STATE OP CALIFORNIA
DECISION OP THE
PUBLIC EMPLOYMENT RELATIONS BOARD

JOSEPH ANTHONY BAIMA,	)	
	)	
Charging Party,	)	Case No. SF-CO-17-S
	)	
v.	)	PERB Decision No. 967-S
	)	
CALIFORNIA UNION OP SAFETY EMPLOYEES,	)	January 19, 1993
	)	
Respondent.	)	

Appearances: Richard L. Coelho, Representative, for Joseph Anthony Baima; Leona M. Cummings, Esq., Representative, for California Union of Safety Employees.

Before Hesse, Chairperson; Caffrey and Carlyle, Members.

DECISION

CARLYLE, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the California Union of Safety Employees (CAUSE) to a proposed decision (attached hereto) of a PERB administrative law judge (ALJ). The ALJ found that CAUSE violated section 3519.5(b) of the Ralph C. Dills Act (Dills Act)[1] by failing to pursue to arbitration Joseph Anthony Baima's (Baima) grievances against the State of California.

[1]The Dills Act is codified at Government Code section 3512 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code. Section 3519.5 states, in pertinent part:

> 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.

The Board has reviewed the entire record in this case, including the transcript, exhibits, proposed decision, CAUSE'S exceptions and Baima's response thereto. The Board finds the ALJ's findings of fact and conclusions of law to be free of prejudicial error and adopts them as the decision of the Board itself.

DISCUSSION

CAUSE'S exceptions focus on its rationale for suspending the processing of Baima's grievances with the state employer. CAUSE contends that it merely suspended work on the grievances until litigation that Baima threatened to file against CAUSE was concluded.

However, when CAUSE decided to stop processing Baima's grievances, no such lawsuit had been filed. Although Baima had threatened legal proceedings, the Board finds that threatened legal action against an exclusive representative by a bargaining unit member does not relieve the exclusive representative's duty in the representation of that member. Therefore, this exception is rejected.

Further, CAUSE also argues that its suspension of action on Baima's grievances was not an arbitrary act. In an August 20, 1991 letter sent by CAUSE Chief Counsel Sam McCall, Baima was informed that CAUSE would not proceed further with arbitration nor discuss the issues of the case with him until litigation between the parties was concluded.

The ALJ relying on NLRB and federal precedent (Plummer's Local Union 598 (Columbia Mechanical Contractors Association) (1980) 250 NLRB 75 [104 LRRM 1400]) found that a union cannot refuse to process a grievance because of activity the union considers disloyal. As the ALJ correctly determined, the suspension of Baima's grievances was not due to their validity but rather in response to Baima's threatened legal action against the exclusive representative. CAUSE has the obligation to represent its employees in their relations with the employer.

Although CAUSE may have distaste for the actions of a bargaining unit member, a threatened lawsuit by itself is insufficient to alter the duty to provide representation. The Board affirms the ALJ's conclusion and rationale that CAUSE'S conduct was arbitrary and in violation of 3519.5(b) of the Dills Act.

Finally, as to the proposed order, the Board affirms the ALJ's determination that CAUSE reimburse Baima for reasonable attorney fees for the processing of his grievances to arbitration.

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, it is found that the California Union of Safety Employees (CAUSE) violated section 3519.5(b) of the Ralph C. Dills Act (Dills Act or Act). CAUSE violated the Act by failing to fairly represent Joseph Anthony

Baima by arbitrarily and in bad faith refusing to process his grievances to arbitration.

Pursuant to section 3514.5(c) of the Dills Act, it is hereby ORDERED that CAUSE, its officers and its representatives shall:

A. CEASE AND DESIST FROM:

1. Refusing to pursue to arbitration the transfer and psychological examination grievances of Joseph Anthony Baima (Baima) which were authorized for arbitration by the CAUSE Labor Relations Committee in June and December of 1989.

