OVERRULED IN PART by California State Employees Association (Hard, et al.) (1999) PERB Decision No. 1368-S, p. 28.

STATE OP CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

MARTHA MAIRE O'CONNELL,	)	
	)	
Charging Party,	)	Case No. SF-CO-12-H
	)	
v.	)	PERB Decision No. 753-H
	)	
CALIFORNIA STATE EMPLOYEES' ASSOCIATION,	)	June 30, 1989
	)	
Respondent.	)	
	)	

Appearances: Martha Maire O'Connell, on her own behalf; Howard Schwartz, Attorney, for California State Employees' Association.

Before Hesse, Chairperson; Porter and Shank, Members.

DECISION

HESSE, Chairperson: This case comes before the Public Employment Relations Board (PERB or Board) on exceptions filed by the charging party, Martha Maire O'Connell, to the attached proposed decision of an administrative law judge (ALJ). The ALJ found that the California State Employees' Association (CSEA or Association) did not violate section 3571.1(b) of the Higher Education Employer-Employee Relations Act (HEERA)[1] by removing

[1]**HEERA** is codified at Government Code section 3560 et seq. Unless otherwise indicated, all statutory references are to the Government Code. Section 3571.1(b) provides:

> It shall be unlawful for an employee organization to:
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> . . . . . .
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> (b) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.

her from her appointed position as an Association representative in retaliation for her pursuing of contract grievances and. for the filing of unfair practice charges against the organization. CSEA does not except to the ALJ's dismissal of the charges.

We have reviewed the ALJ's decision in light of the entire record, including the proposed decision, the transcript, the exceptions filed by the charging party, and CSEA's response thereto, and affirm the decision as modified below.

DISCUSSION

Martha Maire O'Connell's statement of exceptions lists numerous factual disputes with the ALJ's interpretation of the evidence, and, with the possible exception of the dismissal of the duty of fair representation (DFR) motion, states no law and very little rationale to indicate why the legal conclusions of the ALJ are in error. Her statement of exceptions is summarized as follows:

1. Objection to the dismissal of the motion to amend the complaint to include a DFR charge. O'Connell insists that the ALJ amended the charge during the hearing and that CSEA made no objection. The record does not support that statement and the ALJ correctly analyzed the motion under the Santa Clara Unified School District (1979) PERB Decision No. 104 finding CSEA was not required to defend against alleged charges without proper notice.

[2]Since the ALJ rendered his decision, the Board has modified Santa Clara to hold that notice is required in all circumstances where evidence of unalleged conduct might constitute the bases for independent violations. (See Tahoe-Truckee Unified School District (1988) PERB Decision No. 668.)

2. Objection to CSEA's policies and bias of the hearing panel. O'Connell argues that CSEA's written evidence outlining its representative procedures, including decertification, as submitted at the hearing, has been revised, is not appropriate, or otherwise does not exist. As the ALJ indicated in his proposed decision, O'Connell stipulated to the evidence being submitted and stated that she was very well acquainted with those policies. Additionally, O'Connell testified that she understood the policies through the training process, including the need to communicate with CSEA staff regarding campus/systemwide issues. Regarding the alleged panel bias, even assuming the facts support the conclusion of bias, the ALJ correctly determined the ultimate effect of that bias under Konocti Unified School District (1982) PERB Decision No. 217, i.e., that bias of the first level of review cannot be automatically imputed to the final decision maker.

3*. Technical errors in interpretation of the evidence. O'Connell indicates in a number of her exceptions that there was an option requested in her sexual harassment grievance (as opposed to complaint). She also argues about who was responsible for freezing the timelines and at what level the time lines were frozen. The ALJ's view of the evidence presented is largely correct, with one minor technical exception. In the remedy of the sexual harassment grievance, O'Connell does request that employees be informed

that "they may exercise the option of seeking a union representative . . . per Article 8 [of the collective bargaining agreement]." Since the sexual harassment complaint does not contain the "option" language, we find that this minor exception would make no difference in the disposition of the issues in this case.

4. Presentation of additional evidence. O'Connell claims that documentary evidence indicating she had filed many similar grievances in the past were provided with her brief to the ALJ. There is no such evidence in the record, nor is there any indication that the ALJ held the record open to permit the receipt of such evidence.

5. Political causes v. wrongful motivation causes. The remainder of O'Connell's statement of exceptions attempts to point out that the infighting in the San Jose chapter was, in itself, due to her exercise of protected activities. We uphold the ALJ's determination that the discipline imposed would have occurred despite the exercise of protected activity.

We therefore hold the ALJ's findings of fact are free from prejudicial error, and we adopt them as set forth in the proposed decision as the findings of the Board itself. We also affirm the ALJ's conclusions of law with regard to dismissing the motion to

amend the complaint to include a violation of HEERA section 3571.1(e).[3]

While we agree with the ALJ's conclusion regarding the reprisal claim, we cannot adopt his analysis in its entirety. We reject the ALJ's reliance on Service Employees International Union, Local 99 (Kimmett) (1979) PERB Decision No. 106, and the line of cases cited in the proposed decision, at footnote 14, to analyze whether a reprisal claim is cognizable before this Board when a union's internal affairs are involved.

The Kimmett decision was based on a consolidation of five unfair practice cases (LA-CO-27, LA-CO-31, LA-CO-32, LA-CO-33, and LA-CO-34) filed by an employee against an employee organization. Only one of the cases alleged a threatened reprisal, and that case was severed for a separate hearing. In the four remaining cases, which alleged improprieties on the part of the employee organization in the scheduling of employee organization meetings, the failure to notify employees of the meetings, and the failure to adequately inform employees of the status of negotiations, the Board found the allegations raised the issue of a violation of the DFR under the Educational

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[3]Section 3571.1(e) provides:

> It shall be unlawful for an employee organization to:
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> . . . . . .
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> (e) Fail to represent fairly and impartially all the employees in the unit for which it is the exclusive representative.

Employment Relations Act (EERA) section 3544.9.[4] In Kimmett, the issue was whether the duty to fairly represent employees extends beyond negotiation and administration of agreements and is applicable to activities which do not directly involve the employer or which are strictly internal union matters. The Board held that only such activities that have a substantial impact on the relationships of unit members to the employer are subject to that duty, and found no such impact in the Kimmett case.

In addressing whether the alleged improprieties of the union violated section 3543.6(b)[5], the Board noted that, had it found a breach of the DFR, that breach would also constitute a violation of section 3543.6(b). However, since the conduct proscribed by 3543.6(b) encompasses more than the breach of the DFR, the Board held that the charging party's allegations must be examined to

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[4]Section 3544.9 states:

> The employee organization recognized or certified as the exclusive representative for the purpose of meeting and negotiating shall fairly represent each and every employee in the appropriate unit.

