STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

TOMMIE R. DEES,	)	
	)	
Charging Party,	)	Case No. SF-CE-252-H
	)	
v.	)	PERB Decision No. 869-H
	)	
CALIFORNIA STATE UNIVERSITY, HAYWARD,	)	February 25, 1991
	)	
	)	
Respondent.	)	
	)	

Appearances: DiNapoli, Norland & Kays, by Gregg L. Kays, Attorney, for Tommie R. Dees; William B. Haughton, Senior Labor Relations Counsel, for California State University Hayward.

Before Shank, Camilli and Cunningham, Members.

DECISION AND ORDER

SHANK, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by Tommie R. Dees (Dees) to the attached proposed decision by a PERB administrative law judge (ALJ). In his proposed decision, the ALJ dismissed the complaint alleging unlawful retaliation perpetrated against Dees by the California State University, Hayward (CSU) in violation of Section 3571(a) and (b) of the Higher Education Employer-Employee Act (HEERA).[1] We have

[1]HEERA is codified at Government Code section 3560 et seq. Section 3571 (subsequently amended by Chapter 313 of the Statutes of 1989, effective January 1, 1990) stated in pertinent part, as follows:

> It shall be unlawful for the higher education employer:
>
> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise

reviewed the entire record in this case, including the proposed decision, Dees' exceptions and CSU's responses thereto, and find the ALJ's findings of fact and conclusions of law to be free of prejudicial error and therefore adopt them as the decision of the Board itself.

The complaint in Case No. SF-CE-252-H is hereby DISMISSED.

Members Camilli and Cunningham joined in this Decision.

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to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.

(b) Deny to employee organizations rights guaranteed to them by this chapter.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

TOMMIE R. DEES, Charging Party, v. CALIFORNIA STATE UNIVERSITY HAYWARD, Respondent.	)	Case No. SF-CE-252-H (formerly SF-CE-192-H) PROPOSED DECISION **(9/10/90)**

Appearances: DiNapoli, Norland & Kays, by Gregg L. Kays, Attorney, for Tommie R. Dees; William B. Haughton, Attorney, for the California State University, Hayward.

Before Fred D'Orazio, Administrative Law Judge.

PROCEDURAL HISTORY

This lengthy procedural history begins with an unfair practice charge filed on May 21, 1984 by Tommie R. Dees (hereafter Dees or Charging Party) against the California State University, Hayward (hereafter CSU or Respondent). The charge, first amended on August 21, 1984, alleges that CSU committed fourteen separate acts of retaliation against Dees for engaging in protected activity.

On September 7, 1984, the General Counsel of the Public Employment Relations Board (hereafter (PERB or Board) dismissed twelve of the allegations and issued a complaint on two acts of retaliation: an involuntary transfer and subsequent placement on involuntary medical leave. The complaint alleged that this conduct violated the Higher Education Employer-Employee Relations

that (HEERA or Act) section 3571(a) and (b).[1] The complaint was placed in abeyance while Dees appealed the dismissal.

On December 5, 1985, while the appeal was pending, Dees filed a Second Amended Charge alleging additional facts to support his initial claim of retaliation. On June 10, 1986, the PERB General Counsel issued another partial dismissal and a First Amended Complaint. In addition to the allegations in the initial complaint, the First Amended Complaint alleged that CSU retaliated against Dees by considering him "absent without authorized leave" and terminating his employment. Dees appealed the second partial dismissal.

On January 2, 1987, the Board decided Dees' two appeals. The Board dismissed certain allegations, remanded some for further investigation, and ordered complaints issued on others. California State University, Hayward (1987) PERB Decision

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[1]*The* HEERA is codified at Government code section 3560 et seq. Unless otherwise indicated, all references are to the Government Code. Sections 3571(a) and (b) state that it shall be unlawful for the employer to:

> (a) 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.
>
> (b) Deny to employee organizations rights guaranteed to them by this chapter.

No. 607-H.[2] Specific allegations will be addressed below as necessary.

On May 12, 1987, the PERB General Counsel issued a Second Amended Complaint. This complaint contained approximately nine allegations of retaliation against Dees.

Throughout the entire procedural history, CSU, through its answers, has denied violating the Act.

On February 23, 1988, this matter was placed in abeyance by a PERB administrative law judge pending the outcome of Dees' case before the California Workers Compensation Appeals Board. A decision eventually issued in that case, but it had no impact on the settlement of the instant unfair practice charges.

On February 17, 1989, CSU moved to dismiss all allegations. CSU contended that, under a then recent Board decision, the six-month statute of limitations in section 3563.2(a) could not be tolled. For most of the allegations, the complaints assumed the statute of limitations had been tolled by grievances.

At a prehearing conference on August 2, 1989, the undersigned granted Respondent's motion to dismiss all allegations in the three above-referenced complaints, except for the allegation in the First Amended Complaint, issued on June 10, 1986, concerning Dees' termination. See California State University, San Diego (1989) PERB Decision No. 718-H; The Regents of the University of California (1990) PERB Decision No. 826-H.

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[2]On remand the case number was changed from SF-CE-192-H to SF-CE-252-H.

It was concluded that this particular allegation was timely-filed. See California State University, Hayward, supra, p. 21.

Six days of formal hearing were conducted by the undersigned in Hayward, California between February 13 and 21, 1990. Final briefs were submitted on June 21, 1990.

