STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

GLORIA A. CARRILLO, Charging Party,	)	Case No. SA-CO-189-S
v.	)	PERB Decision No. 1199-S
CALIFORNIA STATE EMPLOYEES ASSOCIATION, Respondent.	)	May 14, 1997

Appearance: Gloria A. Carrillo, on her own behalf.

Before Caffrey, Chairman; Johnson and Dyer, Members.

DECISION

DYER, Member: This case comes before the Public Employment Relations Board (Board) on appeal from a Board agent's dismissal (attached) of Gloria A. Carrillo's (Carrillo) unfair practice charge. As amended, Carrillo's charge alleges that the California State Employees Association violated section 3519.5(a) and (b) of the Ralph C. Dills Act (Dills Act)[1] when it failed to adequately represent Carrillo in appealing her automatic

[1]The Dills Act is codified at Government Code section 3512 et seq. Dills Act section 3519.5 reads, in relevant part:

> It shall be unlawful for an employee organization to:
>
> (a) Cause or attempt to cause the state to violate Section 3519.
>
> (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.

resignation from the California Department of Transportation.

The Board has reviewed the entire record in this case, including Carrillo's original and amended unfair practice charge, the warning and dismissal letters, and Carrillo's appeal. The Board finds the warning and dismissal letters to be free of prejudicial error and adopts them as the decision of the Board itself.[2]

ORDER

The unfair practice charge in Case No. SA-CO-189-S is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chairman Caffrey and Member Johnson joined in this Decision.

[2]On appeal, Carrillo contends that the Board agent erred in citing cases interpreting the Educational Employment Relations Act (EERA). It is well established, however, that the Board's analysis of discrimination and duty of fair representation allegations is the same under the Dills Act as it is under the EERA. (See, e.g. California Union of Safety Employees (John) (1994) PERB Decision No. 1064-S at pp. 11-12; California State Employees' Association (Lemmons and Lund) (1985) PERB Decision No. 545-S at p. 2, warning letter.)

STATE OF CALIFORNIA PETE WILSON, *Governor*

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
177 Post Street, 9th Floor
San Francisco, CA 94108-4737
(415) 439-6940

January 28, 1997

Gloria A. Carrillo

Re: **DISMISSAL OF CHARGE/REFUSAL TO ISSUE COMPLAINT**
Gloria A. Carrillo v. California State Employees Association
Unfair Practice Charge No. S-CO-189-S

Dear Ms. Carrillo:

The above-referenced unfair practice charge alleges the California State Employees Association (CSEA) violated its duty of fair representation when it failed to adequately represent you in your employment with the State of California. This conduct is alleged to violate Government Code section 3519.5(b) of the Ralph C. Dills Act (Dills Act or Act).

I indicated to you, in my attached letter dated January 10, 1997, 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 January 17, 1997, the charge would be dismissed.

On January 15, 1997, I returned your voice mail message requesting an additional unfair practice form and an extension of time to file your amended charge. I granted your extension noting the amended charge must be filed by January 21, 1997. I further explained the case law pertaining to the duty of fair representation, quoting directly from pages 5 and 6 of my January 10, 1997, letter. I also reexplained that CSEA did not owe you a duty of fair representation with regard to noncontractual administrative proceedings, in this case all proceedings under Government Code section 19996.2 pertaining to your AWOL status. I further informed you that even if CSEA did owe you a duty of fair representation, the facts as you stated them did not demonstrate CSEA violated that duty. I noted that you must provide facts demonstrating CSEA acted arbitrarily, discriminatorily or in bad faith. You informed me you would provide further facts in your amended charge and that you would

consult your attorney with regard to taking legal action against PERB for dismissing your charge. On January 21, 1997, I again extended the deadline to file an amended charge until January 24, 1997.

On January 24, 1997, you filed an amended charge which restates your original allegations and adds the following.[1] The amended charge begins with your assertion that you were not AWOL when you received Caltrans' letters on October 18, 1995. You allege you left messages for your supervisor on numerous occasions throughout your illness, in conformance with past practice. You further note your supervisor did not respond to your messages, although it seems he did not receive them until two weeks after you began calling. The amended charge also states Caltrans treated you poorly starting in May of 1992, and forced you to accept a mediocre position in May of 1995.