[5]Section 3543.6 states, in pertinent part:

> It shall be unlawful for an employee organization to:
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> . . . . . .
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> (b) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.

determine whether they constituted a violation of that section separate and apart from any violation of section 3544.9.

The Board reasoned that employees' right to "join and participate in the activities of employee organizations" (see EERA section 3543) read broadly in conjunction with section 3543.6(b) could be construed as prohibiting any employee organization conduct which would prevent or limit employees' participation in any of its activities. Therefore, the Board held:

> . . . unless the internal activities of an employee organization have such a substantial impact on employees' relationship with their employer as to give rise to a duty of fair representation, we find that public school employees do not have any protected rights under EERA in the organization of their exclusive representative.
> (Id. at p. 17.) (Emphasis added.)

Thus, the limitation found in Kimmett on PERB's review of internal organizational matters applies only when the allegations present a question of the violation of the DFR. The ALJ's statement that union decisions regarding selection of representatives and procedures are largely immunized from PERB review is based on cases (see fn. 14 of the proposed decision) that can be distinguished because either they addressed only the DFR (California State Employees Association (Lemmons and Lund) (1985) PERB Decision No. 545-S; California School Employees Association, Chapter 318 (Harmening) (1984) PERB Decision No. 442; El Centro Elementary Teachers Association (Willis) (1982) PERB Decision No. 232) or contain an overbroad interpretation of

the Kimmett limitation. (Rio Hondo College Faculty Association (Furriel) (1986) PERB Decision No. 583.)

In Rio Hondo College Faculty Association (Furriel) (1986) PERB Decision No. 583, page 7, the Board upheld the ALJ's dismissal of the charging party's allegation that the association violated section 3543.6(b) by its refusal to appoint him to a joint committee established by the collective bargaining agreement. The Board stated in that case:

> Because we find that selection to the Committee is an internal union matter, and there is no evidence that rejection of Furriel had a substantial impact on his relationship to his employer and/or had a substantial impact on the relationship of other employees to their employer, we conclude that there is no violation of either section 3544.9 or 3543.6(b). (Emphasis added.)

We believe this statement is overbroad and may misconstrue the Kimmett analysis. If the allegations in a complaint state facts supporting retaliation by an employee organization, it makes no difference whether the organization's retaliatory actions have a substantial impact on the relationship of unit members to their employers. (California School Employees Association (Parisot) (1983) PERB Decision No. 280, at p. 11.)

In Parisot, a member of an employee organization charged that the employee organization violated EERA section 3543.6(b) by suspending him from membership and barring him from holding office for a period of time. He claimed that the procedures used

to remove him were unreasonable under section 3543.1.[6] The Board, holding that the hearing officer erred in dismissing the charge based on Kimmett, at page 11, stated:

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

Similarly, in reprisal cases, PERB has statutory authority to inquire into the internal activities of the employee organization. That statutory authority is contained in HEERA section 3571.1 which, in pertinent part, prohibits employee organizations from imposing reprisals on employees because of their exercise of protected rights.

An inquiry must go forth under Carlsbad Unified School District (1979) PERB Decision No. 89 and/or Novato Unified School

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[6]Section 3543.1(a) states:

> (a) Employee organizations shall have the right to represent their members in their employment relations with public school employers, except that once an employee organization is recognized or certified as the exclusive representative of an appropriate unit pursuant to Section 3544.1 or 3544.7, respectively, only that employee organization may represent that unit in their employment relations with the public school employer. Employee organizations may establish reasonable restrictions regarding who may join and may make reasonable provisions for the dismissal of individuals from membership.

HEERA contains no similar statutory provision. However, the fact that HEERA does not contain a provision for permitting an employee organization's establishment of reasonable rules for membership does not mean that the policy embodied in such provisions is not applicable to HEERA.

District (1982) PERB Decision No. 210, as to whether the actions were motivated by a charging party's exercise of protected rights. Novato requires a charging party to show an engagement in protected activity, that the respondent had knowledge of such activity, and that the respondent's harmful action against the charging party was motivated by an unlawful intent. The respondent then must put forward a defense as to whether there was any legitimate business concern sufficient to cause the action against the charging party. If there is both a lawful and an unlawful motive present, the Board will determine whether the respondent would have taken its action had the charging party not engaged in protected activity.

Of course, notwithstanding the existence of a provision permitting unions to establish reasonable rules and regulations governing their internal activities, the lack of fair procedures may work against the establishment of a legitimate affirmative defense to rebut an inference of improper motive. In CSEA's rules and regulations governing the removal of certification from a union representative, there is no indication as to what kinds of infractions would constitute "for cause." However, in reviewing common law cases, California has held for decades that where a statute, city charter, or even the governing bylaws of a fraternal organization or labor union, provide for the loss of a right for cause, a hearing is required absent a clear showing of legislative intent to dispense with that right. (Kramer v. Municipal Court (1975) 49 Cal.App.3d 418.)

In this case, O'Connell was provided with the rudimentary rights and was clearly given an opportunity to challenge the allegations. Nevertheless, administrative agencies and courts must give great deference to a union's interpretation of what conduct is sufficient to constitute cause. (See Kahn v. Hotel and Rest. Employees' and Bartenders, etc. (1977) 469 F.Supp.14 [101 LRRM 2516], aff. 597 F.2nd 1317 [101 LRRM 2521].) The ALJ correctly found that CSEA would have taken its action regardless of O'Connell's participation in protected activity.

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record of this case, it is hereby ORDERED that the complaint in Case No. SF-CO-12-H shall be DISMISSED.

Member Shank joined in this Decision.

Member Porter's concurrence begins on page 12.

Porter, Member, concurring: I concur that the complaint should be dismissed.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

MARTHA MAIRE O'CONNELL, Charging Party, v. CALIFORNIA STATE EMPLOYEES ASSOCIATION, Respondent.	)	Unfair Practice Case No. SF-CO-12-H PROPOSED DECISION (3/19/87)

Appearances: Bill Halloway for Martha Maire O'Connell; Howard Schwartz, Attorney, for the California State Employees' Association.

Before; Barry Winograd, Administrative Law Judge.