FINDINGS OF FACT

During 1981, CSU officials became dissatisfied with the performance of the grounds department at the Hayward campus. Employees demonstrated poor work habits, the rate of absenteeism was high, and the grounds were in a general state of deterioration. According to James Buckley, then assistant director of personnel services, CSU initiated an investigation of the department. (Buckley is now the director of personnel services.) Employees and managers were interviewed and the entire department was evaluated. Among the many recommendations implemented as a result of the investigation was the termination of the head of the grounds department. In December 1982, Buckley testified, Tony Rodriguez was hired to manage the department "in a businesslike fashion." In January 1983, Mario Ruiz was hired as a supervisor in the department. Tommie Dees was a groundsworker in the department at the time Rodriguez and Ruiz were hired.

From the beginning, Dees had a rocky relationship with Ruiz and Rodriguez. Dees testified about several incidents which he

viewed as harassment.[3] For example, in April 1983 a group of groundsworkers asked Dees to present to Rodriguez a health and safety complaint concerning a road work assignment. According to the unrebutted testimony of Margaret DuFresne, then a groundsworker, when Dees attempted to present the complaint, Rodriguez angrily "screamed at [Dees] to get his butt back to work." In another incident, on April 27, 1983, Ruiz told Dees in a hostile tone that he would like to "drill" him. Ruiz apologized in a meeting that same day where Dees was represented by Milton Owens, then a California State Employees Association (CSEA) representative.[4] On another occasion, according to Dees, Ruiz made "weird faces" in an attempt to intimidate him. In another incident, Dees said Ruiz drove by in his vehicle and "made all kinds of faces at me, and then he pretended to laugh outrageously, rocking back and forth behind the steering wheel of his truck, as he drove by."

Also in 1983, Rodriguez told Hisashi Hara, a former groundsworker who now holds the supervisory position formerly held by Ruiz, that group meetings with groundsworkers would "run

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[3]Since Rodriguez and Ruiz were not called to testify at the hearing, much of the testimony about their conduct toward Dees is uncontradicted. They no longer work in the grounds department at CSU, Hayward. However, they were employed by CSU, Hayward on May 29, 1985, the date Dees was terminated.

[4]At all relevant times, CSEA was the exclusive representative of Unit 5, operations support services. A collective bargaining agreement was in effect between CSU and CSEA covering that unit. Dees was a member of Unit 5. Owens was a CSEA representative; he is now manager of the custodial department at CSU, Hayward.

a lot smoother" if Dees was not present. Dees regularly attended these meetings and was outspoken on behalf of employees concerning employment related matters.

Antagonism toward Dees spilled over into the evaluation of his work. Tante Sarmiento, Dees' leadworker, testified that Rodriguez' and Ruiz' repeated criticism of Dees' work was unjustified. These supervisors, according to Sarmiento's unrebutted testimony, evaluated Dees' work as unsatisfactory, but when Sarmiento inspected the work he found it satisfactory. (Even CSU, at the hearing, conceded that Dees' work was satisfactory "when he worked.") Many of the work-related criticisms occurred shortly after Dees filed the first in a series of grievances on June 3, 1983.

Dees' June 3, 1983 grievance claimed his shift was improperly changed without the required notice under the collective bargaining agreement. The grievance was settled favorably from Dees' perspective at the first step of the grievance procedure.

On June 10, 1983, Dees filed another grievance protesting acts of intimidation which occurred in April 1983 (e.g., Ruiz' "I'd like to drill you" comment). This grievance was processed to step three of the negotiated grievance procedure, the final step prior to arbitration. The grievance was denied by CSU.

On July 28, 1983, Dees filed another grievance alleging additional acts of harassment. For example, Dees claimed Rodriguez saw him on campus en route from a grievance meeting

(concerning the June 10, 1983 grievance) to his work station and ordered Sarmiento to write him up for being out of his work area, even though Rodriguez knew of the grievance meeting. The grievance also claimed that Rodriguez threatened to write Dees up for being out of his work area at a time Dees was on break. After the threat, Dees testified, Rodriguez chased him around the Administration Building basement area, followed him to the plant operations area, "snuck up" behind him and again chased him around the office. This grievance was never processed. Dees said CSU lost it.

A fourth grievance, filed on November 3, 1983, alleged Rodriguez had improperly charged Dees with being absent without leave (AWOL) for five days. In fact, co-worker Margaret DuFrense had given Rodriguez prior notice of the absence, Dees had notified the timekeeper on the morning of the absence, and Dees had provided adequate medical justification for the absence. In January 1984, the grievance was settled at step two of the grievance procedure. The AWOL charge was rescinded and Dees was reimbursed for lost monies.

In the midst of these grievances, on October 18, 1983, Dees was reassigned from the Administration Building to the North Science Building. In the past, prior to the arrival of Rodriguez and Ruiz, Dees had been reassigned on occasion. After the new supervisors arrived, they instituted a rotation system. Thus, the reassignment itself was not unusual.

Dees' psychologist, Dr. Robert Rosenbaum, issued a written opinion that Dees would be "adversely affected by the change in work conditions." Since the reassignment involved only a change in work location and no change in Dees' actual duties, Buckley asked Rosenbaum to clarify his opinion. Buckley didn't understand how a mere change in location could affect Dees adversely.

On November 1, 1983, Rosenbaum responded that Dees "feels unsafe working in the basement of the Science Building" because of the "physical characteristics of the room he would be using there." Rosenbaum wrote that the reassignment "seems to have exacerbated [Dees'] anxiety, and he reports an increase in nightmares at the prospect of working there, together with fears of physical violence." Rosenbaum concluded that the "reassignment could lead to a worsening of [Dees'] psychological conditions, and would best be avoided at the present time." Neither of Rosenbaum's letters referred to Dees' relationship with Ruiz or Rodriguez.