The amended charge further alleges that after receiving Caltrans letter dated October 18, 1996, you requested your doctor, Dr. Melcher, respond to Caltrans' letter as your representative. Although no letter is included in the amended charge, you state Dr. Melcher contacted Caltrans and informed them you would not be able to work until mid-December. It is your opinion that Dr. Melcher's letter served to fulfill the requirement of a written appeal pursuant to Government Code section 19996.2.[2]

---

[1] Section 2 of the amended charge names both the employee organization and your employer as Respondents in this case. The amended charge further states you initially filed a charge against both CSEA and your employer, the California Department of Transportation (Caltrans). Section 2 of your original charge names only CSEA as the Respondent in this case. Moreover, Section 2 notes the charge can only name one (1) Respondent. Thus, this charge deals only with your allegations against CSEA, and will not be amended to include the Department of Transportation. If you intend to file against the State of California, you must do so on a separate unfair practice charge form.

[2] §19996.2 states in pertinent part:

> Absence without leave, whether voluntary or involuntary, for five consecutive days is an automatic resignation from state service as of the last date on which the employee worked. A permanent or probationary employee may within 90 days of the effective date of such separation, file a written request with the

With regard to CSEA's actions, you allege Mr. George did not inform you a "Coleman" hearing was required before you returned to work. You further assert that Ms. Seagraves inquired as to your age when attempting to resolve the matter with Caltrans. You contend such an inquiry is age discrimination. The amended charge also asserts you did not inform CSEA that you did not want to return to Caltrans, instead alleging you did not want to return to your specific unit. The charge also states CSEA did not tell you the "Coleman" hearing was to determine your fitness to return to work.

Your further allege CSEA took too much time in sending your retirement application forms and that Ms. Seagraves "screamed" at you over the telephone, stating Caltrans did not want you to return the department. The charge also contends that in attempting to settle your problems with Caltrans, CSEA never informed you that the settlement agreement they reached with Caltrans was not a "draft". The agreement Ms. Seagraves presented included a provision requiring you to drop all claims pending against Caltrans in return for Caltrans removal of your AWOL status and complete confidentiality in this matter. You refused to sign the settlement agreement based in part upon the inclusion of this provision, and returned the agreement to Ms. Seagraves. Additionally, you assert CSEA failed to seek a writ of mandate on your behalf, and that they coerced you into agreeing not to return to Caltrans.

The amended charge also asserts that I failed to inform you as to the necessary elements in a prima facie violation of the duty of fair representation. You further allege that CSEA discriminated

---

> department for reinstatement; provided, that if the appointing power has notified the employee of his or her automatic resignation, any request for reinstatement must be made in writing and filed within 15 days of the service of notice of separation. . . . Reinstatement may be granted only if the employee makes a satisfactory explanation to the department as to the cause of his or her absence and his or her failure to obtain leave thereof, and the department finds that he or she is ready, able, and willing to resume the discharge of the duties of his or her position, or if not, that he or she has obtained the consent of his or her appointing power to a leave of absence to commence upon reinstatement.

against you in the handling of this issue based on your age and in retaliation for a prior complaint you filed against a CSEA employee. The amended charge states that in September, 1992, you complained about the negligent handling of a grievance by Karen Cole, a CSEA representative. Ms. Cole apparently filed an unfair practice charge on your behalf without your knowledge or consent. You complained about this conduct to Mr. Guilamino and Yolanda Solari. You further allege that upon meeting Ms. Seagraves for the first time she remarked that she "knew" of you, citing the numerous problems you had within your unit. Additionally, you state that in 1992, CSEA representative Sandy Davidson told you CSEA would not represent you unless you became a member of the organization.

The amended charge also alleges that under Government Code section 19996 you had a property interest in your position at Caltrans, and were denied due process in not being able to seek reinstatement. You also assert that dismissal under Government Code section 19996 requires your removal from all state employment lists, making Ms. Seagraves contention that you could be rehired by another State agency a lie. Your also cite Doyle v. Miller (1953) 114 Cal.App.2d 347, for the contention that you could not be removed from your position without cause, and an opportunity for a full hearing.

Finally, you allege CSEA stalled in handling your problems with Caltrans and caused you to be out of work. You contend CSEA acted in bad faith and in a negligent manner with regard to your problems with Caltrans, and as such violated the duty of fair representation.