PROCEDURAL HISTORY

In a charge filed January 9, 1986, Martha Maire O'Connell alleged that the California State Employees' Association (CSEA or Association) sought to remove her as a union steward in retaliation for her pursuit of contract grievances and for the filing of an unfair practice charge against the organization. The charge also claimed that CSEA deprived O'Connell of fair representation. The Association's conduct, according to the charging party, violated sections 3571.1(b) and (e) of the Higher Education Employer-Employee Relations Act (HEERA or Act).[1]

[1]The HEERA is codified at Government Code section 3560 et seq., and is administered by the Public Employment Relations

An amended unfair practice charge was filed on March 13, 1986. The amended charge included allegations that O'Connell had been denied a full and fair hearing prior to her decertification as a steward in January 1986, and that the Association's action was part of an effort to stifle internal dissent.

The PERB General Counsel issued a complaint on June 19, 1986. The complaint alleged that O'Connell exercised rights protected by the HEERA, including,

> . . . filing and threatening to file unfair practice charges against Respondent; filing and pursuing grievances; discussing such grievances with the press; and, indicating her interest in running for organizational office.

The complaint concluded that CSEA retaliated against O'Connell for her exercise of HEERA rights by decertifying her as a union

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Board (PERB or Board). Unless otherwise indicated, all statutory references in this decision are to the Government Code. Section 3571.1 provides in relevant part that it shall be unlawful for an employee organization to:

> (b) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.
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> . . . . . .
>
> (e) Fail to represent fairly and impartially all the employees in the unit for which it is the exclusive representative.

steward. This action, according to the complaint, violated section 3571.1(b).[2]

The Association's answer was filed on July 11, 1986. The answer denied the allegations of unlawful conduct and advanced several affirmative defenses. A settlement conference on July 29, 1986 failed to resolve the dispute.

A pre-hearing conference was held on October 14, 1986. Thereafter, a four-day hearing was conducted in San Francisco and San Jose, California, on October 20 through October 22, and on November 21, 1986. Post-hearing briefs were filed by both parties. The dispute was submitted for decision on February 27, 1987.

FINDINGS OF FACT

A. CSEA Organization and Personnel

The Association is the exclusive representative of four bargaining units in the California State University (CSU) multi-campus system. The units represented by CSEA include support employees in clerical and administrative, health care, operations, and technical services. A single bargaining agreement covers the four units for the period July 1985

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[2]No reference was made in the complaint or in the PERB's covering letter to the alleged violation of section 3571.1(e), involving the duty of fair representation. During the hearing, the charging party moved to amend the complaint to include the alleged breach of the duty of fair representation on the basis of the evidence presented. The issue will be discussed below.

through June 1988. O'Connell is a clerical employee at the CSU San Jose campus.

The Association has organized its CSU division along staff and rank-and-file lines. The program manager and a senior staff member oversee four labor relations representatives. These representatives are the paid staff responsible for coordinating contract administration. At the time of the present dispute, Robert Zech was the divisional program manager, Ronald Almquist was the senior labor relations representative, and Kris Organ was the local labor relations representative who covered affairs at San Jose. Organ also has been responsible for coordinating contract and grievance matters at other CSU campuses in San Francisco, Hayward, Sonoma County and Humboldt County. He began working as a labor relations representative in spring 1985, about six months prior to O'Connell's decertification. CSEA is the exclusive representative of about 3,000 employees in Organ's five-campus territory.

Rank-and-file members of CSEA have a number of elected representatives in the CSU division. At San Jose, for example, the local chapter, comprised of the four units, elects a chapter president and other executive officers. Each unit within the chapter also elects a bargaining unit council representative (BUC Rep), officially designated the steward for that unit. BUC Reps throughout the state form a division council, and elect a council chair and a deputy.

Local chapters also have union representatives, popularly referred to as stewards, although not possessing the full organizational authority of a BUC Rep. Union representatives are not elected. They are appointed by BUC Reps and must complete an advanced training program prior to certification by the divisional head. Union representatives in the CSEA structure have responsibility for initial grievance representation through the first two steps of the procedure. Union representatives also provide liaison and support for the paid staff of labor relations representatives at higher stages, which include appeals to the campus president, the systemwide chancellor, and arbitration.

As part of their training, union representatives are instructed that grievances with campuswide, or systemwide, policy implications must be authorized in advance by the labor relations representative. Additionally, paid staff, not union representatives, can pursue grievances to the presidential or higher levels. Union representatives also are required to maintain immediate and full communication with labor relations representatives about all steps of grievances being handled.

O'Connell was a union representative, and a very active one, from the time she joined CSEA in 1981. She stipulated at the hearing that she was familiar with the Association's structure and with the limits on union representative functions that were conveyed in CSEA's training and written guidelines.

Pursuant to CSEA's established procedures, union

representatives can be decertified only for cause. The written procedure requires that the union representative be informed of the charges and given a hearing. Procedural details are not specified. If the three-person hearing panel believes decertification is appropriate, its recommendation is forwarded to the division council for final disposition. Decertification follows if three-fourths of the council sustains the action.[3]

B. San Jose Chapter Conflicts

O'Connell's experiences and relationships in the San Jose chapter were turbulent and bitter long before her eventual decertification as a union representative.

In 1984, for example, O'Connell was ousted by membership vote from her position as chapter vice-president. Eventually, after an internal union appeal, she was reinstated. The hearing officer's report cited a variety of allegations against O'Connell, but found that these did not justify removal.

There also was a dispute in 1984 over the rewrite of a newspaper article prepared by O'Connell regarding a gubernatorial veto of gay rights legislation. O'Connell, a gay rights activist as well as an outspoken member of the union's "progressive caucus," believed that others in the chapter

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[3]CSEA also has an intra-union disciplinary procedure, applying to members as well as representatives. This procedure has more elaborate hearing and appeal requirements, and can result in more severe union punishment. The disciplinary procedure was not invoked in O'Connell's case; only the decertification process was used.

wanted to censor her views and to limit the editorial authority she exercised on the chapter newsletter.

Factional disputes intensified in 1985. In April, an attempt was made by a local chapter BUC Rep to deny O'Connell ongoing certification as a union representative. In July, on appeal, the action was reversed because the formal decertification procedure had not been utilized. In the same period, several intra-union grievances and appeals were pending, charging other CSEA members with wrongdoing. While these were pending, members of the different factions were instructed to refrain from communicating with opponents, and to contact the paid labor relations staff for representation requests.

In summer 1985, a major dispute involved O'Connell's opposition to ratification of CSEA's contract with CSU. An anonymous leaflet distributed by O'Connell through the campus mail system urged employees to reject ratification. The chapter president, Theresa Guyton, apparently distressed by such use of the campus mails, filed a grievance with CSU officials. Thereafter, in settlement of the grievance, CSU agreed to limit mail access to identified CSEA officials, excluding the position held by O'Connell. O'Connell also was disciplined by CSU as an outgrowth of the CSEA grievance.