On November 10, 1983, a meeting was held to seek an accommodation for Dees. In attendance were Dees, Buckley, Ruiz, Rodriguez, and Owens. This was not an ordinary meeting. Prior to the meeting, according to Owens, Dees "took off running" at the mere sight of the supervisors. Eventually the meeting got underway. Dees' fear of Ruiz and Rodriguez apparently was so great that Owens, the CSEA representative, was physically stationed between the two supervisors and Dees, who stood in the

doorway as the meeting progressed.[5] Owens described the meeting as a "circus," with Dees participating from a location 20 feet away from the others.

During the meeting, Buckley offered to move the tool room from the basement of the Science Building to another location. Buckley felt this offer addressed the concerns raised by Rosenbaum, but Dees rejected it. Dees claimed the location of the tool room proposed by Buckley was too close to the offices of Ruiz and Rodriguez. It was not the North Science Building assignment which troubled him, Dees claimed. Rather, he opposed any assignment where he felt Ruiz and Rodriguez had the opportunity to harass him. Dees further claimed the only solution was at least a temporary return to the Administration Building until a permanent solution could be found. Dees' position was based in large part on the location of the Administration Building, which is located close to the police department. Dees felt that an assignment to this location would enable him to run to the police quickly, or, alternatively, to permit the police to respond quickly, in the event Rodriguez or Ruiz threatened him. Dees also insisted that he take orders only

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[5]A written statement prepared by Dees the next day gives the flavor of the circumstances surrounding this meeting. Dees wrote, among other things, that Ruiz and Rodriguez "threatened to kill me, beat me up, or do great bodily harm and especially if there were no witnesses around." Dees felt "Tony and Mario could sneak up on me and catch me in a place I could not run from." Dees labeled Tony Rodriguez a "savage primitive, stalking me by sneaking up on me in the hallway of the Science Building and would have liked to beat me or kill me right then especially if there wasn't anyone around to witness."

from Sarmiento, and that he have no contact with either Rodriguez or Ruiz.

Buckley convincingly testified that he could have accommodated Dees by reassigning him to another location, but no agreement was reached because Dees rejected any arrangement which included contact with either of his two supervisors.[6] Under these circumstances, Buckley concluded, no accommodation could be reached.[7]

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[6]On rebuttal, Dees testified that he did not refuse to have "verbal contact" with Ruiz or Rodriguez. He said he merely "preferred" not to have contact. However, the record supports the finding that Dees insisted on no contact with these supervisors. Buckley convincingly testified that Dees refused to have such contact, and insisted instead on taking orders from leadworker Sarmiento. Owens also testified that Dees wanted "all directions" from Sarmiento, and said he would "run away" if Ruiz or Rodriguez approached him. Other evidence supports Buckley's and Owens' recollections. Dees' subsequent grievance concerning this matter (described more fully below) also seeks a remedy which allows instructions to come only from Sarmiento. And a related complaint filed by Dees with the Department of Public Safety on November 11, 1983, states that Dees wanted to work in the Administration Building so that he could "run away from Mario and Tony if they should try to get close to me." This evidence strongly suggests that Dees considered a "reasonable accommodation" would include no contact with Ruiz or Rodriguez.

[7]The Charging Party, relying primarily on two documents, contends it was not uncommon for employees to have no contact with supervisors. First, Charging Party introduced a July 13, 1983 memo from Rodriguez directing Ruiz to limit his "contact in the field to leadmen only, except in the case of emergency or safety problems." Buckley, who attended the key meeting where this memo was discussed among managers and leadworkers, convincingly testified that it is not CSU policy. He described it as a poorly worded attempt to reinforce the role of leadworkers who have a much larger area of responsibility than employees. Buckley explained that contact with a supervisor, however limited, is a required condition of employment. Buckley's testimony was corroborated by Owens. Second, Charging Party points to a June 10, 1985 settlement agreement between CSU and groundsworker Sam Walton. That agreement, entered into on the eve of Walton's State Personnel Board disciplinary hearing,

On November 11, 1983, Rosenbaum sent Buckley another letter clarifying his earlier opinion regarding Dees. The letter stated:

> Mr. Dees has paranoid fears and ideation regarding two of your grounds department supervisors. I have, of course, no direct knowledge of these people and this letter should not be construed as a statement about these supervisors. I can state, however, that because of his paranoid suspiciousness, Mr. Dees' psychological condition is worsened when he has occasion to be in close proximity to these supervisors in situations which he feels are unsafe. He has told me, however, that he does feel safe working around your administration building, apparently because it is near the police station.
>
> In my opinion, Mr. Dees is able to work in situations were he feels he is in no danger, but is unable to work in situations where his paranoid fears about his supervisors are activated.

On November 15, 1983, Dees was placed on medical suspension by Robert Kennelly, CSU vice president for administration. Kennelly stated the reasons for the suspension as follows:

> On the basis of information provided by your psychologist and your supervisors the University has determined that you are currently unable to carry out the normal duties of your assignment as Groundsworker on

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provides that Walton need not report to Ruiz, unless no other supervisor or leadworker is available. Buckley testified that this was the "type" of accommodation Dees sought, but it was not exactly the same. Where Walton was not required to have contact with Ruiz unless no other option was available, Dees sought a flat ban on all contact with either Ruiz or Rodriguez. Further, Buckley testified, the agreement was entered into to avoid litigation at a time Walton, who had suffered an industrial injury, was on leave under a vocational rehabilitation program and his return was a "remote possibility." The Walton agreement was a "calculated risk," according to Buckley, and did not represent CSU policy.

