

acts in violation of her employee rights.

The Board has reviewed the warning and dismissal letters, the original and amended charges, and the entire record in this case. The Board finds the Board agent's dismissal to be free of prejudicial error and adopts it as the decision of the Board itself.

The unfair practice charge in Case No. S-CO-140-S is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Carlyle and Blair joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD



Sacramento Regional Office
1031 18th Street, Room 102
Sacramento, CA 95814-4174
(916) 322-3198



October 5, 1992

Marilyn Mitchell

Re: Marilyn Mitchell v. State of California (Franchise Tax Board), Case No. S-CO-140-S
DISMISSAL LETTER

Dear Ms. Mitchell:

On January 22, 1992, you filed a charge alleging that the California State Employees Association (CSEA or Association) violated Government Code section 3519.5 (the Dills Act) by engaging in numerous acts in violations of your employee rights.¹ Specifically, you allege that CSEA has imposed reprisals, retaliated, discriminated, interfered with, restrained and used coercion against you for your exercise of employee rights and being active in the union.¹

I indicated to you, in my attached letter dated February 28, 1992, that the above-referenced charge did not state a prima facie case. You were advised that, if there were any factual inaccuracies or additional facts which would correct the deficiencies explained in that letter, you should amend the charge. On March 18, 1992, you filed your First Amended Charge, on March 31, 1992, you filed a Second Amended Charge, on May 15, 1992, you filed a Third Amended Charge, on July 23, 1992, you filed a Fourth Amended Charge, on September 1, 1992, you filed your Fifth Amended Charge, and on October 1, 1992, you filed your Sixth Amended Charge.

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Your original charge contained approximately one hundred and seventy-three (173) allegations.

²Your amended charges contained numerous allegations and more than 600 pages of supporting documents.

I have thoroughly reviewed your amended charges and all the documents you submitted. I have summarized the central allegations contained in your amended charges³:

1. The Association violated its duty of fair representation by refusing to discuss your representation with you.
2. The Association violated its duty of fair representation by refusing to allow you to speak to the Civil Service Division Council regarding your employment/union needs.
3. The Association violated its duty of fair representation by failing to stop Association staff from harassing you through the mail.⁴
4. The Association violated its duty of fair representation by allowing Representative Doug Moffett to refuse to pursue a grievance filed by you on February 15, 1991.
5. The Association violated its duty of fair representation by removing you from your office as District Labor Council (DLC) 786 President.

³Due to the length of your amended charges I have summarized the central allegations, rather than address each allegation separately as I did in my letter of February 28, 1992.

*Your First Amended Charge states:

The Union failed to stop my paid staff person from harassing me through the mail, and also failed to stop him from attempting to sabotage my representation by sending me untimely notices, and notices of meetings concerning my representation that I couldn't receive until after the fact.

Although your charge contains the term "harassing", the factual allegations in your charge fail to demonstrate that the Association's conduct was arbitrary, discriminatory, or in bad faith. Accordingly, that allegation is dismissed.

6. The Association is discriminating against you because you are black.⁵
7. The Association violated its duty of fair representation by refusing to provide you with internal union information you requested in retaliation for your filing an unfair practice charge with PERB.
8. The Association violated its duty of fair representation by denying you the right to use the internal union processes to resolution on every level open to you.
9. On September 22, 1992, Association staff member Gretchen Seagraves violated your rights by sending a three (3) page facsimile transmission through the Franchise Tax Board Management, to be given to another Association Member, which you contend was defamatory to you, read by others and was meant to injury your good name and reputation, and bring you into disrepute.
10. The Association violated your rights by cutting off all DLC President's mail to you before time.

As I informed you in my letter of February 28, 1992, in order to state a prima facie violation of an employee organization's duty of fair representation, Charging Party must show that the employee organization's conduct was arbitrary, discriminatory, or in bad faith. United Teachers of Los Angeles (Collins) (1983) PERB Decision No. 258. In United Teachers of Los Angeles (Collins). Id. the Public Employment Relations Board (PERB) stated:

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

.....

⁵Your amended charge states "CSEA is discriminating against me as a Black". Your amended charges fail to assert any other facts regarding this allegation of racial discrimination to demonstrate that the Association committed an unfair labor practice on the basis of race. Accordingly, that allegation is dismissed.