During the summer 1985 period, O'Connell ran unsuccessfully for chapter office. She continued, however, serving as an

active union representative and filed numerous grievances. These filings included grievances that were the focus of her subsequent decertification, at least one of which reportedly caused internal membership conflict. These grievances will be separately described below.

The troubles for CSEA at San Jose were capped in December 1985. Eleven chapter officers and representatives resigned, effective January 1986. In a letter dated December 5, 1985, the eleven wrote to the statewide CSEA president, explaining that,

> . . . we can no longer support or be party to the divisive and harmful activities of a few individuals acting as agents of CSEA, nor can we continue to rationalize to our members CSEA's silent acceptance of these activities which weaken the union and CSEA's unwillingness to deal with our campus reality.

The resigning chapter officials asked the statewide officers and directors,

> . . . to exercise their authority and act decisively according to CSEA's mandated responsibilities.

Evidence at the hearing indicated that O'Connell and some of her organizational allies were those referred to in the resignation letter as responsible for the alleged "divisive and harmful" union activities.

Within the next few weeks, the San Jose chapter was dissolved. Later in December, O'Connell also received notice of her proposed decertification.

C. Unfair Practice Charges

The internal Association disputes summarized above led to two unfair practice charges by O'Connell against CSEA. The first charge was filed in January 1985. (Case No. SF-CO-6-H.) In that case, O'Connell alleged that the union had, not represented unit members fairly, and that internal decisions, some of which were noted above, affected her ability to participate in the union's affairs. The charge was dismissed at the end of the month on the grounds that it was untimely, and that it involved internal affairs of the union beyond PERB's jurisdiction.

The second charge was filed in September 1985 and grew out of the flyer distributed through CSU mails that urged rejection of the CSEA contract with the employer. (Case No. SF-CO-9-H.) As noted above, the chapter president filed a grievance over use of the mails for that dissenting purpose. O'Connell was then reprimanded by CSU, charged a small fee, and future mail system access was restricted to specified CSEA officials. O'Connell's September charge alleged that the union caused the employer to deny O'Connell her right to use the mail system to communicate with other workers. A complaint issued, but the case was settled before a hearing.

The settlement was completed in December 1985, just several days prior to the initiation of decertification proceedings against O'Connell. The settlement included recognition by CSEA of the past practice regarding mail system access rights,

arguably accepting O'Connell's claim that her use of the mails was protected as a past practice. The settlement also incorporated a letter the union would send to management urging that the reprimand given to O'Connell be removed from her file. O'Connell testified that, as a result of the settlement, she was using the campus mails to distribute a dissident union newsletter.

Allegations were made at the hearing that O'Connell also threatened to file other unfair practice charges in conversations she had with CSEA officials, including Almquist, the senior labor relations representative. The testimony about such threats was vague, however, regarding the subject matter of the disputes, and the seriousness with which O'Connell pressed her case.

D. The Sexual Harassment Policy Grievance

In October 1985, O'Connell filed a grievance against the San Jose campus president's implementation of a systemwide CSU policy that created a special procedure for sexual harassment

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[4]Although the evidence about further charges was uncertain, O'Connell did file a new charge in February 1986, after her decertification, that referred to facts arising in 1985. The charge (Case No. SF-CO-14-H) alleged that CSEA improperly deprived employees of the funds needed to travel to high-level grievance hearings, and that the union previously had misrepresented the availability of such funding in order to secure contract ratification. After dismissal by the General Counsel, the Board partially reversed and remanded, concluding that a prima facie case had been stated on the misrepresentation issue. (See PERB Dec. No. 596-H.)

complaints. O'Connell's grievance followed her initially-unsuccessful attempt to meet with and represent an employee on a sexual harassment issue. Although O'Connell did confer with the employee later, she claimed that the presidential policy, contrary to systemwide intent, superseded the established contractual dispute-resolution procedure, depriving the union and employees of representational rights. The remedy sought by O'Connell was twofold: withdrawal of the presidential policy, and a letter to employees indicating that the contractual procedure for representation could be used.[5]

The grievance was filed at the second, non-presidential level of the grievance procedure, and an administrator was appointed to review O'Connell's claim. In late November, the administrator ruled in O'Connell's favor, holding that the contractual remedy was the exclusive procedure for sexual harassment complaints by employees in the CSEA bargaining units. The policy as a whole was not withdrawn, however, because non-unit employees still could utilize the non-contractual complaint procedure.

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[5]At the PERB hearing, O'Connell asserted that the grievance remedy would provide employees the option of pursuing either the contractual or non-contractual remedies. Although this might have been her intent, at a later stage after the potential impact of the grievance was assessed, the language used in the initial grievance filing did not preserve a dual remedy option. Instead, the grievance explicitly called for withdrawal of the non-contractual remedy established by the campus president, and asked that employees be notified of the contract's complaint procedure.

Organ testified that O'Connell had not informed him about the sexual harassment policy grievance before it was filed, and that the remedy exclusively confining complaints to the contractual procedure was not desired by the union. Organ stated that once he heard about the case after the November decision, and learned of O'Connell's intent to elevate the grievance to the third, campus-president level, he intervened with the employer's representative to freeze the proceeding. On December 5, Organ confronted O'Connell about her allegedly unauthorized action. That same day, O'Connell wrote to management's representative also asking to temporarily halt further proceedings.

For her part, O'Connell testified that she had informed Organ about the grievance once it was filed, giving him the relevant documents during regular meetings he held with local union representatives in November. Other union representatives testified that they observed O'Connell handing materials to Organ, believing these to involve the sexual harassment policy case, among others. Organ also admitted receiving a photocopy of the grievance, dated October 30, 1985, but claimed that he disregarded the document and placed it in a stack of papers because it was not related to an open file.[6] While it can be

[6]This oversight was surprising in light of related events. Organ had heard from O'Connell about the problem she encountered conferring with an employee, and had initiated his own conversations with Almquist to straighten out with CSU the

inferred that Organ knew or should have known about the grievance after it was initiated, there was no evidence that he consented beforehand. Under CSEA's policies, such consent normally would be expected in a case that challenged a campuswide directive implementing a systemwide policy.[7]

E. The AIDS Awareness Week Grievance

On November 9, 1985, O'Connell, as a CSEA representative, filed a grievance challenging the denial by her department of

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apparent confusion between the systemwide, campus and contractual policies. While the text of the grievance did not specify the representational denial first faced by O'Connell, the general subject matter of a policy conflict was identified and should have prompted Organ to at least inquire once he received a copy of the grievance. Additionally, the grievance form indicated, in an appropriately checked box, that a systemwide policy violation was at issue. Organ's lack of attention or poor recollection, evident also in connection with a second grievance discussed below, is not attributable to insincerity, for he freely admitted his own shortcomings, but more likely resulted from the overextended nature of his job responsibilities; he served as the sole paid staff representative for 3,000 employees in four separate units spread across five campuses throughout Northern California.

