. Complaints regarding Menaster's behavior were recurrent and from employees in both the Sacramento office and the Oakland office. The charge reflects the Department provided Menaster with consistent justifications for its actions including specific examples of the types of behaviors that were at issue. Under these circumstances, the charge does not demonstrate that Moore's advice to resign rather than face termination was without a rational basis or devoid of honest judgment. Nor do these facts indicate that UAPD was without a rational basis or devoid of honest judgment when it chose not to file grievances on Menaster's behalf.

### Right to Appeal

Pursuant to PERB Regulations,<sup>3</sup> you may obtain a review of this dismissal of the charge by filing an appeal to the Board itself within twenty (20) calendar days after service of this dismissal. (Regulation 32635(a).) Any document filed with the Board must contain the case name and number, and the original and five (5) copies of all documents must be provided to the Board.

A document is considered "filed" when actually received during a regular PERB business day. (Regulations 32135(a) and 32130; see also Government Code section 11020(a).) A document is also considered "filed" when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet which meets the requirements of Regulation 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. (Regulation 32135(b), (c) and (d); see also Regulations 32090 and 32130.)

The Board's address is:

Public Employment Relations Board  
Attention: Appeals Assistant  
1031 18th Street  
Sacramento, CA 95814-4174  
(916) 322-8231  
FAX: (916) 327-7960

If you file a timely appeal of the refusal to issue a complaint, any other party may file with the Board an original and five copies of a statement in opposition within twenty (20) calendar days following the date of service of the appeal. (Regulation 32635(b).)

### Service

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding, and a "proof of service" must accompany each copy of a document served upon a

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<sup>3</sup> PERB's Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

party or filed with the Board itself. (See Regulation 32140 for the required contents.) The document will be considered properly "served" when personally delivered or deposited in the mail or deposited with a delivery service and properly addressed. A document may also be concurrently served via facsimile transmission on all parties to the proceeding. (Regulation 32135(c).)

Extension of Time

A request for an extension of time, in which to file a document with the Board itself, must be in writing and filed with the Board at the previously noted address. A request for an extension must be filed at least three (3) calendar days before the expiration of the time required for filing the document. The request must indicate good cause for and, if known, the position of each other party regarding the extension, and shall be accompanied by proof of service of the request upon each party. (Regulation 32132.)

Final Date

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

Sincerely,

ROBIN WESLEY  
Acting General Counsel

By \_\_\_\_\_  
Tammy Sammel  
Regional Attorney

Attachment

cc: Gary Robinson

TLS



by Mr. Schoenfelder and possibly other Department employees, and a pervasive code of silence.

Menaster divided the charge into the following sections: Whistleblower Retaliation; Altered Business Records; Retaliation/Discrimination by the Department; Interference by an Employer with Employee Rights; Employer Interference with Employee Organization Rights; Employer Failure to Negotiate in Good Faith--Unilateral Change; Employer Failure to Negotiate in Good Faith—Surface Bargaining.

Menaster also provided the following summary:

UAPD offered me no representation during my unemployment appeals hearing and did not oppose Dr. Clancey's declaration. It failed to file any grievances on my behalf or oppose any discipline or inform me of my rights. It kept no documentation about meetings. It offered no opposition to Dr. Clancey's disclosures to Department management or her declaration to the Court. It did not respond to my inquiries of union steward-union member confidentiality. [reference omitted.]

The Addendum focuses on Menaster's attempt to be rehired by the Department and makes the following allegations: the UAPD violated Government Code section 3515 and 3516; UAPD violated its duty of fair representation; UAPD violated Government Code section 3519.5; the UAPD retaliated against him; and the UAPD failed to negotiate in good faith.

Many of the allegations set forth in the charge fail to state a prima facie violation for the reasons that follow.

#### Allegations of Conduct by the Employer

This charge is filed against Menaster's exclusive representative. UAPD is not responsible for the actions of Menaster's employer. As such, allegations of conduct by the Department must be dismissed.<sup>2</sup>

#### PERB's Limited Jurisdiction

PERB's jurisdiction is limited to the determination of unfair labor practice claims arising under the Dills Act and a few other public sector labor statutes. (California School Employees Association, Chapter 245 (Waymire) (2001) PERB Decision No. 1448; Sweetwater Union High School District (2001) PERB Decision No. 1417-E.) PERB's jurisdiction does not include, inter alia, enforcement of the Americans with Disabilities Act, the U.S. Constitution, the

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<sup>2</sup> Menaster also filed Unfair Practice Charge No. SF-CE-240-S against the Department. Allegations of conduct by the Department will be addressed in the course of the investigation of that charge.