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

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

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

The allegations that the Association violated its duty of fair representation by refusing to discuss **your representation with you**; by refusing to stop Association staff from **harassing you**" through the mail; by allowing Representative Moffett to refuse to pursue the grievance you filed on February 15, 1991; by sending a three (3) page facsimile transmission to another Association Member, which you contend was defamatory to you, read by others and was meant to injury your good name and reputation, and bring you into disrepute; and by cutting off all DLC President's mail to you before time, fails to assert sufficient facts from which it becomes apparent how or in what manner the exclusive representative's action or inaction was without a rational basis or devoid of honest judgment. In the absence of specific allegations of arbitrary, discriminatory, or bad faith denial of representation, you have failed to establish a prima facie violation that CSEA breached its duty of fair representation. Therefore, your allegations contained in the above listed-allegations that the Association violated its duty of fair representation shall be dismissed.

Your allegations that the Association violated its duty of fair representation by refusing to allow you to speak to the Civil Service Division Council regarding your employment/union needs; by removing you from your office as District Labor Council 786

President; and by denying you the right to use the internal union processes to resolution on every level open to you, refer to activities which are strictly internal union matters, which do not have a substantial impact on the relationships of unit members to their employers. The duty of fair representation extends only to union activities that have a substantial impact on the relationships of unit members to their employers and does not apply to those activities which do not directly involve the employer or which are strictly internal union matters. Service Employees International Union, Local 99 (Kimmett) (1979) PERB Decision No. 106; Rio Hondo College Faculty Association, CTA/NEA (1986) PERB Decision No. 583. Accordingly, those allegations are dismissed.

Finally, your amended charges allege that the Association violated its duty of fair representation by refusing to provide you with internal union information you requested in retaliation for your filing an unfair practice charge with the PERB⁶. I have been unable to find any authority that you have a right to the information you requested from the Association, or that the Association has a duty to provide you with the requested information. Accordingly, that allegation is dismissed.

Even assuming that the Association had a duty to provide you with the requested information, you have still failed to establish a prima facie violation. The duty of fair representation does not apply to those activities which are strictly internal union matters. (See, Service Employees International Union, Local 99 (Kimmett), supra.) However, when allegations of reprisal for protected activity are present, if the allegations state facts supporting retaliation by an employee organization, internal union activities may be reviewed. Such an inquiry must go forth

⁶The information you requested from the Association which was not provided, included:

- a. A copy of the Errors and Omissions Insurance coverage and policies carried by the Association;
- b. A copy of the workers compensation insurance coverage carried by the Association; and
- c. Information regarding the representation matters of another Association member.

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under Carlsbad Unified School District (1979) PERB Decision No. 89 and/or Novato Unified School District (1982) PERB Decision No. 210, as to whether the employee organization's actions were motivated by a charging party's exercise of protected rights. California State Employees' Association (O'Connell) (1989) PERB Decision No. 753-H.

Although your amended charges contain allegations that you engaged in protected activity and the Association had knowledge of such activity, your amended charges fail to demonstrate that the Association's actions were motivated by your exercise of protected rights. Therefore, those allegations must also be dismissed.

Therefore, I am dismissing your charges based on the facts and reasons contained in this letter and my February 28, 1992 letter.

Right to Appeal

Pursuant to Public Employment Relations Board regulations, you may obtain a review of this dismissal of the charge by filing an appeal to the Board itself within twenty (20) calendar days after service of this dismissal. (Cal. Code of Regs., tit. 8, sec. 32635(a).) To be timely filed, the original and five copies of such appeal must be actually received by the Board itself before the close of business (5 p.m.) or sent by telegraph, certified or Express United States mail postmarked no later than the last date set for filing. (Cal. Code of Regs., tit. 8, sec. 32135.) Code of Civil Procedure section 1013 shall apply. The Board's address is:

Public Employment Relations Board
1031 18th Street
Sacramento, CA 95814

If you file a timely appeal of the refusal to issue a complaint, any other party may file with the Board an original and five copies of a statement in opposition within twenty (20) calendar days following the date of service of the appeal. (Cal. Code of Regs., tit. 8, sec. 32635(b).)

Service

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding, and a "proof of service" must accompany each copy of a document served upon a party or filed with the Board itself. (See Cal. Code of Regs., tit. 8, sec. 32140 for the required contents and a sample form.) The

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document will be considered properly "served" when personally delivered or deposited in the first-class mail, postage paid and properly addressed.