2. Failing and/or refusing to fairly represent Baima in his employment relations with the State of California.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE ACT:

1. Effective immediately upon service of a final decision in this matter, reactivate and pursue to arbitration the transfer and psychological examination grievances of Joseph Anthony Baima which were authorized for arbitration by the CAUSE Labor Relations Committee in June and December of 1989. In the further processing of these grievances, CAUSE is to pay reasonable expenses for Baima to hire outside counsel, should he desire, to represent him in the arbitration hearing.

2. Within thirty-five (35) days following the date this Decision is no longer subject to reconsideration, post at all work locations where notices to employees customarily are placed, copies of the Notice attached as an Appendix hereto, signed by an authorized agent of CAUSE. Such posting shall be maintained for a period of thirty (30) consecutive workdays.

Reasonable steps shall be taken to insure that this Notice is not reduced in size, defaced, altered or covered by any material.

3. Written notification of the actions taken to comply with this Order shall be made to the Sacramento Regional Director of the Public Employment Relations Board in accordance with the director's instructions.

Chairperson Hesse and Member Caffrey joined in this Decision.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OP THE
PUBLIC EMPLOYMENT RELATIONS BOARD
An Agency of the State of California

After a hearing in Unfair Practice Case No. SF-CO-17-S, Joseph Anthony Baima v. California Union of Safety Employees, in which all parties had the right to participate, it has been found that the California Union of Safety Employees (CAUSE) has violated section 3519.5(b) of the Ralph C. Dills Act (Act). CAUSE violated the Act when it failed to fairly represent Joseph Anthony Baima by arbitrarily and in bad faith refusing to process his grievances to arbitration.

As a result of this conduct, we have been ordered to post this notice and we will:

A. CEASE AND DESIST FROM:

1. Refusing to pursue to arbitration the transfer and psychological examination grievances of Joseph Anthony Baima (Baima) which were authorized for arbitration by the CAUSE Labor Relations Committee in June and December of 1989.

2. Failing and/or refusing to fairly represent Baima in his employment relations with the State of California.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE ACT:

1. Effective immediately upon service of a final decision in this matter, reactivate and pursue to arbitration the transfer and psychological examination grievances of Joseph Anthony Baima which were authorized for arbitration by the CAUSE Labor Relations Committee in June and December of 1989. In the further processing of these grievances, CAUSE is to pay reasonable expenses for Baima to hire outside counsel, should he desire, to represent him in the arbitration hearing.

Dated:

CALIFORNIA UNION OF
SAFETY EMPLOYEES

By: _____
Authorized Representative

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR AT LEAST THIRTY (30) CONSECUTIVE WORKDAYS FROM THE DATE OF POSTING AND MUST NOT BE REDUCED IN SIZE, DEFACED, ALTERED OR COVERED BY ANY MATERIAL.

STATE OP CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

JOSEPH ANTHONY BAIMA, Charging Party, v. CALIFORNIA UNION OF SAFETY EMPLOYEES, Respondent.	)	Unfair Practice Case No. SF-CO-17-S PROPOSED DECISION **(5/8/92)**

Appearances: Richard Coelho for Joseph Anthony Baima; Leona Cummings, for the California Union of Safety Employees.

Before Ronald E. Blubaugh, Administrative Law Judge.

PROCEDURAL HISTORY

A State Fish and Game warden brings this action against his union for failure of the union to pursue to arbitration his grievances against the State employer. The warden alleges that the union acted in bad faith by refusing to go forward with the grievances. The union contends that it was compelled to delay processing the grievances by financial problems. Then, it suspended action on the grievances because of a lawsuit which was filed against it by the charging party.

Joseph Anthony Baima filed the underlying unfair practice charge on September 19, 1991, against the California Union of Safety Employees (CAUSE or Union). The general counsel of the Public Employment Relations Board (PERB or Board) followed on November 26, 1991, with a complaint against the Union. The complaint alleges that by refusing to take Mr. Baima's grievances to arbitration, as promised, the Union breached its duty of fair

representation.[1] This action was alleged to be in violation of section 3519.5(b) of the Ralph C. Dills Act.[2]

---

[1]Specifically, the complaint makes the following factual allegations regarding the decision not to take Mr. Baima's grievances to arbitration:

> Between January and November 1989, Charging Party filed a total of seven grievances, which Respondent agreed to consolidate and take to arbitration. However, on or about May 8, 1991, following a decertification election involving Respondent held on or about May 3, 1991, Respondent informed Charging Party that it had decided to reconsider whether or not to take his cases to arbitration. Thereafter, in June of 1991, Respondent's President, Cecil Riley, informed Charging Party during a discussion concerning Charging Party's grievances, that Charging Party's affiliate, the California Fish and Game Wardens Protective Association, should have been "tighter with CAUSE" during the decertification election. By letter dated August 2, 1991, Charging Party advised Mr. Riley that he was considering civil litigation against Respondent unless the latter compensated him for his damages in failing to represent him. By letter dated August 20, 1991, Respondent's representative, Sam McCall, advised Charging Party that CAUSE would not take his cases to arbitration because it appeared that the Charging Party was prepared to sue Respondent.

[2]Unless otherwise indicated, all statutory references are to the Government Code. The Ralph C. Dills Act (Dills Act) is codified at Government Code section 3512 et seq. In relevant part, section 3519.5 provides as follows:

> 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.

The Union answered the complaint on December 5, 1991, denying any wrong-doing. A hearing was conducted in San Francisco on March 3 and 4, 1992. With the filing of briefs, the matter was submitted for decision on May 1, 1992.

FINDINGS OF FACT

Joseph Anthony Baima has been employed by the State of California (State) as a fish and game officer for 14 and one-half years. Currently he works out of Petaluma. At all times relevant, CAUSE has been the exclusive representative of State employee Unit 7, Protective Services and Public Safety, which includes fish and game wardens.

Beginning in June of 1987, Mr. Baima filed a series of grievances against the Department of Fish and Game (Department). In the first of these, Mr. Baima unsuccessfully challenged the procedure by which the Department conducted a promotional exam for the position of lieutenant. Mr. Baima contended that the Department improperly used a captain's eligibility list for the lieutenant's examination. Other grievances and complaints followed, many of them alleging that subsequent actions against him were in retaliation for his challenge of the 1987 exam for lieutenant.

In 1989, Mr. Baima filed a series of seven grievances which led to the present charge against CAUSE. The Department denied all seven grievances. In summary form, the grievances by date of filing are as follows:

——January 4, 1989. Mr. Baima alleged that he was denied a transfer to a patrol boat

when Department procedures were not followed and a warden junior to him got the job. He asked that the person who got the position be removed and it be given to him.

___July 8, 1989. Mr. Baima alleged that when a new position was established at the Napa Fish and Game Academy, it was offered to another warden without the proper procedures being followed. Since he did not get the opportunity to apply for a transfer to the position, he requested a transfer to Bodega Bay or $15,000.

___July 8, 1989. Mr. Baima alleged that his captain used improper management techniques in a corrective interview and letter of warning given to him. He requested $10,000.

---September 22, 1989. Mr. Baima alleged improper management techniques and reprisal by two supervisors relating to an order to him that he report to the Regional Headquarters for assignment on September 15. He requested $10,000.

___September 24, 1989. Two grievances were filed on this date but the record contains a copy of only one of them. Although the record is not definite on this point, both grievances apparently involved a September 19 order to Mr. Baima that he report to a San Francisco psychologist for a fitness for duty evaluation. He requested $10,000 and $900 a week for loss of family income.

___September 26, 1989. Mr. Baima alleged that the September 19 order that he secure a fitness for duty evaluation was a reprisal.

Some of these grievances were filed by Mr. Baima in his own name. Others were filed by CAUSE on Mr. Baima's behalf. Mr. Baima received advice from CAUSE representatives on the grievances he filed himself and CAUSE ultimately assumed responsibility for processing all of the grievances. The record shows that beginning in March of 1989, various CAUSE

representatives wrote letters on Mr. Baima's behalf to Department and State administrators. Efforts to settle the grievances were not successful.