> the University campus. Under the provisions of the Agreement between Unit 5, Operations Support Services, California State Employees' Association and The California State University you are hereby placed on leave until such time as you are able and willing to perform the full range of your normal duties as and where assigned by your supervisors.
>
> You may return to work when you submit a medical release confirming your ability to perform your normal assignment without damage to your health and well-being and indicate your willingness to perform your normal assignment under normal working conditions.
>
> You may elect to use any accrued sick leave or other leave credits while you are on leave. In the event you exhaust your sick leave credits you should contact the Personnel Officer to inquire about non-industrial disability insurance benefits available to you.

Buckley, Rodriguez, Ruiz and Slade Lindemon, personnel director, had input into this decision. Don Farley, director of plant operations, also played a minor role in the decision-making process. There is no evidence that Kennelly, who was not called to testify, had Rosenbaum's November 11, 1983 letter at the time he placed Dees on leave. Asked if he believed Kennelly had the letter, Buckley testified "I would be surprised if he did."

The authority for the action taken by Kennelly is found in the contract between CSEA and CSU. Article 14, section 14.9, provides that CSU may direct an employee to take sick leave if it is determined that an employee has restricted ability to carry out his duties due to illness.

Dees' refusal to work at the North Science Building and his refusal to take direction from Ruiz and Rodriguez could have been

considered insubordination. On this basis alone, Buckley testified, Dees could have been disciplined or considered to have resigned. Asked why CSU placed Dees on medical leave instead, Buckley explained the decision as follows:

> It seemed to us to be the most humane thing to do at the time. I mean, we weren't operating in a vacuum; we did have obviously something from the doctor saying he was disturbed. We did -- we saw Mr. Dees visibly shaken. We didn't want to compound that. It seemed like the best thing to do at the time was to -- to put him on leave until we could sort things out.

On December 7, 1983, Dees filed the so-called "medical accommodation grievance" challenging the decision to place him on leave. As a remedy, Dees sought the accommodation first proposed at the November 10, 1983 meeting. He testified that he wanted "Tony and Mario to stay away from [him], from having direct verbal or physical contact with [him]."

Dees' last grievance was filed on December 28, 1983. It covered several incidents of alleged harassment beginning in June 1983.[8]

At least two of Dees' grievances - the December 28, 1983 retaliation grievance and the December 7, 1983 medical accommodation grievance - were processed into 1984. Grievance meetings were attended by Dees, Lindemon, Farley, CSEA representative Marilyn Sardonis, and Roger Meredith, an attorney hired by Dees. Dees' representatives communicated his desire to

[8]All grievances were filed under the collective bargaining agreement between CSEA and CSU. CSEA representatives were named on each grievance.

return to work under certain conditions. They continued to demand that CSU reassign Dees to an area such as the Administration Building. They also raised the possibility that Dees work only weekends so he would have no contact with Ruiz or Rodriguez. They continued to insist that he have no contact with Rodriguez or Ruiz and that he receive orders only from leadworker Sarmiento. Dees testified that the CSU representatives, during all meetings, misunderstood his concerns. These representatives, he claimed, erroneously believed he was afraid of the tool room. However, he was not afraid of the tool room. He was afraid of working in any isolated location where Ruiz and Rodriguez had the opportunity to harass and abuse him.

Further processing of Dees' grievances for all intents and purposes stopped on or about May 21, 1984, when he filed the instant unfair practice charge against CSU, and a separate unfair practice charge against CSEA.[9] Apparently, the grievances were informally placed in abeyance. Dees adopted a new strategy of seeking redress through PERB.

Meanwhile, Dees eventually exhausted his leave credits and some action was necessary to define his employment status. On March 8, 1984, Lindemon informed Dees that his leave credits were exhausted, and he must be placed on unpaid leave status, return

[9]Dees' alleged CSEA breached the duty of fair representation in the manner it processed the various grievances. The Board, on March 14, 1985, upheld a Regional Attorney dismissal of the charge. Dees v. California State Employees Association (1985) PERB Decision No. 496-H; See also Dees v. California State Employees Association (1986) PERB Decision No. 590-H.

to work or terminate employment. Lindemon explained each option. With respect to Dees' possible return to work, Lindemon wrote:

> If you are able and willing to return to work, you should contact your supervisor, Mr. Mario Ruiz, immediately. Upon your return, you must submit a physician's or psychologist's written statement to confirm that you are able to resume your employment without endangering your health. Resumption of your assignment must include normal working relations with your supervisors as explained in Dr. Kennelly's memo to you on 11/15/83.

Lindemon concluded the memo: "inaction would result in termination of your employment since you have not requested an approved leave."

After Dees and Lindemon exchanged additional correspondence, CSEA representative Sardonis, on April 12, 1984, informed Lindemon that Dees was able to work. She objected to Lindemon contacting Dees directly while the related grievance was pending, and she asked for a meeting to work out a "reasonable accommodation." Further discussions were held during the 1984 grievance meetings, but the parties' positions remained unchanged.

Since Dees did not respond to Lindemon's March 8, 1984 memo, he was placed on unpaid leave status for an indefinite period of time. According to Buckley, the normal practice is to terminate an employee who is absent without approved leave for more than five days. However, Dees was not terminated because of his outstanding grievances. Buckley feared that, under the circumstances, termination would be viewed as retaliation.

By September 1984, Dees' two outstanding grievances - concerning alleged retaliation and the attempt at securing an accommodation regarding his work assignment - had reached step three of the negotiated grievance procedure. The next step is arbitration. Only CSEA can invoke arbitration under the contract.

