STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

SHARON A. COHEN, Charging Party,	)	Case No. SF-CO-20-S
v.	)	PERB Decision No. 980-S
CALIFORNIA STATE EMPLOYEES ASSOCIATION, Respondent.	)	March 12, 1993

Appearance: Sharon A. Cohen, on her own behalf.

Before Blair, Chair; Caffrey and Carlyle, Members.

DECISION AND ORDER

CAFFREY, Member: This case is before the Public Employment Relations Board (Board) on appeal by Sharon A. Cohen (Cohen) to a Board agent's dismissal (attached hereto) of her unfair practice charge. In her charge, Cohen alleged that the California State Employees Association violated section 3519.5(b) of the Ralph C. Dills Act (Dills Act)[1] by engaging in numerous acts in violation of her employee rights.

The Board has reviewed the warning and dismissal letters,

[1]The Dills Act is codified at Government Code section 3512 et seq. 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 original and amended charges, Cohen's appeal 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. SF-CO-20-S is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chair Blair and Member Carlyle joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
177 Post Street, 9th Floor
San Francisco, CA 94108-4737
(415) 557-1350

November 30, 1992

Sharon A. Cohen

Re: **DISMISSAL OF UNFAIR PRACTICE CHARGE/REFUSAL TO ISSUE COMPLAINT**
Sharon E. Cohen v. California State Employees' Association
Unfair Practice Charge No. SF-CO-20-S

Dear Ms. Cohen:

The above-referenced unfair practice charge, filed on April 8, 1992 and amended on November 16, 1992, alleges that the California State Employees' Association (Association) breached its duty of fair representation to Sharon E. Cohen. This conduct is alleged to violate Government Code section 3519.5 of the Ralph C. Dills Act (Dills Act).

I indicated to you, in my attached letter dated October 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. You were further advised that, unless you amended the charge to state a prima facie case or withdrew it prior to November 5, 1992, the charge would be dismissed. I granted you an extension to file an amended charge, which you filed on November 16, 1992.

The amended charge contains numerous allegations. Cohen also submitted to the undersigned on November 5, 1992 a ten-paged single-spaced typewritten letter, together with 51 pages of exhibits. This document contained essentially the same allegations as those outlined in the amended charge. These allegations are summarized as follows. Cohen alleges that Association representative Sherry Hayes took certain documents, including the original rejection from probation notice, the supervisor's final probationary report, and Cohen's tele-typewriter tape from the Skelly hearing, failed to return them, and led Cohen to believe that the Pelican Bay State Prison (Prison) maintained possession of the documents. The Association, through Nancy Canadian, did provide copies of these

documents in September and October 1991. Cohen alleges that the withholding of these documents demonstrates arbitrary and discriminatory conduct. These allegations fail to demonstrate the Association refused to process any of Cohen's grievances for arbitrary, discriminatory or bad faith reasons. Canadian provided Cohen an opportunity to discuss her pending disputes with the Prison. Canadian independently reviewed those disputes after Hayes left employment with the Association and stated the Association's reasons for not continuing to represent Cohen in her letter dated November 18, 1991. Furthermore, the amended charge fails to allege how the withholding of these documents caused actual prejudice in the prosecution of Cohen's grievances.

Cohen alleges that the Association made an agreement with the Prison prior to her Skelly hearing, gave her a brief summary of it, made some minor changes to her benefit, and then never gave her a copy of the agreement. She further alleges that Hayes concealed the existence of a Skelly hearing results document. These allegations also fails to demonstrate arbitrary, discriminatory or bad faith conduct. The agreement to which Cohen refers is presumably the agreement by the Prison not to reject Cohen from probation but extend her 90 days in which to find other employment with the State. Cohen does not deny that she comprehended the substance of the agreement. It is unclear that Cohen was actually prejudiced by the Association's failure to provide her a copy of the agreement or the Skelly hearing results. For example, the Skelly results letter dated June 22, 1990, appears to merely to memorialize the agreement to hold the rejection from probation action in abeyance. In addition, the allegations that Hayes willfully concealed these documents are conclusory.

Cohen alleges Hayes' conduct in not returning telephone calls near the time she resigned from the Association demonstrates a breach of the duty of fair representation. If this conduct were considered an independent violation it would be untimely since Hayes left in May or June of 1991 and six months prior to the filing of the original charge was November 8, 1991. (Gov. Code, sec. 3514.5(a).) Hayes herself is not alleged to have ever refused to process a grievance for Cohen. It was Canadian who reviewed the pending grievances and decided not to pursue them.