Beginning in June of 1989, several of the grievances were put before the CAUSE Labor Representation Committee. The committee, composed of four members appointed by the president of CAUSE, is authorized under CAUSE procedures to decide whether grievances will be taken to arbitration. On June 14, the committee reviewed and authorized for arbitration the transfer grievance.[3] In December, the committee reviewed and authorized for arbitration the three consolidated grievances spawned by the required psychological examination.[4]

There were further efforts to settle the grievances in the early part of 1990. When these proved unsuccessful, CAUSE moved in November to schedule the cases for arbitration. In March, the State and CAUSE agreed on an arbitrator. Because counsel for the State had been called to one month of military service beginning on April 8, the parties agreed that the arbitration should be postponed until mid to late May. Ultimately, the arbitration was set for May 29 and 30.[5]

---

[3]Charging Party's exhibit No. 2 identifies this grievance as follows: "LR GREV 2754-89/TRANSFER."

Respondent's exhibit No. 3 identifies this grievance as follows: "LR GREV 3006-89/REPRISALS."

Consistent with the committee's approval of the grievances for arbitration, CAUSE has at no time in these proceedings contended that the grievances were not meritorious.

The delay between the filing of the grievances and their scheduling for arbitration, produced a high level of friction between CAUSE and the California Fish and Game Wardens Protective Association (Association).[6] This can be seen in a spring 1991 exchange of letters between Association President Todd Tognazzini and CAUSE President Cecil Riley. On April 2, Mr. Tognazzini wrote the CAUSE president to complain about the delays noting that "[e]ach time I inquire, some new reason for delays is found." He observed that it has been "several years" since CAUSE had carried an arbitration for a member of the fish and game wardens association.

Mr. Riley replied on April 26. After describing what CAUSE had done for various of its law enforcement members in recent years, Mr. Riley complained that very little appreciation had been shown in return. He then observed that Mr. Tognazzini and his affiliate "did nothing to indicate you opposed the [then pending] decertification[7] or disagreed with the allegations of poor representation." He accused Mr. Tognazzini of offering "weak assurances that you were remaining neutral."[8]

---

[6]The Association is a constituent organization within CAUSE.

[7]A decertification election between CAUSE and a rival union was conducted by mail ballot between April 1 and April 29, 1991. Ballots were counted on May 2, 1991, with CAUSE the apparent winner.

[8]The California Fish and Game Wardens Protective Association maintained an official position of neutrality during the decertification election.

By letter of May 8, CAUSE Chief Counsel Sam A. McCall notified Mr. Baima that CAUSE planned to cancel the arbitration and reschedule it for a later date. Mr. McCall wrote that the recent decertification election "has required CAUSE to re-evaluate its representational programs in order to more fully maximize its personnel and financial resources to the betterment of the maximum [number] of members." Mr. McCall's letter did not suggest a date for rescheduling the arbitration.

The cancellation of the arbitration produced an immediate reaction from Mr. Baima. He hired an attorney who called and then, on May 23, wrote to Mr. McCall complaining about the Union's failure to take the grievances to arbitration. In the letter, the attorney expressed a concern that if the grievances were not taken to arbitration soon the State might argue that they had lapsed for failure to timely prosecute. Mr. McCall replied on May 30, stating that CAUSE had never agreed to take all seven grievances to arbitration. He said the Union would take the appropriate cases to arbitration "[a]t the time I understand CAUSE is [in] a position to proceed."

At the hearing, Mr. McCall testified that a shortage of money was the primary reason the cases were not taken to arbitration as originally scheduled.[9] He said the cost of

[9]Mr. McCall outlined the cost of an arbitration as follows: $600 per day for the arbitrator, $450 to $800 per day for a transcript, $400 to $500 per day for travel and lodging expenses for each witness. Mike Nadeau, chairman of the CAUSE Labor Relations Committee, estimated the cost at $3,000 to $4,000 per arbitration.

fighting the decertification attempt had severely drained the CAUSE treasury. He said that in March and April of 1991, CAUSE was unable to order supplies because it had not paid its bills. He said a printer refused to take more CAUSE work and the copy machine was not fixed when it broke. He testified that CAUSE representatives were not being reimbursed for travel expenses and for a time they had to travel out of their own pockets.