On September 13, 1984, CSU employee relations specialist Irene Cordoba, having received no response to earlier inquiries, wrote to Sardonis to determine the status of the outstanding grievances. Cordoba suggested formally placing the grievances in abeyance pending the outcome of the unfair practice charge. However, she informed Sardonis that she would consider the grievances "resolved" if she received no response by September 28, 1984.

On October 1, 1984, Dees wrote to Cordoba informing her that CSEA no longer represented him. He wrote:

> I have at this time an Appeal before the PERB BOARD in which the IMPASSE PROCEDURE, Article 9 of the PERB rules are still in effect concerning the above. Also, I have requested that I be represented by some independent third party other than CSEA and do not wish to proceed at level three but either go directly to Arbitration by the PERB or the above Grievances to be included in the Unfair Charges in order to be ruled on that way as an alternative at no cost to the Charging Party. The Grievance charges that CSEA sent you are incorrect and I rewrote them as the Amended Unfair Labor Practice Charges against the CSU as they should have been written in the first place_____CSEA had not given me the opportunity to edit or approve of them before they illegally sent them past level II improperly to level III.

Aside from unfair practice filings and workers compensation claims, this was the only response CSU received from Dees after Lindemon's March 8, 1984 letter.

Since Cordoba never responded to Dees October 1, 1984 letter, Dees assumed the grievances were in abeyance until resolution of the unfair practice charge or the decision by an arbitrator. However, the grievances were never resolved amicably and CSEA decided not to take the cases to arbitration. This effectively ended the processing of the grievances.

By May 1985, Buckley was informed by Cordoba that CSEA, despite inquiries by CSU, had made no demand to pursue the outstanding grievances to arbitration. Both of the cases were then considered closed.

Buckley, Lindemon and Carolyn Spatta, vice president for administration and business affairs, met and decided to terminate Dees. Neither Rodriguez nor Ruiz played a role in this decision. On May 29, 1985, Spatta informed Dees of his termination.

> In accordance with Article 12.1 and 12.2 of the Agreement between the Trustees of The California State University and the California State Employees' Association for Unit 5, Operations Support Services employees, you are hereby notified that you have automatically resigned from employment with the University. You were informed in March, 1984 of the actions necessary to protect your employment. These included returning to your normal assignment with a medical release, or requesting a leave of absence if you were unable to return to work. You failed to respond and your status since

that time is therefore absence without authorized leave.[10]

Several provisions in the collective bargaining agreement are relevant here. Article 14, section 14.12, provides that an employee may be placed on "unpaid sick leave," but Dees was placed on "unpaid leave" in March 1984, a category not covered by the contract. The limit on leaves of absence without pay under Article 15, section 15.1, is one year. Dees remained on leave without pay in excess of one year, even though he did not request this status. Article 15, section 15.3, of the agreement provides that an employee must apply for a leave of absence without pay. Thus, having made no request for a specific leave, Dees was unilaterally placed in a leave category not defined by the contract.

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[10]Article 12, sections 12.1 and 12.2 state:

Automatic Resignation

12.1. An employee who is absent for five (5) consecutive workdays without securing authorized leave from the President shall be considered to have automatically resigned from CSU employment as of the last day worked. All unauthorized absences, whether voluntary or involuntary, shall apply to the five (5) consecutive workday limitation. The five (5) day period referred to above shall commence at the beginning of the first shift of such absence and shall be deemed to have been completed at the end of the employee's scheduled work hours on the fifth consecutive day of unauthorized absence.

12.2 The President shall notify the employee as soon as possible after the effective date and time of the resignation that he/she is no longer a CSU employee.

Later, in May 1985, CSU terminated Dees on the basis that he was in an AWOL status - as opposed to an unpaid leave status - and considered to have "automatically resigned." The contract provides in article 12, section 12.1, that an employee who is absent without leave for more than five consecutive days may be considered to have automatically resigned. Section 12.2 provides that CSU shall notify the employee "as soon as possible" after the effective date that the employee is no longer considered a CSU employee.

Buckley conceded that Dees was unilaterally placed on unpaid leave in March 1984, and that this action is not expressly covered by the contract. He also conceded that Dees remained on leave without pay for a period longer than permitted by the contract. But he also pointed out that Dees could have been considered AWOL five workdays after March 8, 1984, and considered to have automatically resigned. Buckley said Dees was in "limbo." He was placed in a dual status from March 1984 to May 1985; that is, he was put on unpaid leave for "payroll purposes" so he wouldn't have to be separated, but technically he was absent without leave because he failed to respond to the March 8, 1984 letter from Lindemon. Buckley testified that Dees was carried on the rolls in this fashion because of the pending grievances. Buckley felt Dees' termination while these

grievances were pending would have been construed as further retaliation.[11]

ISSUE

Whether Tommie Dees was considered absent without leave and terminated in retaliation for his protected activities?

DISCUSSION

The complaint in this case alleges that CSU took the complained of conduct "because of" Dees' protected conduct. Section 3571(a) prohibits retaliation against an employee for engaging in conduct protected by the Act. To prove unlawful retaliation, the Charging Party bears the burden of showing that Dees engaged in protected activity, that the Respondent knew of the activity, and that the protected activity was a "motivating factor" in the Respondent's decision to terminate him. Novato Unified School District (1982) PERB Decision No. 210; California State University, Sacramento (1982) PERB Decision No. 211-H. The Charging Party must also show, under objective standards, that the employer's action was adverse to Dees. Palo Verde Unified School District (1988) PERB Decision No. 689.