Cohen alleges that Hayes forfeited other grievances which she claimed to be handling. Cohen does not allege any specifics to

identify the nature of these grievances, even assuming Hayes' conduct was more than negligent. Therefore, it cannot be demonstrated that the Association forfeited a meritorious grievance for arbitrary, discriminatory or bad faith reasons. (United Teachers of Los Angeles (Collins) (1982) PERB Dec. No. 258.) Cohen lists 35 sections of the MOU that she maintains involved grievances which Hayes had led her to believe she was prosecuting. The claim that Hayes agreed to represent Cohen on these matters is unsupported by clear and concise evidence. The notes of Hayes conversations with Cohen indicate the efforts of a sympathetic and concerned representative attempting to answer all of Cohen's questions and provide advice. They do not support a conclusion that Hayes agreed to file a grievance on every matter discussed. For example, in one comment, highlighted by Cohen, Hayes states, "I think either Sacramento finds you a job or you have a hell of a good case with EEOC."[1] Finally, these allegations would appear to be untimely as well.

Cohen also alleges misconduct by Gladys Perry, the supervisor of Canadian and Hayes, including claims that Perry delayed in replacing Hayes, screened out Cohen's telephone calls, took at face value Canadian's assessment of her case, and stated that she did not believe deaf people should live in rural regions. None of the allegations demonstrate that the decision not to pursue Cohen's grievances, which was made and communicated to Cohen by Canadian, was made by the Association for arbitrary, discriminatory or bad faith reasons. There is insufficient evidence to support an inference that Perry predisposed Canadian to terminate Cohen's case.

Therefore, for the facts and reasons state above and those contained in my October 28, 1992 letter, I am dismissing your charge.

Right to Appeal

Pursuant to Public Employment Relations Board regulations, you

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[1] Even if this could be construed as a promise to provide representation before the Equal Employment Opportunities Commission, PERB would not have jurisdiction to pursue an alleged failure to represent Cohen in the matter. (American Federation of State, County and Municipal Employees (Moore) (1988) PERB Dec. No. 683-S.)

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 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 G. THOMPSON
Deputy General Counsel

DONN GOZA
Regional Attorney

Attachment

cc: Robert L. Mueller

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
177 Post Street, Suite 900
San Francisco, CA 94108-4737
(415) 557-1350

October 28, 1992

Sharon A. Cohen

Re: **WARNING LETTER**
Sharon E. Cohen v. California State Employees' Association
Unfair Practice Charge No. SF-CO-20-S

Dear Ms. Cohen:

The above-referenced unfair practice charge, filed on April 8, 1992, alleges that the California State Employees' Association (Association) breached its duty of fair representation to Sharon E. Cohen. This conduct is alleged to violate Government Code section 3519.5 of the Ralph C. Dills Act (Dills Act).

Investigation of the charge revealed the following facts. Sharon Cohen began employment with the State of California, Department of Corrections (Department) on November 1, 1989 as a probationary Office Assistant (Typing) at Pelican Bay State Prison (Prison). In June 1990, the Department gave notice to Cohen that it intended to reject her during her probationary period. A "Skelly" hearing was conducted on June 22, 1990. Cohen was represented by Sherry Hayes of the Association. During the hearing the parties agreed to have the decision to reject during probation held in abeyance and to grant Cohen a 90 day unpaid leave of absence to allow her time to seek other employment. If she were successful in finding employment, the Department agreed to provide the "necessary personal transactions." According to a letter from the Department to Hayes, dated March 12, 1991, the Department agreed to reevaluate her case at the expiration of the 90 day period. The letter also stated that one of the reasons for the Department's agreement to hold their rejection in abeyance was due to the fact that Cohen was on Worker's Compensation at the time of the Skelly hearing. Therefore, the Department agreed to commence the 90 day period from the date her Worker's Compensation benefits ceased on January 11, 1991. The Department's concession on this point appears to have been at least partially in response to a July 30, 1990 letter from Hayes to the Department asserting that Cohen had filed a legitimate claim for Industrial Disability Leave, which the Personnel Department had never processed.