[7] In O'Connell's rebuttal testimony, she claimed that she had on other occasions filed grievances involving campuswide policies without first getting authorization from Organ. When pressed to specify the case(s), however, O'Connell was unable to identify any comparable instance. O'Connell estimated that she had handled 20 to 40 grievances in the period after Organ began working with the San Jose chapter and before her ouster as a steward. Moreover, even if O'Connell had leeway to commence grievances and pursue them through the second level, there was no evidence that she was authorized by Organ to proceed to the presidential level after the administrator's decision in late November. The testimony on O'Connell's behalf placed all of her conversations about the case with Organ earlier in the month, and there was no testimony with regard to authorized proceedings at the presidential level.

of administrative time off to participate in AIDS Awareness Week, a campus educational program for students, faculty and staff. O'Connell alleged that employees previously had been permitted to use informal release time to attend other functions, including social events, and that the denial in her case was inequitable and a deviation from past practice. Several days after the grievance was filed, another CSEA union representative, Stephanie Chavez, was substituted as the official representative acting on O'Connell's behalf.

On November 19, ten days after the grievance was submitted, the campus newspaper published an article describing the grievance and quoted O'Connell about the alleged inequitable treatment. The press contact alone was not unusual, as the evidence showed that other chapter officers and representatives, as well as O'Connell, periodically publicized pending grievances or other organizational activities. In the article about the release time issue, however, O'Connell was described as representing "employees," when, in truth, she was the only aggrieved individual identified in the grievance. The article also elaborated on the theory of the grievance, citing in detail the allegations about other social, cultural and educational events for which administrative time off had been given. By so arguing in favor of a past practice parallel for AIDS Awareness Week, and attributing the argument to CSEA generally, O'Connell gave campuswide prominence to the conflict she had with her departmental managers.

The grievance and press accounts apparently distressed O'Connell's intra-union critics. They feared that the grievance might jeopardize discretionary administrative release time for a range of social and campus activities. This distress was communicated to Organ, who, in early December, confronted O'Connell about the grievance.

According to Organ, the grievance was filed without his authorization, and contrary to objections he had expressed in early November. Organ testified that in November he told O'Connell that the administration had the discretion to allow informal release time, and that the contract did not support her claim. Organ also suggested that other employees enjoyed time off that could be adversely affected by a general CSU cutback in response to the grievance. When O'Connell asked what CSEA would do about the issue, Organ said a letter from the union would be sent seeking time off for employees.

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[8]A key grievance that O'Connell compared to her AIDS Awareness Week dispute involved a conflict the year before over time off to attend Women's Week functions. O'Connell made the comparison in her talk with Organ, in the grievance itself, and during the unfair practice hearing. While the two issues bear a resemblance, Organ testified, without contradiction, that the Women's Week grievance sought continuation of a practice approved by the campus president and followed in prior years for that event. In contrast, the AIDS Awareness Week grievance did not involve withdrawal of a practice, but extension to a new event for which management had never granted time off. There was no evidence offered by O'Connell that the union had ever grieved a dispute over the grant of new release time, as O'Connell sought to undertake in this instance.

Organ conceded at the hearing that, when pressed further, he told O'Connell she might have to file a grievance to get the release time she desired. Organ's comment was heard by others, but it was not clear from any testimonial account whether Organ was authorizing an independent grievance or a grievance with CSEA support. Given Organ's earlier stated objections, it is unlikely he intended to give the go-ahead, although O'Connell might have inferred from his comments that a union-backed grievance could be filed.

Organ stated that he did not learn about the AIDS Awareness Week grievance until early December, when O'Connell's chapter opponents chided him for permitting it to go forward. Organ then confronted O'Connell, at which time she claimed to have informed him of the grievance during their meetings in November. Organ thereafter indicated that the union would no longer support the grievance or arbitration. Eventually, O'Connell pursued the issue independently.

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[9]The possibility of a misunderstanding between the two was underscored by a comment from one of O'Connell's witnesses. He described the charging party as someone who would have "screamed from the rafters" if her grievance was blocked, followed by a flood of documentation protesting the union's decision. This view of O'Connell was consistent with the tone and volume of paper generated by O'Connell in connection with her intra-union disputes. Also, as noted above, the scope and demands on Organ created by his job might have affected his ability to clearly organize and recall the details of his everyday representational duties.

F. Decertification

In early and mid-December 1985, Organ consulted with Almquist, his supervisor, about the sexual harassment policy and the AIDS Awareness Week grievance disputes he had with O'Connell. In Organ's view, O'Connell had been an irresponsible union representative, acting in disregard of the labor representative's view, and advocating substantive positions that could harm the interests of unit members. In mid-month, Organ outlined his objections in a memo to Almquist. On December 19, Almquist wrote to Zech proposing O'Connell's decertification as a union representative. On December 24, Zech gave O'Connell notice of a decertification hearing to be held on January 11, 1986, and sent a copy of Almquist's complaint memorandum.

Three charges were filed against O'Connell. The first involved the sexual harassment policy grievance, alleging that O'Connell pursued the case without authorization to the presidential level, despite the systemwide implications of the grievance. The charge also claimed that O'Connell's action jeopardized employee rights to use the non-contractual sexual harassment complaint procedure.

The second decertification charge was that the AIDS Awareness Week grievance was filed without authorization and despite Organ's express disapproval, thereby jeopardizing informal time off for diverse activities. The conduct by

O'Connell was characterized as a willful failure to follow established union procedures.[10]

The third and final charge was that O'Connell's newspaper interview about the release-time grievance was a misuse of her union representative position, thereby jeopardizing informal time off and discrediting the organization.

The decertification hearing conducted on January 11, 1986 was a comparatively informal proceeding. Zech chaired the three-person panel. The two other members were local campus representatives. At the hearing, O'Connell's representative made a statement, submitted a lengthy written response to the charges, with exhibits, and was given an opportunity to challenge the claims made by Organ and Almquist. O'Connell could have offered the testimony of witnesses, but she claimed that none were willing to travel from San Jose to Oakland on a Saturday. Instead, written witness statements were provided. Although O'Connell requested taping or transcription of the hearing, this was denied because of the informal nature of the proceeding. O'Connell's request to disqualify two of the panel members, apparently not supported by a showing of bias, also was rejected.