Mr. McCall also suggested, during the hearing, that the transfer grievance was inappropriate for arbitration because it would pit one unit member against another. If Mr. Baima were to prevail and secured a transfer to the patrol boat, Mr. McCall said, the warden who got the position would be transferred out. Mr. McCall said that for this reason the Union would "have to take a second look" at that grievance. Mr. McCall acknowledged, however, that he had never gone back to the Labor Relations Committee with this concern. Mr. Baima was never given this reason before the hearing.

Mr. Baima and Mr. Tognazzini had been given the shortage of funds rationale by several CAUSE representatives, including Mr. McCall, when they were trying to get the grievances processed. Upon hearing this explanation, Mr. Tognazzini offered on behalf of the wardens association to pay part of the cost. No CAUSE representative ever pursued this offer to determine how much the association would contribute.[10] Mr. Tognazzini

[10]Mr. McCall testified that Mr. Tognazzini did not make the offer of assistance until much later, after Mr. Baima had sued CAUSE.

testified that "as soon as I made that offer, then there was some other reason why they wouldn't go forward."

Mr. Baima testified that after he received Mr. McCall's May 8 letter he called CAUSE President Riley to complain. He said that Mr. Riley told him that CAUSE was having financial problems "but they could have found the money if our association would have supported them during the decertification."[11] He said he told Mr. Riley that the Union "should not take that type of attitude." Mr. Riley denied that he linked the decision on the arbitration to the Association's position in the decertification. He said the only thing he remembered from the telephone conversation was that Mr. Baima threatened to sue him if the arbitration did not proceed.[12]

On August 2, 1991, Mr. Baima put his threat of legal action into writing. He wrote Mr. Riley that CAUSE had failed to represent him in grievances causing him to suffer $87,000 in damages. "We can settle this by sending me a check for $5,000.00 by August 12, 1991 or face [c]ivil litigation," he wrote.

On August 5, CAUSE Field Director Miriam S. Doonan wrote to the State's attorney handling the Baima grievances and asked to have them re-set for arbitration. She suggested that the parties secure the same arbitrator as previously scheduled.

---

[11]See testimony of Joseph Anthony Baima, Vol. 1, p. 11 of the Reporter's Transcript.

[12]See testimony of Cecil Riley, Vol. 1, p. 81 of the Reporter's Transcript.

On August 8, Mr. Baima wrote again to CAUSE President Riley, noting that he had received a copy of the Doonan letter but no response yet from the CAUSE president. Mr. Baima wrote that he considered the State blameless in the various delays and asked Mr. Riley to respond to his letters by August 15.

CAUSE Chief Counsel McCall replied on behalf of Mr. Riley in a seven-page letter of August 20. Mr. McCall wrote that although he believed Mr. Baima "had been the subject of illegal actions" by his Department, CAUSE was suspending efforts to take his cases to arbitration. He wrote that Mr. Baima by his demand letter of August 2 had created a state of litigation between himself and the Union. "Because it is subject to litigation," Mr. McCall wrote, "it would be impossible to proceed to arbitration in a different forum for a determination as to liability or the extent of damages." Mr. McCall wrote that "CAUSE will not proceed further with the arbitration . . . until the issues you have raised with your letter of August 2nd are resolved."

Mr. McCall described as "ridiculous" Mr. Baima's claim that CAUSE had caused him $5,000 in damages by failing to pursue the grievances. He said he had "asked for legal research on the matter and [had] been provided legal counsel that in fact, it may be a form of attempted bribery." He warned that he would be discussing with CAUSE President Riley whether Mr. Baima's request for money "should be presented to the Office of the District Attorney for review." CAUSE did not cause Mr. Baima any damages, he wrote, and would not "succumb to such ludicrous settlement

demands out of fear of litigation." Whoever advised Mr. Baima to make such a demand, made "a tactical error," he wrote.[13]

In his letter, Mr. McCall accused Mr. Baima of "constantly and excessively calling the CAUSE office seeking updated reports on the progress of your case." He advised Mr. Baima that, because of the threatened litigation, he should not to attempt further communication with Mr. Riley. Moreover, Mr. McCall warned, he "would not guarantee a response" to future letters like those Mr. Baima had most recently written.