Once this is established, the burden shifts to the Respondent to demonstrate that it would have taken the same

[11]Buckley's concerns were not without foundation. Dees had filed several retaliation claims in other forums. Among others, these included claims of religious and political discrimination filed with the U.S. Equal Employment Opportunity Commission and the U.S. Department of Labor, Office of Federal Contract Compliance. He also filed lengthy harassment and retaliation complaints with the campus police. All Dees' complaints were duly investigated by the appropriate authorities, but no discrimination or retaliation was found.

action even in the absence of protected conduct. Ultimately, the employee must show that "but for" the protected conduct he or she would not have suffered the adverse action. Novato Unified School District, supra. Once employer misconduct is demonstrated, the employer's action,

> . . . should not be deemed an unfair labor practice unless the Board determines that the employee would have been retained "but for" his union membership or his performance of other protected activities. Martori Brothers Distributors v. Agricultural Labor Relations Board (1981) 29 Cal.3d 721, 729-730.

In applying this test, the trier of fact is required to weigh both direct and circumstantial evidence in order to determine whether an action would not have been taken against an employee "but for" the exercise of protected rights. Novato Unified School District, supra; California State University, Sacramento, supra; Martori Brothers Distributors v. Agricultural Labor Relations Board, supra.

It is clear that, from early 1983 until his termination in May 1985, Dees engaged in activities protected under the Act. He regularly attended staff meetings and spoke out concerning employment related matters. In April 1983, for example, he presented a health and safety complaint to Rodriguez concerning a road work assignment. Pleasant Valley School District (1988) PERB Decision No. 708. He was represented, on April 27, 1983, by CSEA in a meeting concerning Ruiz threat to "drill" him. The meeting ended with an apology from Ruiz. The right to representation is fundamental under the Act. Section 3565.

Dees also filed four grievances from June 3, 1983 to November 3, 1983; after he was placed on leave, he filed two additional grievances in December 1983. These grievances were filed under a collective bargaining agreement and Dees was represented by CSEA in each grievance.[12] North Sacramento School District (1982) PERB Decision No. 264. Dees also filed the instant unfair practice charge on May 21, 1984. He amended the charge on August 21, 1984 and December 5, 1985. Participation in the Board's unfair practice procedures is protected conduct. See Placer Hills Union School District (1984) PERB Decision No. 377; Riverside Unified School District (1987) PERB Decision No. 639. Dees also filed complaints with the U.S. Department of Labor and the U.S. Equal Opportunity Commission alleging employment discrimination. San Joaquin Delta Community College District (1982) PERB Decision No. 261. All of this conduct is protected by the Act, and there is no dispute that Respondent was aware of Dees protected activities. It is similarly clear that Dees suffered adverse action as a result of the CSU decisions to place him on leave and eventually terminate him.

In addition, the evidence points to sufficient unlawful motive to connect the protected conduct to the adverse action.

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[12]The contract between CSU and CSEA (Article 5, section 5.14) provides for binding arbitration of grievances alleging "reprisals for participation in union activities." This arguably raises a question of deferral. However, under the contract an employee has no right to invoke the arbitration procedure, and CSEA has decided not to do so. Under the circumstances, deferral would be futile. See State of California (Department of Corrections') (1986) PERB Decision No. 561-S.

The timing of the November 15, 1983 decision to place Dees on Leave is suspicious.[13] This decision came soon after Dees filed a series of grievances (the most recent on November 3, 1983) and was represented by Owens at the November 10, 1983 meeting to seek a resolution to his situation. Suspicious timing is evidence which suggests unlawful motive. North Sacramento School District supra, p. 9.

Other indications of unlawful motive are found in the conduct of Rodriguez and Ruiz, both of whom contributed to Kennelly's November 15, 1983 decision to put Dees on medical suspension. As described above, Dees was outspoken on behalf of employees during meetings where employment related matters were discussed. Rodriguez' comment to Hara that such meetings would run a lot smoother if Dees were not present suggests that Rodriguez was annoyed at Dees' conduct. On another occasion, lees raised a health and safety complaint on behalf of groundsworkers, and Rodriguez angrily told him to get his "butt back to work." When Dees resorted to the grievance machinery, Rodriguez responded with obstructionist conduct. He ordered Sarmiento to write Dees up for being out of his work area, even

[13]As pointed out earlier in the Procedural History, all allegations except the alleged unlawful termination of May 29, 985, have been dismissed as time-barred and are not considered here as independent violations. They are, however, intertwined with the final termination decision. Because the trier of fact lay consider the totality of evidence and draw inferences reasonably justified therefrom, the entire series of events beginning with the November 15, 1983 decision to place Dees on leave will be considered as background to the final termination decision.

though he knew that Dees was en route from a grievance meeting. On yet another occasion, Rodriguez wrongfully changed Dees work schedule and denied him leave, requiring Dees to seek redress through protracted grievance meetings. Finally, Rodriguez and Ruiz routinely criticized Dees' work, but Sarmiento's unrebutted testimony is that Dees' work was satisfactory. Even CSU at the hearing conceded that Dees' work was satisfactory "when he worked." The totality of these circumstances suggests a hostile attitude from which an unlawful motive on the part of Rodriguez and Ruiz may be inferred.

Unlawful motive having been established, the burden now shifts to the Respondent to demonstrate that it would have taken the same action even in the absence of protected activity.