During the session, Almquist, who presented the case

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[10]Chavez, who took over this grievance a week after it was filed, but who had not been forewarned of union objections by Organ, was not disciplined or decertified.

against O'Connell, referred not merely to the charges set forth in the written decertification proposal, described above, but also to the fact that O'Connell had filed one or more unfair practice charges against the union. Almquist suggested that this added to the evidence that O'Connell was not the kind of representative the union desired. Almquist was not called as a witness by the union at the PERB hearing, and the statements he made were not clearly denied in respondent's case.[11]

The hearing panel unanimously recommended that O'Connell be decertified. According to Zech's uncontradicted testimony, the panel in its deliberations considered only the three charges lodged against O'Connell, excluding the references by Almquist to unfair practice charges.

The panel's recommendation was transmitted to the division council for its determination on January 25, 1986. The council heard from one witness on O'Connell's behalf, but otherwise reviewed only the documentation and report forwarded by the

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[11]During the hearing, there also was testimony that Almquist stated a CSEA steward could not file individual, personal grievances, while retaining representative status. O'Connell argues that this is an unlawful condition on union stewards because it forces them to abandon a HEERA right to file contract grievances. Although this might be a sound argument for another case, evidence on this issue was irrelevant to the current charge, except, perhaps, for credibility purposes. This is so because O'Connell did not file either the sexual harassment or the AIDS Awareness Week grievances as an individual, but pursued each as a designated CSEA representative. It was on that basis, and the question of notice and authorization, that the decertification was undertaken.

hearing panel. The division council voted unanimously to decertify O'Connell. One consequence of the decision, according to O'Connell, was that she could not seek election as a BUC Rep for her unit since a candidate had to be a steward to be eligible.

During the decertification proceedings in January 1986, O'Connell (and her representative) asserted that CSEA had a retaliatory motive based on O'Connell's intra-union political positions and the opposition it had aroused. O'Connell's point-by-point, eight-page written rebuttal of the charges against her concluded:

> In sum: these charges are completely without foundation and are politically motivated by a letter of resignation from the current Chapter officers and the Guyton-appointed committee coordinators. . . . In order to placate these individuals, CSEA staff have brought decertification charges against O'Connell, one of the recognized leaders of the progressive movement within Chapter 307.
>
> Since his assignment to SJSU, Organ has become increasingly hostile towards O'Connell and those other CSEA union reps who support the progressive movement. In short, he has been playing "chapter politics."

Notes offered by the charging party of the remarks made by O'Connell's representative at the January 11 decertification hearing also indicate that political retaliation was imputed as the motive for the CSEA action.

O'Connell's written rebuttal to the union's charges, quoted above, did not refer to her unfair practice filings as a cause

for CSEA's reprisal, and only mentioned the mail system access case in one passing comment. She did raise the unfair practice basis for her decertification, however, as one of several alleged motivating factors in the unfair practice charge and amended charge that led to the instant complaint. When O'Connell was asked at the hearing why she had not referred to **her** prior unfair practice filings when fighting the decertification attempt, even though a CSEA associate at the San Francisco State campus serving as an intermediary had suggested that rationale, she gave two explanations. She stated she would have included the allegation had it been drafted for someone else, and not as part of the internal exhaustion of remedies. O'Connell also testified that, in her view, the mail system unfair practice charge to which Almquist **alluded** was the predominant reason for CSEA's retaliation because it opened use of the mails to dissidents to criticize **the union.**

CONCLUSIONS OF LAW

A. Introduction

O'Connell contends that her decertification was a reprisal **for** activity protected under the HEERA, referring specifically in her post-hearing briefs to the filing of grievances to enforce contract rights, and to the filing of unfair practice charges.[12] As legal authority supporting PERB review of a

[12]**The** charging party did not argue in her brief, as the complaint had alleged, that her press contacts and her interest

union's internal retaliatory actions, O'Connell relies on California School Employees Association and its Shasta College Chapter #381 (Parisot) (1983) PERB Decision No. 280. In Parisot, the Board remanded for hearing a charge that a union officer and member was unfairly and excessively disciplined for internal union activity, although recognizing that conduct hostile to the union, such as a decertification drive, could be grounds for some degree of union punishment.

Parisot was distinguished by the PERB from Service Employees International Union, Local 99 (Kimmett) (1979) PERB Decision No. 106. Kimmett established the general rule that internal union affairs would be reviewed by the PERB only when the activities,

> . . . have a substantial impact on the relationship of unit members to their employers. . . . (Id. at p. 10.)[13]

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in running for an elected position were protected conduct. These issues were mentioned in her brief only as further evidence suggesting an unlawful motivation for her decertification by CSEA. Given the distinction, the complaint's allegations about those aspects of the case as protected activity will not be considered as potential violations standing alone.

[13]The Board explained its rationale by stating:

> The internal organization structure could be scrutinized as could the conduct of elections for union officers to ensure conformance with an idealized participatory standard. However laudable such a result might be, the Board finds such intervention in union affairs to be beyond the legislative intent in enacting the EERA. (Id. at p. 16.)

Kimmett's "substantial impact" test is utilized for assessing claims that internal organizational conduct either was discriminatory or was a breach of the union's duty of fair representation. (Id. at pp. 10, 16.) Hence, O'Connell argues that her decertification was not strictly an internal matter because it involved her underlying right to file contract-based grievances as well as her right to file unfair practice charges to protect her participatory interests.

CSEA does not, and could not, dispute O'Connell's claim that her contract grievances and unfair practice filings were activities usually deserving protection under the HEERA. In each instance, employer-employee relations were underlying elements of O'Connell's actions, whether, for example, it was contract enforcement or use of the mail system to communicate with others about contract ratification. The Association counters, however, that HEERA protections do not apply to the present facts, and that Parisot is distinguishable. CSEA contends that its action against O'Connell was a self-protective internal union response within the discretion of the organization when faced with an irresponsible union steward, asserting that O'Connell's misconduct was the cause for union decertification, not the grievances or unfair practice filings per se.

In examining the parties' arguments, a strong presumption favors PERB restraint when the ordering of internal

organizational affairs is challenged. This is the principle to be drawn from Kimmett, which involved the choice of negotiators and the timing of meetings, among other issues. This principle also is present in other Board decisions in which internal union decisions regarding selection of representatives and procedures were largely immunized from PERB review.[14] While there is precedent in federal labor relations experience to protect, for example, the right to file unfair practice charges against unions,[15] it must be demonstrated that the union's punishment was motivated by the filing of the charge, and not by internal organizational decisions to regulate legitimate union

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[14]See, e.g., California State Employees' Association (Lemmons and Lund) (1985) PERB Decision No. 545-S (removal of union steward); California School Employees Association, Chapter 318 (Harmening) (1984) PERB Decision No. 442 (recall of chapter president); El Centro Elementary Teachers Association (Willis) 1982 PERB Decision No. 232 (barring non-member voting on contract ratification); Rio Hondo College Faculty Association (Furriel) (1986) PERB Decision No. 583 (composition of sabbatical leave committee).