On March 15, 1991, Hayes filed a grievance on behalf of Cohen alleging violations of the Memorandum of Understanding (MOU) for Unit 4. The grievance alleged violations of Article 5, section

5.6(15) and 5.6(6). Section 5.6 incorporates various Government Code provisions on wages, hours and working conditions. The grievance specified that the Department violated Government Code section 19991.4 under section 5.6(15), which states:

> Unpaid Leaves of Absence
>
> 19991.4 Provides that absence of an employee for work-incurred compensable injury or disease is considered as continuous service for purposes of salary adjustments, sick leave, vacation or seniority.

The grievance also specified that the Department violated Government Code section 19877 under section 5.6(6), which states:

> Industrial Disability Leave (IDL)
>
> 19877 Authorizes [Department of Personnel Administration] to adopt rules governing IDL.

The narrative portion of the grievance asserts that the Department is required to restore Cohen to employment because she was placed on Industrial Disability Leave in June 1990 and is now physically ready and able to return to work.

By letter dated March 15, 1991, Hayes wrote to Charles Marshall, Warden of the Prison, requesting that Cohen's leave of absence be extended from April 15, 1991 until the grievance was resolved. The Department in an undated letter extended the leave of absence to May 15, 1991.

On March 27, 1991, the Prison responded to the grievance asserting that it was not required to restore Cohen to her position because it could not reasonably accommodate Cohen's physical disability, a hearing impairment, following denials of the Prison's request for purchase of a TDD machine and its offer of vocational rehabilitation, which it asserts Cohen did not accept. Cohen disputes this assertion. The Prison further asserted that it was not required to restore Cohen to work following an Industrial Disability Leave because she did not fulfill the requirement to participate in vocational rehabilitation. Cohen also disputes this assertion. The Prison also contended that Government Code section 19991.4 requires placement in or assistance in locating alternative employment if the employee cannot return to work due to a permanent disability, only if the permanent disability was due to a compensable

permanent disabling injury. The Prison asserted that Cohen's stress disability was not found by the State Compensation Insurance Fund to be permanent and that her hearing disability existed prior to her employment with the Prison. Finally, the Prison claimed that it would not restore Cohen's back pay because it would violate the agreement reached as a result of the June 30, 1990 Skelly hearing.

On May 14, 1991, Hayes requested an additional extension to June 17, 1991 of Cohen's leave of absence. Cohen alleges that the Department terminated her leave of absence on June 17, 1991, but failed to notify her of this until October 1991. Sometime in May 1991, Hayes left employment with the Association and failed to notify Cohen of her resignation. Cohen discovered this herself in July 1991. During this period, Hayes failed to return phone calls or answer letters. Cohen contacted Hayes' replacement, Nancy Canadian in September 1991 but was not able to meet with her until November 1991. Cohen had two meetings with Canadian.

By letter dated November 18, 1991, Canadian recounts her meetings with Cohen and states that Cohen submitted a request with the Department to set aside her resignation. The letter states that Cohen voluntarily resigned in response to an offer by the Department because her time for finding alternative employment had expired. According to Canadian, Cohen accepted the offer rather than suffer a rejection from probation, which the Department had held in abeyance since July 1990. Canadian asserts that she advised Cohen that if she sought to rescind her resignation, the Department would reject her from probation. For further assistance, she referred Cohen to "the outside attorney who is handling [her] discrimination complaint and tort claim against [the Prison]" for any questions concerning her "appeal" of the resignation. Canadian states that she informed Cohen that the Department would not grant any further extensions of her leave of absence.

The charge contains numerous allegations which are as follows. The charge alleges that the Association failed to file grievances and appeals which it asserted it had, and defaulted on those it had filed, causing the Department to generate a "resignation" notice. Hayes told Cohen that she had filed an appeal with the State Personnel Board, when in fact she had not. The Association agreed to represent Cohen in matters involving discrimination due to disability, wrongful termination, rejection on probation, supervisory harassment, medical leave of absence, Industrial Disability Leave, and other matters. The Association failed to advise her that some of these matters were not covered by the grievance procedure and falsely led her to believe that they were. The Association failed to advise her of all of her rights

concerning these matters and other matters such as Unemployment Compensation, and failed to advise her of procedural requirements of the State Compensation Insurance Fund and Department of Fair Employment and Housing. The Association inadequately investigated the facts of her case and hindered her ability to do so independently. The Association withheld and/or concealed documentation needed by Cohen. The Association failed to adequately inform Cohen of the status of her case. The Association refused to allow Cohen to use its appeal forms to challenge the resignation letter. The Association promised to find Cohen a private attorney to assist her and failed to do so. The Association failed to inform her that it would not pursue her case further. The Association engaged in collusion with a private attorney who had represented her prior to November 1991. That attorney, whom Cohen located, failed to advise her of his work for the Association and, after abandoning her, denied that he ever represented her.