As Respondent points out in its brief, there were valid reasons to place Dees on leave in November 1983, and eventually terminate him. Dees' reassignment to the North Science Building, the event that triggered a chain reaction which ended with Dees' termination, was not itself an unusual assignment. Dees had been reassigned before, and this assignment was consistent with Rodriguez' and Ruiz' newly implemented rotation system. Nevertheless, the reassignment resulted in a major confrontation between Dees and his supervisors at the meeting on November 10, 1983. While Buckley would have considered other locations or even reassigned Dees to the Administration Building temporarily, Dees' adamant insistence on having no contact with his supervisors was simply not acceptable. It was Dees' insistence

on this point, not his protected activity, which in large part prevented the parties from reaching an accommodation on November 10, 1983.

The Charging Party argues that the refusal to permit Dees to have contact only with leadworker Sarmiento was inconsistent with CSU policy and amounts to disparate treatment. This argument, based primarily on the Sam Walton case and Rodriguez' July 13, 1983 memo to Ruiz, is not persuasive.

Buckley and Owens convincingly testified that it was not CSU policy to permit employee contact only with leadworkers. Leadworkers typically have a much larger area of responsibility than rank-and-file employees, and they are not always available to employees. While many directives are routinely conveyed to employees by leadworkers in the course of day-to-day operations, supervisors must be free to have at least minimal contact with employees. It is unrealistic that any organization could function under a blanket prohibition of supervisor-employee contact such as that sought by Dees. Furthermore, it seems likely that managerial efforts defining lines of authority, if truly intended to represent formal policy, would have been incorporated into an official CSU publication or operations manual. A single, handwritten memo hardly qualifies as CSU policy and, in fact, suggests just the opposite. For these reasons, Buckley's testimony is credited and Rodriguez' July 13, 1983 memo is not construed as CSU policy.

In addition, the Sam Walton case is easily distinguished. The Walton settlement, an isolated event, came on the eve of a disciplinary hearing before the State Personnel Board. At the time, Walton had suffered an industrial injury and was on leave under a rehabilitation program. His return was a remote possibility. As Buckley pointed out, the agreement was an inducement to avoid litigation in circumstances where it was highly unlikely that the parties would have to live under its terms. More significantly, the terms of the Walton agreement are quite different from the arrangement sought by Dees. Where Walton was not required to have contact with Ruiz unless no other option was available, Dees sought a flat ban on all contact with Ruiz and Rodriguez. This was plainly unacceptable to Buckley.

Based on the foregoing, it is concluded that CSU, in refusing to agree to Dees demand for no contact with Ruiz or Rodriguez, did not deviate from established policy, nor did it subject Dees to disparate treatment.

Dees' emotional condition also played a role in the November 15, 1983 decision to place him on leave. At the time the decision was made, Kennelly had two of Rosenbaum's letters explaining that Dees would be "adversely affected" by the mere reassignment to the North Science Building.[14] Buckley too

[14]These letters did not mention Ruiz or Rodriguez. It has not been established that Kennelly, at the time the November 15, 1983 memo was issued, had Rosenbaum's November 11, 1983 letter where he first mentioned Dees' reaction to his supervisors. But even if it is found that Kennelly had Rosenbaum's November 11, 1983 letter at the time the November 15, 1983 memo was issued, it would not alter the outcome here. Rosenbaum's letter merely

witnessed Dees' unusual behavior at the November 10, 1983 meeting, and he testified CSU representatives knew Dees was "disturbed." Accordingly, CSU placed Dees on medical leave, an available option under the collective bargaining agreement (Article 14, section 14.9) for employees who have "restricted ability to carry out his/her duties due to illness." Buckley saw Dees "visibly shaken" and at that time didn't want to compound the situation by more drastic action, such as forced resignation. As pointed out by Kennelly in his memo, Dees could have returned to work under an appropriate medical release which indicated he was able to perform his "normal assignment under normal working conditions." Dees did not do so.

Under the circumstances described above, it is concluded that CSU had the authority to place Dees on leave on November 15, 1983, and that CSU would have taken this action even if Dees had engaged in no protected conduct.

The subsequent actions of CSU were similarly not unlawful under the Act. Beginning with the March 8, 1984 memo placing Dees on unpaid leave, all CSU decisions were made by Lindemon, Buckley, Farley and/or Spatta. There is no evidence in the record that Ruiz or Rodriguez played a continuing role in Dees' cases, nor has it been established that Buckley, Lindemon, Farley or Spatta harbored an unlawful motive. Unlawful motive harbored

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represents a professional opinion that Dees could not work with Ruiz or Rodriguez, a situation CSU found to be unworkable. CSU still had the right under Article 14, section 14,9, of the contract to place Dees on medical leave.

by Rodriguez and/or Ruiz is not automatically imputed to their superiors. Therefore, the decisions made on March 8, 1984 and thereafter are not subject to attack under the Act, and the unfair practice complaint must be dismissed on this basis alone. Konocti Unified School District (1982) PERB Decision No. 217.

Even assuming, for argument's sake, the presence of an unlawful motive and a shift in the burden of proof to Respondent, the record does not support a conclusion that the Act has been violated. Lindemon's March 8, 1984 letter placing Dees on unpaid leave was prompted by Dees' exhaustion of leave credits. Lindemon explained the available options, and Dees was clearly informed of the required steps to return to work or secure approved leave. Dees was warned that "inaction would result in termination of your employment since you have not requested an approved leave." But Dees did not comply. Instead, Sardonis wrote Lindemon a letter complaining that Lindemon had contacted Dees directly and asking for an accommodation. Further grievance meetings were held and various options discussed, but in the end no realistic alternative emerged.