Whistleblower Protection Reporting Act, laws governing improper government activity, laws governing sexual harassment, laws governing defamation, or laws governing the unemployment insurance process. Thus, allegations regarding statutes other than the Dills Act are dismissed as outside of PERB's jurisdiction.<sup>3</sup>

#### Statute of Limitations

Dills Act section 3514.5(a)(1) prohibits PERB from issuing a complaint with respect to "any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge." The limitations period begins to run once the charging party knows, or should have known, of the conduct underlying the charge. (Gavilan Joint Community College District (1996) PERB Decision No. 1177.) The statute of limitations is an affirmative defense which has been raised by the respondent in this case. (Long Beach Community College District (2003) PERB Decision No. 1564.) Therefore, charging party now bears the burden of demonstrating that the charge is timely filed. (cf. Tehachapi Unified School District (1993) PERB Decision No. 1024; State of California (Department of Insurance) (1997) PERB Decision No. 1197-S.)

As Menaster filed the charge on July 19, 2006, the statute of limitations dates back to include conduct occurring on or after January 19, 2006. As such, allegations of conduct that occurred before January 19, 2006, are untimely and must be dismissed.

#### Dills Act §§ 3515 and 3516

Menaster alleges the UAPD violated Dills Act sections 3515 and 3516 by failing to help him gain reinstatement into his former position.

Dills Act section 3515, is the provision which sets forth, "Employee organizational rights; maintenance of membership; fair share fee; self representation" rights. The charge does not provide any facts indicating the UAPD violated this section. A charging party should allege the "who, what, when, where, and how" of an unfair practice. (United Teachers-Los Angeles (Ragsdale) (1992) PERB Decision 944.) Mere legal conclusions are insufficient. (See State of California (Department of Food and Agriculture) (1994) PERB Decision No. 1071-S.) As such, this allegation must be dismissed.

Dills Act section 3516 is the provision which defines the scope of representation. The "scope of representation" is a term of art describing those matters which the exclusive representative and employer must negotiate. It is unclear even under what theory this provision would have applicability to the circumstances presented in the charge. (United Teachers-Los Angeles (Ragsdale) (1992) PERB Decision No. 944; State of California (Department of Food and Agriculture) (1994) PERB Decision No. 1071-S.) As such, this allegation must be dismissed.

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<sup>3</sup> This letter does not address whether Menaster has rights or remedies under other state or federal laws.

Retaliation (Dills Act § 3519.5)

Menaster alleges the UAPD retaliated against him for his participation in protected activities when it "failed to respond to the Department's refusal to reinstate me."<sup>4</sup>

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 exclusive representative had knowledge of the exercise of those rights; and (3) the exclusive representative 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; California School Employees Association & its Chapter 36 (Peterson) (2004) PERB Decision No. 1683.)

The refusal to rehire Menaster is conduct attributable to the Department, not the UAPD. The charge does not provide facts indicating that UAPD had an obligation to help Menaster get reinstated. As such, the charge does not demonstrate UAPD's inaction can be considered an adverse action. Nor does the charge provide facts indicating that its failure to respond to the Department's decision to not reinstate Menaster was retaliatory in nature. A charging party should allege the "who, what, when, where, and how" of an unfair practice. (United Teachers-Los Angeles (Ragsdale) (1992) PERB Decision 944.) Mere legal conclusions are insufficient. (See State of California (Department of Food and Agriculture (1994) PERB Decision No. 1071-S.) As such, this allegation must be dismissed.

Failure to Negotiate in Good Faith

Menaster alleges the UAPD violated its duty to negotiate in good faith. The duty to negotiate in good faith is set forth in Dills Act § 3519.5. It is a duty owed to the Department, not to unit members. (Alum Rock Education Association, CTA/NEA (Kirkaldie) (1995) PERB Decision No. 1118.) As such, this allegation must be dismissed.

Denied Duty of Fair Representation

The charge includes a lengthy chronology of facts regarding the UAPD conduct toward Menaster. Not all of that information is set forth below. Information regarding UAPD conduct before January 19, 2005 has been excluded because, as discussed above, allegations regarding that conduct is untimely filed and must be dismissed. The information set forth below is limited to those facts which center on the UAPD's failure to represent Menaster with regard to the ADA, unemployment insurance benefits, and his bid to be rehired.

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<sup>4</sup> The charge also alleges UAPD's failure to help Menaster get rehired was a violation of its duty of fair representation. These theories are addressed separately.