Based on the above stated facts, and assuming your facts to be true, the charge fails to state a prima facie violation of the duty of fair representation, and therefore must be dismissed.[3]

As fully set forth in my January 10, 1997, letter, and explained during our telephone conversation on January 15, 1997, CSEA does not owe you a duty of fair representation in noncontractual administrative proceedings. The duty of fair representation is limited to contractually based remedies under the union's exclusive control. Thus, PERB will dismiss charges based on alleged union failures to pursue noncontractual administrative or

---

[3] The amended charge also requests an additional extension of time so that you may fully investigate the case law cited in my January 10, 1997, letter and to provide more information. As I have already granted you two extensions and have fully cited the applicable case law, your request for more time is denied.

judicial relief. (California Union of Safety Engineers (John) (1995) PERB Decision No. 1064-S (no duty of fair representation obligation attached to disciplinary matter before SPB); San Francisco Classroom Teachers Association (Chestangue) (1985) PERB Decision No. 544 (association need not represent teacher in a mental illness proceeding under the Education Code).)

To the extent that your charge alleges CSEA failed to fairly represent you with regard to the "Coleman" hearing and the subsequent settlement attempt, the charge fails to state a prima facie case. Additionally, to the extent your charge alleges CSEA failed to fairly represent you with regard to the filing of a writ of mandate, the charge is dismissed.

The amended charge cites Government Code section 19996 and subsequent case law under that section, for the proposition that you were denied due process in the loss of your job with Caltrans. However, you were not "terminated" under Government Code section 19996, but instead "automatically resigned" under Government Code section 19996.2. When the state exercises its statutory authority under Government Code section 19996.2(a) to treat an employee's unexcused absence from state employment for five consecutive working days as an "automatic resignation", the state must give notice to the employee of the facts supporting the resignation and an opportunity to respond. (Coleman v. Department of Personnel Administration (1991) 52 Cal.3d 1102, 1122-23.) If the employee challenges the accuracy of the state's factual basis, the state must, as soon as practicable, give the employee an opportunity to present his or her version of the facts in front of a neutral fact finder. (Id.) Pursuant to Government Code section 19996.2, as quoted above, in order to proceed to a "Coleman" hearing, the employee must file a timely formal appeal of the resignation with the Department of Personnel Administration and be ready, willing and able to report to work. In the instant case, a "Coleman" hearing was not held, as you were not ready, willing and able to report to work and continue your prior job duties. Although you deny you were AWOL, stating you telephoned your supervisor numerous times, such a factual assertion does not alter the provision, its requirements, or CSEA's duty thereunder.

As stated above, PERB will dismiss charges based on alleged union failures to pursue noncontractual administrative relief. Additionally, although CSEA chose to represent you prior to the "Coleman" hearing, PERB's jurisdiction is limited to examining CSEA's role as an exclusive representative. Thus, PERB cannot pass judgment on CSEA's duties which may arise by virtue of its fiduciary duty to its members outside the exclusive representative setting. (California State Employees Association

(Parisi) (1989) PERB Decision No. 733-S.) For this reason, your assertion that CSEA failed to fairly represent you with regard to the "Coleman" hearing, the settlement and the writ of mandate are dismissed.

Assuming, however, CSEA owed you a duty of fair representation following your automatic resignation, the charge fails to state a prima facie violation.[4] Charging Party has alleged that the exclusive representative denied Charging Party the right to fair representation guaranteed by Dills Act section 3519.5(b). The duty of fair representation imposed on the exclusive representative extends to grievance handling. (Fremont Teachers Association (King) (1980) PERB Decision No. 125; United Teachers of Los Angeles (Collins) (1982) PERB Decision No. 258.) In order to state a prima facie violation of this section of EERA, Charging Party must show that the Association's conduct was arbitrary, discriminatory or in bad faith. In United Teachers of Los Angeles (Collins). the Public Employment Relations Board 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. [Citations.]
>
> A union may exercise its discretion to determine how far to pursue a grievance in the employee's behalf as long as it does not arbitrarily ignore a meritorious grievance or

[4] Page 8 of the amended charge alleges I failed to inform you of the necessary elements of a prima facie violation of the duty of fair representation. Such an allegation is untrue. Pages 5, 6, and 7, of my January 10, 1997, letter fully set forth the elements necessary for a prima facie violation, stating in part at page 5:

> In order to state a prima facie violation of this section of EERA, Charging Party must show that the Association's conduct was arbitrary, discriminatory or in bad faith.

The letter goes on to explain the meaning of that standard, citing numerous PERB cases. Moreover, during our January 15, 1997, telephone conversation, I explained in detail the elements necessary to state a prima facie case and provided you with relevant case cites.