Mr. Baima, nevertheless, on December 12, wrote again to Mr. Riley, repeating his demand that CAUSE pay him $5,000 in settlement of his grievances "or face civil litigation." He accused CAUSE of violating its duty of fair representation. This letter went unanswered and on January 10, 1992, Mr. Baima filed a small claims lawsuit against CAUSE.

LEGAL ISSUE

Did CAUSE breach the duty of fair representation toward Mr. Baima and thereby violate Dills Act section 3519.5(b)?

CONCLUSIONS OF LAW

The duty of fair representation requires an exclusive representative to fairly and impartially represent all employees

[13]Mr. McCall also stated that he had granted the request of CAUSE representative Miriam Doonan to be relieved of the assignment. Mr. McCall wrote that Ms. Doonan believed she could not "effectively communicate" any longer with Mr. Baima and he agreed with her. However, he observed, "CAUSE only has a limited number of staff persons able to handle a complex arbitration case like yours." He left unresolved how the grievances would be reassigned.

in the bargaining unit. The duty is breached when the exclusive representative's conduct toward a unit member is arbitrary, discriminatory or in bad faith. (Rocklin Teachers Professional Association (Romero) (1980) PERB Decision No. 124.)

Unlike the other two statutes administered by the PERB, the Dills Act contains no specific statutory provision setting out the duty.[14] Nevertheless, PERB decisions have assumed the existence of a duty of fair representation under the Dills Act. (See, for example, California State Employees Association (Lemmons and Lund) (1985) PERB Decision No. 545-S and CSEA (Darzins) (1985) PERB Decision No. 546-S.) A breach of the duty is an unlawful discrimination and a violation of Dills Act section 3519.5(b). (See the rationale in Mt. Diablo Education Association (Quarrick and O'Brien) (1978) PERB Decision No. 68.)

Existence of the duty does not mean, however, that an employee has "an absolute right to have a grievance taken to arbitration . . . . An exclusive representative's reasonable refusal to proceed with arbitration is essential to the operation of a grievance and arbitration system." (Castro Valley Teachers Association (McElwain and Lyen) (1980) PERB Decision No. 149.) An exclusive representative has no obligation to pursue a grievance where the "potential success at arbitration was

[14]Duty of fair representation provisions are set out at section 3544.9 of the Educational Employment Relations Act and section 3578 of the Higher Education Employer-Employee Relations Act.

doubtful." (Sacramento City Teachers Association (Fanning et al) (1984) PERB Decision No. 428.)

Mr. Baima argues that CAUSE acted in bad faith when it cancelled the arbitration of his grievances on May 8, 1991. Mr. Baima contends that CAUSE has never taken to arbitration any grievance filed by a member of the fish and game wardens association. He rejects outright the assertion that CAUSE could not afford to carry his grievances to arbitration, contending that CAUSE has adequate funds to carry forward litigation against its members.

CAUSE argues that the election position of Mr. Baima and the wardens association was irrelevant to its decision to postpone the arbitration. CAUSE contends that it had represented Mr. Baima throughout the decertification campaign and its decision to delay was due solely to financial need. CAUSE argues that its action was not arbitrary, discriminatory or in bad faith and that Mr. Baima has failed to set out a prima facie violation.

As Mr. Baima points out, the contention that CAUSE cancelled the May 29 arbitration for financial reasons is suspicious. Had financial problems been the reason, one would have expected more interest from CAUSE in the offer by the fish and game wardens association to contribute toward the cost. Yet it was the unrebutted testimony of Association President Tognazzini that CAUSE officers ignored his offer to share in the cost of Mr. Baima's arbitration.

But even if CAUSE is given the benefit of the doubt on the shortage of funds argument, there is no justification for Mr. McCall's August 20 suspension of all further processing of the grievances. Just 12 days earlier, CAUSE had again notified the State that it was prepared to go forward with the Baima grievances. But Mr. McCall, reacting to Mr. Baima's August 2 threat of legal action, cancelled all further action on the grievances. Mr. McCall wrote that CAUSE would not proceed to arbitration "until the issues you have raised with your letter of August 2nd are resolved." He even advised Mr. Baima not to attempt further communication with CAUSE President Riley.