The parties ultimately were left with a situation that required Dees to return to work in the grounds department at CSU, Hayward or seek an approved leave. Dees refused to seek an approved leave and he insisted on returning to work only on the condition he have no contact with Ruiz or Rodriguez. CSU's continued rejection of Dees' proposal as unworkable was not without foundation. While the conduct of Rodriguez and Ruiz left

much to be desired, it was not so outrageous to justify the extreme and unyielding position taken by Dees. Rodriguez and Ruiz were admittedly aggressive supervisors. However, based on the evidence presented here, Dees' fear of physical violence was exaggerated. Under these circumstances, CSU could not tolerate a situation in the grounds department where supervisors were precluded from having any contact with Dees. If Dees was able to return to work, he had an obligation to have contact, however minimal, with his supervisors. If, on the other hand, he was not able to return to work, he had an obligation to seek an approved leave. These were essentially the options presented to him by Lindemon in March 1984.

On September 13, 1984, Cordoba informed Sardonis she would consider the grievances resolved if she received no response by September 28, 1984. On October 1, 1984, Dees sent Cordoba a letter dismissing CSEA as his representative. He announced he had "an appeal before PERB" and did "not wish to proceed at level three but either go directly to arbitration by the PERB or the above grievances to be included in the unfair charges in order to be ruled on that way as an alternative at no cost to the charging party." Although the parties disagree about the meaning of this inartfully worded letter, Respondent's conclusion that it indicated Dees had effectively abandoned the grievances in favor of pursuing a remedy before PERB is at least a plausible interpretation and therefore does not suggest unlawful motive under the Act.

In any event, whether Dees had abandoned his grievances is a moot point. CSEA retained control of the arbitration process under the contract. After CSEA decided not to take Dees' grievances to arbitration, the cases were closed. When Buckley learned of this, he met with Spatta and Lindemon and they decided to terminate Dees. Having failed to exercise any of the options set out in Lindemon's March 8, 1984 letter, Dees was AWOL and considered to have resigned under Article 12, sections 12.1 and 12.2, of the collective bargaining agreement between CSU and CSEA.

The Charging Party argues that the manner in which CSU applied the contract suggests an unlawful motive under the Act. The Board has no authority to enforce collective bargaining agreements. Section 3563.2(b). However, the Board has the authority to interpret a contract to determine if an unfair practice has been committed. Grant Joint Union High School District (1982) PERB Decision No. 196.

Although several CSU acts arguably violate the agreement, the overall application of the contract suggests no unlawful motive. First, when Dees exhausted his leave credits, Lindemon, on March 8, 1984, placed him on unpaid leave, a category admittedly not covered by the contract. Second, if the contract had been applied strictly, Dees could have been declared AWOL and terminated five workdays after March 8, 1984. Third, CSU should have informed Dees of his AWOL status "as soon as possible," but it failed to do so. Instead, CSU carried Dees in an unpaid leave

status for much longer than the contractually prescribed one year period, even though he did not expressly request this status as required under the contract.

However, as Buckley explained, Dees' unique situation did not fit neatly into the various circumstances contemplated by the agreement. Although Dees did not expressly request leave, he nevertheless refused to return to work except under his own terms. Dees was in "limbo." From March 1984 to May 1985, he was placed on unpaid leave so he would not have to be terminated, but he was technically AWOL because he didn't respond to Lindemon's March 8, 1984 memo. CSU took these actions and in effect delayed termination as part of a tactical decision to avoid more allegations of retaliation. Whether this conduct was right or wrong, it did not disadvantage Dees. Dees could have been considered AWOL and terminated five workdays after March 8, 1984. If anything, the so-called technical violations of the contract postponed termination and in effect preserved Dees' various options for a period longer than that contemplated under the contract.

Nor did the application of the contract affect Dees' appeal rights. As pointed out earlier, CSU had the authority under Article 12 of the collective bargaining agreement to conclude, based on Dees' AWOL status, that he had automatically resigned. Absent the collective bargaining agreement, Education Code section 89541(a), contains the procedure to appeal such decisions. However, Education Code section 89541(b), provides

that if these appeal rights are in conflict with a collective bargaining agreement, the agreement governs. In this case, Article 12, sections 12.3, 12.4 and 12.5, of the contract provide for direct appeal of automatic resignation decisions to the CSU president. The contract also provides, in Article 12, section 12.6, that the agreement supercedes Education Code section 89541. Thus, CSU and the exclusive representative had earlier agreed to the automatic resignation provision, and they also agreed to make the contractual procedure the exclusive method to appeal automatic resignation decisions. Dees was free to appeal under this provision, but he chose not to do so. There is nothing unlawful under the Act in negotiating such a provision and implementing it under appropriate circumstances.

Based on the foregoing, it is concluded that application of the contract, even assuming the presence of technical violations, is not evidence of unlawful motive under the Act.[15]

CONCLUSION

Based on the foregoing findings of fact, conclusions of law and the entire record herein, the complaint in Unfair Practice

[15]It has been found that the decision to terminate Dees was free of unlawful motive under the Act. It has also been found that, even assuming the presence of unlawful motive, CSU had valid reasons for the decision to terminate Dees and would have taken the same action even in the absence of protected conduct. To the extent Charging Party contends Respondent's conduct constitutes independent violations of Dees' Education Code and/or constitutional rights, those matters must be taken up in another forum. See Oxnard School District (1988) PERB Decision No. 667; Leek v. Washington Unified School District (1981) 124 Cal.App.3d 43 [177 Cal.Rptr. 196].

Charge No. SF-CE-252-H (formerly SF-CE-192-H) is hereby dismissed.

Pursuant to California Administrative Code, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a 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, 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, 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, sections 32300, 32305 and 32140.

Dated: September 10, 1990

Fred D'Orazio
Administrative Law Judge