When Menaster filed for unemployment insurance benefits the Department opposed his application. The UAPD refused to represent Menaster in the hearing, claiming that it does not provide representation services for unemployment hearings. During the hearing on this matter, the Department submitted a declaration by Clancey which referenced, inter alia, the bake-sale conversation with Menaster. Menaster alleges Clancey mischaracterized several of their conversations.

The UAPD did not help Menaster when the Department ignored Menaster's request to be rehired.

Some of the above-stated information does not state a prima facie duty of fair representation violation.

Charging Party has alleged that the exclusive representative denied Charging Party the right to fair representation guaranteed by Dills Act section 3515.7(g) and California State Employees' Association (Norgard) (1984) PERB Decision No. 451-S and thereby violated section 3519.5(b). The duty of fair representation imposed on the exclusive representative extends to grievance handling. (Fremont Teachers Association (King) (1980) PERB Decision No. 125; United Teachers of Los Angeles (Collins) (1982) PERB Decision No. 258.) In order to state a prima facie violation of this section of the Dills Act, Charging Party must show that the Respondent's conduct was arbitrary, discriminatory or in bad faith. In United Teachers of Los Angeles (Collins), the Public Employment Relations Board stated:

Absent bad faith, discrimination, or arbitrary conduct, mere negligence or poor judgment in handling a grievance does not constitute a breach of the union's duty. [Citations omitted.]

A union may exercise its discretion to determine how far to pursue a grievance in the employee's behalf as long as it does not arbitrarily ignore a meritorious grievance or process a grievance in a perfunctory fashion. A union is also not required to process an employee's grievance if the chances for success are minimal.

In order to state a prima facie case of arbitrary conduct violating the duty of fair representation, a Charging Party:

". . . must at a minimum include an assertion of sufficient facts from which it becomes apparent how or in what manner the exclusive representative's action or inaction was without a rational basis or devoid of honest judgment. (Emphasis added.)" [Reed District Teachers Association, CTA/NEA (Reyes) (1983) PERB Decision No. 332, p. 9, citing Rocklin Teachers

Professional Association (Romero) (1980) PERB Decision  
No. 124.]

The charge alleges that UAPD failed to represent Menaster in his hearing before the EDD. The duty of fair representation does not attach to an exclusive representative in extra-contractual proceedings before agencies such as the Employment Development Department. (See generally California Union of Safety Employees (John) (1994) PERB Decision No. 1064-S; California State Employees Association (Carrillo) (1997) PERB Decision No. 1199-S.) As such this allegation must be dismissed.

The charge alleges the UAPD failed to help Menaster obtain a reasonable accommodation under the ADA. UAPD does not owe a duty of fair representation to Menaster in a forum over which the union does not exclusively control the means to a particular remedy. (California State Employees Association (Parisi) (1989) PERB Decision No. 733-S.) As such, this allegation must be dismissed.

The charge alleges the UAPD failed to help Menaster when the Department ignored his request to be rehired. As Menaster chose to resign, it does not appear that the UAPD's duty of fair representation extended to include his post-resignation requests for representation. Even if the duty extended to include this post-resignation request, the application process for state employment is extra-contractual in nature. As such, this allegation must be dismissed.

For these reasons the following allegations, as presently written, must be dismissed: that the Department violated the Act; that the UAPD's conduct violated statutes other than the Dills Act; that the UAPD's conduct before January 19, 2006 violated the Act; that the UAPD violated Dills Act §§ 3515 and 3516; that the UAPD retaliated against Menaster by refusing to help him when the Department did not rehire him; that the UAPD failed to negotiate in good faith; that the UAPD denied Menaster his duty of fair representation with regard to ADA violations, unemployment insurance benefits, and a bid to be rehired. If there are any factual inaccuracies in this letter or additional facts that would correct the deficiencies explained above, please amend the charge. The amended charge should be prepared on a standard PERB unfair practice charge form, clearly labeled First Amended Charge, contain all the facts and allegations you wish to make, and be signed under penalty of perjury by the charging party. The amended charge must have the case number written on the top right hand corner of the charge form. The amended charge must be served on the respondent's representative and the original proof of service must be filed with PERB. If I do not receive an amended charge or

SF-CO-50-S  
November 27, 2006  
Page 7

withdrawal from you before December 7, 2006, I shall dismiss the above-described allegation from your charge. If you have any questions, please call me at the telephone number listed above.

Sincerely,

Tammy Samsel  
Regional Attorney

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