It should be noted that Mr. Baima's threat of a lawsuit against CAUSE was not without some provocation. His demand letter must be viewed accordingly. More than two years had elapsed from the filing of the grievances during which time Mr. Baima was given numerous excuses for why the cases could not go forward faster. Then, just when Mr. Baima believed he finally would have his grievances heard, he was again to be disappointed. It seems obvious that his threat of a lawsuit was, at least in part, an act of frustration.

In its brief, CAUSE offers no justification for Mr. McCall's August 20 letter. Indeed, the brief acknowledges that CAUSE has no intention of going forward with the arbitration in the face of Mr. Baima's lawsuit. "CAUSE," the brief reads, "was and continues to await the outcome of said litigation in order that

CAUSE can determine its rights and obligations, if any, with respect to Mr. Baima."

A union cannot refuse to process a grievance because a member has engaged in conduct the union considers disloyal. The National Labor Relations Board (NLRB) and the federal courts will find such action to be a breach of the duty of fair representation.[15] See, for example, Plumbers Local Union 598 (Columbia Mechanical Contractors Assn.) (1980) 250 NLRB 75 [104 LRRM 1400], where a union breached the duty of fair representation when it refused to process a grievance because the grievant has filed charges with public agencies.[16]

Cessation of all activity on Mr. Baima's behalf because of his demand for money and threatened lawsuit was an arbitrary act. It had nothing to do with the merits of Mr. Baima's grievances. It grew solely out of the Union's anger that he had threatened the Union. A union cannot refuse to represent an employee because the union is angry with him for threatening a lawsuit. If the lawsuit is without merit, the Union can challenge it in the proper forum and seek appropriate remedies. But this cannot be linked to the Union's separate duty to continue to represent the employee in his relations with the employer. The Union has incurred this duty through its role as exclusive representative

---

[15]Morris, The Developing Labor Law, BNA, 1983, Vol. 2, p. 1331, and cases cited therein.

[16]See also, Graphic Communications International Union, Local 388 (Georgia Pacific Corp.) (1988) 287 NLRB 1128 [128 LRRM 1176].

and it may not withhold representation of an employee because he creates trouble for the Union.

Accordingly, I conclude that CAUSE violated the duty of fair representation when Mr. McCall by letter of August 20, 1991, suspended all further processing of Mr. Baima's grievances. This action was arbitrary and in bad faith and thereby violated Dills Act section 3519.5(b).

REMEDY

The PERB in section 3514.5(c) is given:

> . . . the power to issue a decision and order directing an offending party to cease and desist from the unfair practice and to take such affirmative action, including but not limited to the reinstatement of employees with or without back pay, as will effectuate the policies of this chapter.

The ordinary remedy in a duty of fair representation case is an order that the respondent exclusive representative properly represent the aggrieved employee. That remedy is insufficient here. The letter written by CAUSE Chief Counsel McCall on August 20 makes it clear that CAUSE has no interest in processing Mr. Baima's grievances. This action, when coupled with the two-year delay which preceded the letter, makes it extremely unlikely that Mr. Baima could secure appropriate handling of his grievances from CAUSE.

Mr. Baima has requested in his brief that CAUSE be ordered to hire outside counsel to take his grievances to arbitration. There is precedent for such a remedy. In circumstances where a union has shown bad faith in the processing of grievances, the

NLRB finds it appropriate not only to compel the union to pursue the grievances but also to require the union to hire outside counsel to do it. See, for example, San Francisco Web & Platemakers' Union No. 4 v. NLRB (9th Cir. 1986) 794 F.2d 420 [122 LRRM 3000] where the Court enforced an NLRB order requiring the hiring of outside counsel. At times this extends to a requirement that the aggrieved employee may hire counsel of the employee's own choice at the union's expense. (See Glass Bottle Blowers Association (Owens-Illinois, Inc.) (1979) 240 NLRB 324 [100 LRRM 1294, 1296].)