> 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. (Emphasis added.)" [Reed District Teachers Association. CTA/NEA (Reyes) (1983) PERB Decision No. 332, p. 9, citing Rocklin Teachers Professional Association (Romero) (1980) PERB Decision No. 124.]

The amended charge and the original charge contain a number of factual inconsistencies, including your assertion in the amended charge that Mr. George never informed you a hearing was necessary in order to return to work at Caltrans. Indeed, Caltrans letter and your subsequent allegations demonstrate you were aware a hearing was necessary under Government Code section 19996.2. However, assuming your facts as true, you further allege CSEA: (1) failed to explain the Coleman hearing process; (2) informed you that Caltrans did not want you back; (3) failed to inform you the settlement agreement was nonnegotiable; (4) coerced you into seeking retirement benefits; (5) stalled in the handling of your issues with Caltrans; and (6) discriminated against you based on your age and in retaliation for your complaints against CSEA representatives. With regard to allegations 1 through 6 above, the charge fails to state a prima facie case.

The amended charge alleges CSEA stalled in the handling of your problems with Caltrans and failed to keep you apprised of the status. However, the charge fails to demonstrate CSEA's handling of your problems was without a rational basis or devoid of honest judgment. From the date you contacted CSEA in early December until the date CSEA presented you a settlement agreement, less than three months elapsed. Thus, although CSEA did not work fast enough for your satisfaction, the charge does not demonstrate CSEA's handling was devoid of honest judgment. You further allege CSEA failed to file a timely appeal of your resignation and failed to inform you that the statute of limitations was not tolled during the negotiation process. As stated in my January 10, 1997, letter, CSEA did not appeal the automatic resignation

as you did not wish to return to your unit. Moreover, even if CSEA's conduct was negligent, such a finding does not result in a violation of the duty of fair representation. A breach of the duty of fair representation is not stated merely because a union negligently forgets to file a timely appeal. (San Francisco Classroom Teachers Association (Bramell) (1984) PERB Decision No. 430.) Mere negligence by a union in grievance handling does not constitute a breach of the duty of fair representation. (California School Employees Association (1984) PERB Decision No. 427.)

With regard to your allegation that CSEA coerced you into seeking retirement benefits and failed to inform you the settlement agreement was nonnegotiable, the charge again fails to state a prima facie case. The amended charge alleges CSEA coerced you into seeking retirement benefits in lieu of returning to your position at Caltrans. However, neither the original charge nor the amended charge present any evidence of such coercion. CSEA merely suggested you consider retirement rather than returning to a unit you had stated you wished to stay away from. Moreover, you subsequent actions in travelling to the Public Employees Retirement System's (PERS) office and the filing of the appropriate paperwork do not demonstrate CSEA forced you into accepting retirement. Additionally, the amended charge alleges CSEA failed to inform you the settlement conditions were nonnegotiable. Upon receiving the settlement agreement, you chose not to sign it as you did not want to drop all charges you had pending against Caltrans. Ms. Seagraves informed you that because you failed to sign the settlement agreement, CSEA would no longer represent you. The amended charge does not present any facts demonstrating CSEA's refusal to continue to represent you after your rejection of the settlement was arbitrary or in bad faith.

You allege CSEA discriminated against based on your age and in retaliation for your complaints against CSEA representatives. As stated in the January 10, 1997, letter, PERB lacks jurisdiction over federal and state claims based on age discrimination, and thus your allegation that CSEA discriminated against you based on your age is dismissed.

With regard to your assertion that CSEA retaliated against you based on prior complaints, the charge again fails to demonstrate a prima facie case. To demonstrate a violation of Dills Act section 3519.5(b), the charging party must show that: (1) the employee exercised rights under the Dills Act; (2) the employee organization had knowledge of the exercise of those rights; 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; Department of Developmental Services (1982) PERB Decision No. 228-S; California State University (Sacramento) (1982) PERB Decision No. 211-H.)