[15]See, e.g., NLRB v. Marine Workers (1968) 391 U.S. 418; H.B. Roberts v. NLRB (D.C. Cir. 1964) 350 F.2d 427 [59 LRRM 2801]; Iron Workers (1985) 277 NLRB No. 99 [121 LRRM 1001].

The construction of similar or identical provisions of the National Labor Relations Act (NLRA), as amended, 29 U.S.C, section 151 et seq., may be used to guide interpretation of California labor relations legislation. (See San Diego Teachers Assn. v. Superior Court (1979) 24 Cal.3d 1, 12-13; Fire Fighters Union v. City of Vallejo (1974) 12 Cal.3d 608, 616.) Compare section 3571.1(b) of the HEERA with the NLRA's section 8(b)(1) (29 U.S.C, sec. 158(b)(1)), each of which prohibits an organization from restraining or coercing employees in the exercise of protected rights.

interests.[16] Unions, therefore, are given the latitude, as are employers, to make decisions about their own management, provided such decisions are not unlawfully motivated.[17]

Indeed, O'Connell, a staunch and active unionist,

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[16]NLRB v. Marine Workers, supra, 391 U.S. at 424, and other decisions cited supra, fn. 15. In determining whether unlawful retaliation has occurred, the PERB has adopted a standard, expressed in California State University, Sacramento (1982) PERB Decision No. 211-H, at pp. 13-14, that is consistent with the Supreme Court's analysis in NLRB v. Transportation Management Corp. (1983) 462 U.S. 393, cited in Santa Clara Unified School District (1985) PERB Decision No. 500. This test requires the trier of fact to weigh both direct and circumstantial evidence in order to determine whether an action would not have been taken but for the exercise of protected rights. (Also see Martori Bros. Distributors v. Agricultural Labor Relations Bd. (1981) 29 Cal.3d 721 (same approach under state farm labor law).)

[17]Federal decisions applying laws other than the NLRA, also recognize the importance of union discretion over internal affairs as part of the larger goal of maintaining healthy, viable unions that can contribute to stable and productive bargaining relationships. For example, in Finnegan v. Leu (1982) 456 U.S. 431, the Supreme Court upheld the right of a newly-elected union president to discharge an appointed business agent who had supported the previous incumbent, rejecting a claim premised on federal law protecting internal union freedom of speech. In the last year, in Am. Fed. Gov. Em. v. FLRA (D.C. Cir. 1986) _____F.2d_____[124 LRRM 2015], a court remanded a case involving an ousted union steward who claimed that federal public sector labor relations law prohibited retaliation for reporting misconduct by another employee. The court, in a decision by Judge Harry T. Edwards, a respected labor relations scholar, required the agency to explain why it departed from the general rule of restraint when considering internal matters typically left to a union's discretion. A recent appellate decision under the NLRA followed similar reasoning in reversing a portion of an NLRB unfair practice order against a union for disciplining a dissident newspaper publisher, with the circuit court concluding that the employer-employee relationship had not been affected. (NLRB v. Operating Engineers Local 139 (7th Cir. 1985) 796 F.2d 985 [123 LRRM 2021].)

recognizes in her brief the limits of her own legal arguments and the question to be resolved:

> The authority of CSEA to discipline its agents for breaches of internal union policy and procedures is not at issue. This we do not contest, anymore than we would contest the authority of an employer to discipline an employee for a work rule violation. This authority of CSEA, however, cannot be used as a smokescreen behind which reprisals are taken against a union dissident for exercise of rights under HEERA.

With the issues thus posed, as explained hereafter, it has been concluded that O'Connell's decertification was not a reprisal for the exercise of protected rights. For procedural reasons, the claim that O'Connell was deprived of fair representation by CSEA also shall be dismissed.

B. The Reprisal Claim

The charging party presented a prima facie case of an unlawful reprisal by the Association. First, O'Connell's decertification followed the then-recent filing of an unfair practice charge and the issuance of a complaint by the PERB. The settlement of that case, shortly before the decertification began, did not involve an admission of CSEA liability, but it was favorable to O'Connell. It could be inferred that the Association might have struck back at her through another proceeding.

Second, there was direct testimony, not clearly denied, that Almquist raised the subject of O'Connell's unfair practice filings at the time of her decertification hearing, adding the

reference to the other written claims against her. Since Almquist was the senior labor relations representative who helped initiate the decertification effort by transmitting the problems reported by Organ, there can be little doubt that he played a key role in the evolving confrontation.[18]

Last, a prima facie case is supported by the deficiencies in the Association's determination that there was "cause" to remove O'Connell from her steward's post. Several aspects of the case were weak. There was credible evidence that Organ knew or should have known about the sexual harassment grievance earlier than he claimed he knew. The decertification charge incorrectly stated that the sexual harassment grievance was filed at the presidential level when it actually was filed one level below. A CSEA grievance seeking release time from CSU for Women's Week had been pursued in the past, and it raised issues similar to those in the AIDS Awareness Week dispute. The claim involving O'Connell's press contact about the AIDS grievance seemed overblown when examined in light of evidence that other chapter activists at San Jose had regular press contacts on pending matters. Regarding all of the charges, there was no evidence that the decertification was a progressive step following prior counseling or written warning,

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[18]The inference about Almquist's bias also was supported by O'Connell's hearsay account of her conversation with a CSEA intermediary from the San Francisco State campus.

as one might expect when "cause" is at issue. These weaknesses in the Association case, while not conclusive on the question of just cause for decertification, raise the inference that she was removed for reasons other than those that were expressed by the union.

Nonetheless, it is concluded that the Association demonstrated that O'Connell's unfair practice and grievance filings were not the reason she was decertified. Several aspects of this case, taken together, support the respondent's defense to the reprisal claim.

First, even if Almquist harbored some animus toward O'Connell based on her earlier unfair practice charge, there was unrebutted evidence from Zech that the three-person hearing panel reviewed only the written charges against O'Connell, and did not consider Almquist's supplemental remarks made at the hearing. The hearing panel's recommendation was then forwarded to the division council, which affirmed the decertification. There was no suggestion in the record that the division council had any information about protected activity which could sway its decision. Under these circumstances, Almquist's animus against O'Connell for her resort to PERB, assuming it was his predominant motivation, cannot automatically be ascribed to the other decision-making bodies for CSEA. (See Konocti Unified School Dist. (1982) PERB Dec. No. 217 at pp. 10-11 (superintendent's anti-union animus not imputed to school board

after independent hearing to impose discipline).)