Extension of Time

A request for an extension of time, in which to file a document with the Board itself, must be in writing and filed with the Board at the previously noted address. A request for an extension must be filed at least three (3) calendar days before the expiration of the time required for filing the document. The request must indicate good cause for and, if known, the position of each other party regarding the extension, and shall be accompanied by proof of service of the request upon each party. (Cal. Code of Regs., tit. 8, sec. 32132.)

Final Date

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

Sincerely,

ROBERT THOMPSON
Deputy General Counsel

By Michael E. Gash
Michael E. Gash
Regional Attorney

Attachment

cc: Bob Zenz

PUBLIC EMPLOYMENT RELATIONS BOARD



Headquarters Office
1031 18th Street
Sacramento, CA 95814-4174
(916) 322-3088



February 28, 1992

Marilyn Mitchell

Re: Marilyn Mitchell v. California State Employee Association
Unfair Practice Charge No. S-CO-140-S
WARNING LETTER

Dear Ms. Mitchell:

On January 22, 1992, you filed a charge alleging that the California State Employees Association violated Government Code section 3519.5 (the Dills Act) by engaging in numerous acts in violations of your employee rights.¹ Specifically, you allege that CSEA has imposed reprisals, retaliated, discriminated, interfered with, restrained and used coercion against you of your exercise of employee rights and being active in the union as a Union Activist.

After a thorough review of all your allegations, I find that you have failed to state a prima facie case that CSEA has violated section 3519.5 of the Dills Act.²

PERB Regulation 32615 (California Code of Regs., tit. 8, sec. 32615) requires that your charge contain a clear and concise statement of the facts and conduct alleged to constitute an unfair practice.

¹Your charge contains approximately one hundred and seventy-three (173) allegations.

²Due to the length of your charge, the allegations contained in your charge are incorporated by reference, as if fully set forth herein. My warning letter will address your allegations by page number, with corresponding allegation number or letter, where appropriate.

The following allegations fail to state a clear and concise statement of the facts and conduct alleged to constitute an unfair practice:

P. 1, paragraphs 1 and 2; P. 2, paragraphs 3, 5, 9, 10, 12 and 14; P. 3, paragraph 3; P. 4, paragraphs 9, 10, 11, 12, 13, 14, 15 and 16; P. 5, paragraphs 17, 18, 19, 20 and 22; P. 6, paragraphs 23, 24, 26 and 27; P. 7, paragraphs 28, 29, 30, 31, 32, 33, 34 and 35; P. 8, paragraphs 36, 37, 38, 39, 40, 44, 46 and 47; P. 9, paragraphs 51, 52, 53, 58 and 59; P. 10, paragraphs 61, 62 and 70; P. 11, paragraphs 72, 73, 74, 75, 77, 78, 79, 80, 81 and 82; P. 12, paragraphs 83, 84, 85, 86, 88, 89, 89 [sic] and 90; P. 13, paragraphs 91, 92, 96, 98 and 99;

P. 14, paragraphs 100, 103, 104 and 105; P. 15, paragraphs 106, 107, 109 and 110; P. 16, paragraphs 111A, 111B, 111C, 111E and 111G; P. 17, paragraphs 111H, 111I, 111J(1), U1J(2), 111J(3), 111J(4), 111J(5) and 111J(6); P. 18, paragraphs 111J(7), 111J(8), 111J(9), HU(IO) and 111J [sic]; P. 19, paragraphs 111Kd), 111K(2), 111K(3), 111K(4), 111K(5), 111K(6), 111K(7), 111K(8), 111K(9), 111K(10) and 111K [sic]; P. 20, paragraphs 111L, 111M, 111N, 111O, 111P and 112; P. 21, paragraphs 113A, 113B, 113C, 113D and 113E; P. 22, paragraphs 113F, 113G and 113H; P. 23, paragraphs 113I, 113J and 113K.

In the absence of a clear statement of facts and conduct constituting an unfair practice, the allegations in the above-listed paragraphs fail to state a prima facie violation of the Dills Act and will be dismissed.