I find it appropriate that Mr. Baima be permitted to hire counsel of his own choosing at the expense of CAUSE for the further processing of his grievances.[17] This remedy is granted because of the adamant opposition to further processing of the grievances set out in Mr. McCall's August 20 letter to Mr. Baima. I believe Mr. McCall's statements in the letter demonstrate scant likelihood that Mr. Baima's grievances will be fairly processed in the absence of outside counsel.

It is further appropriate that the Union be directed to post a notice incorporating the terms of the order. Posting of such a notice, signed by an authorized agent of the Union, will provide

[17]The grievances which Mr. Baima can take forward at the expense of CAUSE are the grievances which were set for arbitration in May of 1991. I believe that the most definitive statement of exactly which grievances these are can be found in a May 14, 1991, letter from Miriam Doonan to the arbitrator. (Respondent's exhibit No. 3 at p. 54). The letter identifies the relevant grievances as: "CAUSE (Baima) v. State (Department of Fish and Game)/LR MISC 1072-87, 3109-89/DPA #89-07-0035, 49, 50."

shall accompany each copy served on a party or filed with the Board itself. (See Cal. Code of Regs., tit. 8, secs. 32300, 32305 and 32140.)

Dated: May 8, 1992

Ronald E.Blubaugh
Administrative Law Judge

posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced or covered with any other material.

3. Upon issuance of a final decision, make written notification of the actions taken to comply with the Order to the San Francisco Regional Director of the Public Employment Relations Board in accord with the director's instructions.

Pursuant to California Code of Regulations, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the 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 Cal. Code of Regs., tit. 8, sec. 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 Cal. Code of Regs., tit. 8, sec. 32135; Code Civ. Proc., sec. 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

employees with notice that the Union has acted in an unlawful manner, is being required *to* cease and desist from this activity, and will comply with the order. It effectuates the purposes of the Dills Act that employees be informed of the resolution of this controversy and the Union's readiness to comply with the ordered remedy. (Placerville Union School District (1978) PERB Decision No. 69.)

Mr. Baima's request that CAUSE pay to him "the amount of $7,000.00 to reimburse him for attorney fees he paid to outside counsel and costs" is denied. Attorneys fees are justified where "there is a showing that the respondent's unlawful conduct has been repetitive and that its defenses are without arguable merit." (Modesto City Schools and High School District (1985) PERB Decision No. 518.) Mr. Baima was not represented at any part of these proceedings by an attorney. His request for attorney's fees appears intended to cover costs he incurred outside the present hearing before the PERB. He has cited no justification for such a remedy.

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law and the entire record in the case, it is found that the California Union of Safety Employees (CAUSE) violated section 3519.5(b) of the Ralph C. Dills Act (Act). The Union violated the Act by failing to fairly represent Joseph Anthony Baima by arbitrarily and in bad faith refusing to process his grievances to arbitration.

Pursuant to section 3514.(c) of the Government Code, it thereby is ORDERED that the Union, its officers and its representatives shall:

A. CEASE AND DESIST FROM:

1. Refusing to pursue to arbitration the transfer and psychological examination grievances of Joseph Anthony Baima which were authorized for arbitration by the CAUSE Labor Relations Committee in June and December of 1989.

2. Otherwise failing and/or refusing to fairly represent Joseph Anthony Baima in his employment relations with the State of California.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE ACT:

1. Effective immediately upon service of a final decision in this matter, reactivate and pursue to arbitration the transfer and psychological examination grievances of Joseph Anthony Baima which were authorized for arbitration by the CAUSE Labor Relations Committee in June and December of 1989. In the further processing of these grievances, CAUSE is to pay the expense for Mr. Baima to hire outside counsel, should he desire, to represent him in the arbitration hearing.

2. Within ten (10) workdays of the service of a final decision in this matter, post at all work locations where CAUSE customarily posts notices to members of State employee bargaining Unit 7, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of CAUSE, indicating that the CAUSE will comply with the terms of this Order. Such