Based on the facts stated above the charge as presently written fails to state a prima facie violation of the Dills Act for the reasons that follow.

In order to state a prima facie case involving a breach of the duty of fair representation, facts must be alleged in the charge indicating how and in what manner the Association refused to process a meritorious grievance for arbitrary, discriminatory or bad faith reasons. In United Teachers of Los Angeles (Collins) (1982) PERB Dec. No. 258, the 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 Dec. No. 332, citing Rocklin Teachers Professional Association (Romero) (1980) PERB Dec. No. 124.)

The charge fails to allege specific facts from which it can be concluded that the Association failed to proceed with a meritorious grievance for arbitrary, discriminatory or bad faith reasons. The mere fact that the Association filed Cohen's March 15, 1991 grievance does not mean that it was required to proceed with it through all stages of the grievance procedure. Grievances may and often are filed for tactical reasons and because the risk in filing a grievance is minimal. However, a union may decide to withdraw a grievance later in the process if, for example, facts come to light which cast doubt on the merits of the grievance or if it is determined that the interpretation of the collective bargaining agreement required to sustain the grievance would establish an unwanted precedent. In this case, according to Canadian's November 18, 1991 letter, the Association determined that proceeding with the grievance would be fruitless because it believed that reneging on the original agreement to extend the probationary period would result in the Department proceeding to reject Cohen on probation. In the absence of facts showing that its decision was made for arbitrary, discriminatory or bad faith reasons, this reassessment of the merits of the grievance does not establish a violation of the duty of fair representation. (United Teachers of Los Angeles (Collins), supra, PERB Dec. No. 258.)

Although it would appear that Hayes abandoned Cohen when she left employment with the Association, her departure is not shown to have caused Cohen to forfeit any of her grievances due to the lapse of time or other circumstances. (See Ruzika v. General Motors Corp. 523 F.2d 306 [90 LRRM 2497] (6th Cir. 1975); McKelvey, The Changing Law of Fair Representation (1985) pp. 158-163 [forfeiture of grievance through procedural default as arbitrary and perfunctory].) While Hayes' failure to notify Cohen might be considered ill-advised, it amounts to negligence at worst. (United Teachers of Los Angeles (Collins), supra, PERB Dec. No. 258.)

Although the charge alleges that the Association failed to file or otherwise forfeited grievances in addition to the one filed by the Association, there are no specific facts supporting this allegation.

The charge also alleges that the Association failed to advise Cohen that several of her disputes were not covered by the MOU. There is no duty under the Dills Act requiring an exclusive representative to advise accurately an employee concerning rights and duties pertaining to the exercise of legal remedies outside of the collective bargaining agreement. While there may have been extra-contractual legal remedies available to Cohen through the State Personnel Board, State Compensation Insurance Fund, or Department of Fair Employment and Housing, the Association owes no duty of fair representation in regard to these potential avenues of relief. (California Faculty Association (Pomerantsey) (1988) PERB Dec. No. 698-H.) Even assuming facts were alleged to demonstrate that the Association promised to undertake representation in these arenas, and then negligently forfeited Cohen's rights, such conduct would not be within PERB's jurisdiction, but her recourse, if any, would be in the State courts. (See Lane v. I.U.O.E Stationary Engineers (1989) 212 Cal.App.3d 164 [260 Cal.Rptr. 634].)

The charge also alleges that the Association hindered Cohen's ability to investigate facts or marshal documentation in support of her grievance, failed to inform her of the status of her case, breached its promise to find her a private attorney, and engaged in collusion with a private attorney. The charge lacks sufficient facts demonstrating how the Association's conduct in this vein actually caused her to forfeit a meritorious grievance. (Ruzika v. General Motors Corp., supra, 523 F.2d 306; McKelvey, The Changing Law of Fair Representation, supra, pp. 158-163

For these reasons, the 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 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

November 5, 1992. I shall dismiss your charge. If you have any questions, please call me at (415) 557-1350.

Sincerely,

DONN GINOZA
Regional Attorney