The allegations contained in the following listed paragraphs fail to set forth a date, or allege conduct which falls within the Public Employment Relations Board's (PERB or Board) statute of limitations:

P. 1, paragraphs 1 and 2; P. 2, paragraphs 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14 and 15; P. 3, paragraphs 1, 2, 4, 5, 6, 7 and 8; P. 4, paragraphs 9, 10, 11, 12, 13, 14, 15 and 16; P. 5, paragraphs 17, 18, 19, 20, 21 and 22; P. 6, paragraphs 23, 24, 25, 26 and 27; P. 7, paragraphs 28, 29, 30, 31, 32, 33, 34 and 35; P. 8, paragraphs 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48 and 49; P. 9, paragraphs 50, 51, 53, 54, 55, 56, 57, 58 and 59; P. 10, paragraphs 60, 61, 62, 66, 67,

69, and 70; P. 11, paragraphs 71, 72, 73, 74, 76, 77, 78, 79, 80 and 81; P. 12, paragraphs 85, 86, 87, 88, 89, 89 [sic] and 90; P. 13, paragraphs 91, 92, 93, 94 and 99;

P. 14, paragraphs 100, 101, 102, 103, 104 and 105; P. 15, paragraphs 106, 107 and 110; P. 16, paragraphs 111A, 111B, 111C, 111D, 111E, 111F and 111G; P. 17, paragraphs 111I, 111J(1), 111J(2), 111J(3), 111J(4), 111J(5) and 111J(6); P. 18, paragraphs 111J(7), 111J(8), 111J(9) and 111J; P. 19, paragraphs 111K(1), **111K(2), 111K(3), 111K(4), 111K(5), 111K(6), 111K(7),** 111K(8), 111K(9), 111K(10) and 111K [sic]; P. 20, paragraphs 111L, 111M, 111N, 111O and 112; P. 21, paragraphs 113A, 113B, 113C, 113D and 113E; P. 22, paragraphs 113F, 113G and 113H; P. 23, paragraphs 113I, 113J and 113K.

In order to state a prime facie case a Charging Party must allege and ultimately establish that the conduct complained of either occurred or was discovered within the six-month period immediately preceding the filing of the charge. San Dieguito Union High School District (1982) PERB Decision No. 194. Government Code section 3514.5(a) states in relevant part:

Any employee, employee organization, or employer shall have the right to file an unfair practice charge, except that the board shall not do either of the following: (1) issue a complaint in respect of any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge, . . .

Your charge was filed with PERB on January 22, 1992, which means that any alleged unfair practice should have occurred during the six-month statutory period which began on July 22, 1991. The allegations contained in the above listed paragraphs of your charge either fails to set forth a date, or states a date which is beyond the six-month statute of limitations, therefore, those allegations must be dismissed.

Assuming your charge was timely, the following listed allegations in your charge appear to allege that CSEA, the exclusive representative, violated its duty of fair representation in violation of section 3519.5(b) of the Dills Act:

P. 1, paragraphs 1 and 2; P. 2, paragraphs 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14 and 15; P. 4, paragraphs 9 and 16; P. 5, paragraphs 21 and 22; P. 6, paragraphs 24; P. 8, paragraphs 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48 and 49; P. 9, paragraphs 50, 51, 53, 54, 55, 56, 57, 58 and 59; P. 10, paragraphs 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, and 70; P. 11, paragraphs 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81 and 82; P. 12, paragraphs 83, 84, 85, 86, 87, 88, 89, 89 [sic] and 90; P. 13, paragraphs 91, 93, 94, 95, 96, 97, 98 and 99; P. 14, paragraphs 102, 103 and 104; P. 16, paragraphs 111A, 111C, 111D, 111F and 111G; P. 17, paragraphs 111H, 111I, 111J(3), 111J(4), 111J(5) and 111J(6); P. 18, paragraphs 111J(7), 111J(8), 111J(10) and 111J; P. 19, paragraphs 111K(1), 111K(2), 111K(3) 111K(4), 111K(5), 111K(6), 111K(7), 111K(8), 111K(9) and 111K(10); P. 20, paragraphs 111L, 1110, 111P and 112; P. 21, paragraphs 113A, 113B, 113C, 113D and 113E; P. 22, paragraphs 113F, 113G and 113H.

The Dills Act does not contain a specific section **specifying an employee** organization's duty of **fair representation; such a duty can** be implied from the fact that **the Dills Act provides for** exclusive representation. (Gov. Code, secs. 3513(b) and 3515.5;) Norgard v. California State Employees Association (1984) PERB Decision No. 451-S.