Second, even if the Association's motive to decertify O'Connell was mixed, composed of unlawful as well as lawful bases, the evidence does not lead to the conclusion that O'Connell's ouster as a union representative would not have occurred but for her protected activity. The decertification charges, while imperfect and deficient in some respects, did set forth certain allegations that were supported by the facts.

In the sexual harassment policy grievance, O'Connell clearly violated the spirit if not the letter of union policy by proceeding without any advance clearance to challenge a campus-wide presidential policy—setting in motion a process that would presumably require presidential intervention. O'Connell's proposed remedy also was understandably troubling from the standpoint of the exclusive representative. By seeking withdrawal of the presidential policy, rather than merely reaffirming the viability of the contractual complaint procedure, O'Connell was making a decision divorced from consultation about larger bargaining tactics and strategy. The decertification, in any event, only followed upon Organ's effort to freeze the grievance after learning that it was about to be elevated to the third, presidential level.

The AIDS Awareness Week grievance was perhaps more troubling from the Association's standpoint because of evidence that Organ had expressed contractual and practical objections

to the grievance proposed by O'Connell. Under these circumstances, O'Connell should have acted more cautiously both before and after filing in the Association's name, trying to work with Organ step-by-step rather than challenging his perspective. This approach was called for, even if Organ's early November remarks were misunderstood to permit a CSEA-sponsored filing, because O'Connell knew or should have known that others in the chapter would feel that their own release time interests were threatened. Such a threat would arise from the potential administrative response of cutting back on time off in general in order to avoid further claims of unequal treatment.

As noted before, the decertification charges also were weak on the press contact issue. Yet, even on that point, the Association had some cause for concern, assuming that Organ's underlying reservations about the AIDS Awareness Week grievance were appropriate and were understood by O'Connell. The press contact aggravated the situation, with the notoriety possibly raising the stakes for O'Connell's union opponents as well as the University administration.

Overall, on the issue of cause, the Association's decertification of O'Connell had some basis in fact that was sufficient to be viewed, subjectively, as reason for her removal. While the absence of just cause can raise an inference of retaliation, an objective analysis of cause does not resolve the ultimate legal issue for the PERB. From the

Board's standpoint, the Association could have removed O'Connell for the wrong or misstated cause, or even due to personal ill will, as long as she was not decertified for protected activity. (Moreland Elementary School Dist. (1982) PERB Dec. No. 227 at p. 15; Regents of the University of California (1983) PERB Dec, No. 305-H at pp. 12-13.)

Finally, the Association's defense was buttressed, oddly enough, by the substantial evidence introduced by O'Connell regarding the bitter conflicts within the San Jose chapter, suggesting that her decertification was a final step for her opponents, precipitated by the two grievance, disputes. In this respect, O'Connell herself responded to the decertification by characterizing it as a politically motivated attack, not even referring to protected grievance and unfair practice activity as the reason for her removal as a steward.[19] This political view of the conflict has a sounder ring to it, and underscores

[19]Moreover, O'Connell's attempt at the hearing to explain the omission of any reference to protected activity during the decertification was inadequate, thereby reinforcing the adverse inference to be drawn from her written rebuttal to the charges. First, O'Connell's claim that the protected activity allegation was irrelevant to her exhaustion of internal remedies, while her imputation of a political motive was relevant to the CSEA process, is a distinction that does not explain. Instead, it suggests that she shaped her theory to fit the forum, not the facts. Second, characterizing her mail access unfair practice case as the predominant reason for her decertification, so that the union could exclude dissident transmissions, ignores the fact that under O'Connell's theory of the mail access case, and the apparent basis for her settlement, her stewardship and decertification would be unrelated to her right to use the mails for the concerted expression of views.

the need for the Board to exercise restraint when called upon to intercede in internal union affairs. Such restraint can be particularly appropriate when intervention is sought by employees who have lost union elections or have been removed from appointed positions of authority.

C. The Fair Representation Claim

Under limited circumstances, violations that are not set forth in the complaint may be considered as part of the disposition of an unfair practice case. In Santa Clara Unified School District (1979) PERB Decision No. 104, the Board stated that an unalleged violation may be reviewed if it is intimately related to the subject matter, arises from the same course of conduct, and has been fully litigated. (Also see San Ramon Valley Unified School Dist. (1982) PERB Dec. No. 230.)

O'Connell argues that the evidence of the Association's handling of the sexual harassment and AIDS Awareness Week grievances demonstrates a breach of the duty of fair representation through a failure to enforce the literal terms of the contract and a failure to prevent disparate, discriminatory treatment. On the basis of the present record, however, this unalleged violation cannot be considered without causing prejudice to CSEA.

While the grievances were related to the decertification proceeding, the fair representation issue was not squarely an issue for CSEA to resolve internally. Rather, the Association focused on procedural issues involving CSEA structure and personnel.

Similarly, in the PERB proceeding, the Association was not required on the basis of the complaint to defend at trial against a fair representation charge, but only to demonstrate the cause for O'Connell's removal. Although the contractual issues have some relevance to that cause determination, the Association presumably could have offered additional evidence if faced from the outset with a fair representation case. For example, what factors, apart from contract language alone, influenced CSEA's decisions regarding the sexual harassment and AIDS Awareness Week grievances? Were parallel talks or other steps being pursued with CSU? To defend its position on the grievances, CSEA might have offered evidence of bargaining history about sexual harassment complaints, and of management's right to give discretionary time off. More detailed evidence about the disposition of other release time grievances based on past practice also could have been appropriate to resolving the dispute. Further, in response to a claim of discrimination on the basis of sexual preference, the Association could have presented other cases or bargaining demands it has handled.

All of these evidentiary categories would have been relevant to a fair representation case. CSEA, however, was not required to produce such evidence in order to litigate the decertification dispute on the basis of the PERB complaint, and the record at trial provided an incomplete basis for a decision on the question. In short, finding unfair representation at

this juncture would deny the Association adequate notice and a reasonable opportunity to defend.

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in the case, it is hereby ordered that the complaint shall be DISMISSED.

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

with the Board itself. See California Administrative Code, title 8, part III, sections 32300, 32305, and 32140.

Dated: March 19, 1987

BARRY WINOGRAD
Administrative Law Judge