In order to state a prima facie violation of an employee organization's duty of fair representation, Charging Party must show that the employee organization's conduct was arbitrary, discriminatory, or in bad faith. United Teachers of Los Angeles (Collins) (1983) PERB Decision No. 258. In United Teachers of Los Angeles (Collins). Id., the Public Employment Relations Board (PERB) stated:

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

.

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

employee's grievance if the chances for success are minimal.

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

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

The allegations contained in the above-listed **paragraphs fail to** assert sufficient facts from which it becomes apparent **how or in** what manner the exclusive representative's **action or inaction was** without a rational basis or devoid of honest judgment. In the absence of specific allegations of arbitrary, **discriminatory, or bad faith denial of representation, you have failed to establish a prima facie violation that CSEA breached its duty of fair representation.** Therefore, your allegations contained in the above listed-allegations that CSEA violated its duty of fair representation shall be dismissed.

Your charge also contains the following listed allegations that appear to allege that CSEA violated its duty of fair representation by engaging in reprisals, acts of retaliation, discrimination, interference, restraint and coercion for your exercise of rights during internal union business and meetings:

P. 1, paragraphs 1 and 2; P. 2, paragraphs 3, 5, 8, 9, 10, 11, 14 and 15; P. 3, paragraphs 1, 4 and 8; P. 5, paragraph 17; P. 6, paragraphs 25, 26 and 27; P. 7, paragraphs 28 and 34; P. 13, paragraphs 95, 96, 97, 98 and 99;

P. 14, paragraphs 100, 101, 104 and 105; P. 15, paragraphs 106, 107, 108, 109 and 110; P. 16, paragraphs 111A, and 111G; P. 17, paragraphs 111H, 111J(3), 111J(4), 111J(5) and 111J(6); P. 20, paragraphs 111O, 111P and 112; P. 23, paragraphs 113I, 113J and 113K.

The duty of fair representation extends only to union activities that have a substantial impact on the relationships of unit members to their employers and does not apply to those activities which do not directly involve the employer or which are strictly internal union matters. Service Employees International Union, Local 99 (Kimmett) (1979) PERB Decision No. 106; Rio Hondo College Faculty Association, CTA/NEA (1986) PERB Decision No. 583.

The allegations in the above-listed paragraphs refer to activities which are strictly internal union matters and do not have a substantial impact on the relationships of unit members to their employers. Therefore, those allegations shall also be dismissed.

However, when allegations of reprisal for protected activity are present, if the allegations state facts supporting retaliation by an employee organization, internal union activities may be reviewed. Such an inquiry must go forth under Carlsbad Unified School District (1979) PERB Decision No. 89 and/or Novato Unified School District (1982) PERB Decision No. 210, as to whether the employee organization's actions were motivated by a charging party's exercise of protected rights. California State Employees' Association (O'Connell) (1989) PERB Decision No. 753-H.

To demonstrate a violation, you must show that you engaged in protected activity, that the employee organization had knowledge of such activity, and (3) the employee organization imposed or threatened to impose reprisals, discriminated or threatened to discriminate, or otherwise interfered with, restrained or coerced the employees because of the exercise of those rights. Novato Unified School District (1982) PERB Decision No. 210; Carlsbad Unified School District (1979) PERB Decision No. 89. Although your charge contains some allegations of your engaging in protected activity and knowledge of such activity by CSEA, your charge fails to demonstrate that CSEA's actions were motivated by your exercise of protected rights. Therefore, your allegations must be dismissed.

For these reasons, your charge as presently written does not state a prima facie case. If there are any factual inaccuracies in this letter or any additional facts that would correct the deficiencies explained above, please amend the charge accordingly. The amended charge should be prepared on a standard PERB unfair practice charge form clearly labeled First Amended Charge, contain all the facts and allegations you wish to make, and must be signed under penalty of perjury by the charging

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party. The amended charge must be served on the respondent and the original proof of service must be filed with PERB. If I do not receive an amended charge or withdrawal from you before March 10, 1992, I shall dismiss your charge. If you have any questions, please call me at (916) 322-3198.

Sincerely,

A handwritten signature in cursive script that reads "Michael E. Gash". The signature is written in dark ink and is positioned above the typed name and title.

Michael E. Gash
Regional Attorney