Although the timing of the employee organization's adverse action in close temporal proximity to the employee's protected conduct is an important factor, it does not, without more, demonstrate the necessary connection or "nexus" between the adverse action and the protected conduct. (Moreland Elementary School District (1982) PERB Decision No. 227.) Facts establishing one or more of the following additional factors must also be present: (1) the employee organization's disparate treatment of the employee; (2) the employee organization's departure from established procedures and standards when dealing with the employee; (3) the employee organization's inconsistent or contradictory justifications for its actions; (4) the employee organization's failure to offer the employee justification at the time it took action or the offering of exaggerated, vague, or ambiguous reasons; or (5) any other facts which might demonstrate the employer's unlawful motive. (Novato Unified School District. supra; North Sacramento School District (1982) PERB Decision No. 264.) As presently written, this charge fails to demonstrate any of these factors. The mere fact that Charging Party complained about a CSEA representative five years ago, and Ms. Seagraves acknowledgment that she had heard about Charging Party's problems, do not demonstrate any of CSEA's actions or inactions were retaliatory or discriminatory. Thus, the charge fails to state a prima facie violation of Dills Act section 3519.5(b) .

Finally, Charging Party also asserts that in 1992, CSEA representative Sandy Davidson refused to provide Charging Party representation because she was not a union member. Such an allegation must be dismissed as it falls outside PERB's statute of limitations. Government Code section 3514.5(a)(1) states the board shall not "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." As the alleged statement was made five years ago, it is clearly outside of PERB's jurisdiction.

Therefore, I am dismissing the charge based on the facts and reasons contained herein and in my January 10, 1997, 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 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
Kristin L. Rosi
Regional Attorney

Attachment

cc: Catherine Kennedy, CSEA

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
177 Post Street, 9th Floor
San Francisco, CA 94108-4737
(415) 439-6940

January 10, 1997

Gloria A. Carrillo

Re: **WARNING LETTER**
Gloria A. Carrillo v. California State Employees Association
Unfair Practice Charge No. S-CO-189-S

Dear Ms. Carrillo:

The above-referenced unfair practice charge alleges the California State Employees Association (CSEA) violated its duty of fair representation when it failed to adequately represent you in your employment with the State of California. This conduct is alleged to violate Government Code section 3519.5(b) of the Ralph C. Dills Act (Dills Act or Act).

Investigation of the charge revealed the following. Prior to March 1996, you were employed by the California Department of Transportation (Caltrans) and were exclusively represented by CSEA in bargaining unit 1.

On or about October 12, 1995, while hospitalized, you received two letters from Caltrans, informing you that they considered you to be absent without leave (AWOL) pursuant to Government Code section 19996.2(a).[1] The letters further stated you were not

[1] §19996.2 states in pertinent part:

> Absence without leave, whether voluntary or involuntary, for five consecutive days is an automatic resignation from state service as of the last date on which the employee worked. A permanent or probationary employee may within 90 days of the effective date of such separation, file a written request with the department for reinstatement; provided, that if the appointing power has notified the employee of his or her automatic resignation, any request for reinstatement must be made in writing and filed within 15 days of the

authorized to be on medical leave and that you had failed to inform Caltrans as to why you were not at work. Upon receiving these letters, you contacted CSEA representative Charles George. Mr. George informed you that he would contact CalTrans and attempt to resolve the matter. Thereafter, Mr. George contacted you and informed you that your AWOL status had to be resolved at a formal hearing, to be scheduled when you were well enough to attend. Such a hearing is frequently referred to as a "Coleman" hearing.

On or about December 6, 1995, you attempted to contact Mr. George to schedule your formal hearing. After several attempts to contact Mr. George, you were informed that he no longer worked for CSEA. Upon learning this fact, you contacted Caltrans Personnel Services and spoke with Lynn Brazelton about arranging a hearing date. Mr. Brazelton informed you that you must have CSEA representation at the hearing and scheduled the hearing for the following day.

Following the scheduling of the hearing, you contacted CSEA seeking representation and were informed that Gretchen Seagraves would serve as your representative. Ms. Seagraves requested that you meet with her prior to the hearing to discuss your situation. During your meeting with Ms. Seagraves and her supervisor, Frank Guiliamino, you were informed that the hearing served a purpose only if you were fit enough to return to work. As you did not appear well enough to return to work, Ms. Seagraves suggested you not attend the hearing.

Also during the December 7, 1995 meeting, Ms. Seagraves inquired as to whether or not you wished to return to your particular office, as you had encountered problems in this office prior to your illness. You informed Ms. Seagraves that you did not want to return to your department. Ms. Seagraves also suggested you consider disability retirement, which you agreed Ms. Seagraves

---

> service of notice of separation. . . . Reinstatement may be granted only if the employee makes a satisfactory explanation to the department as to the cause of his or her absence and his or her failure to obtain leave thereof, and the department finds that he or she is ready, able, and willing to resume the discharge of the duties of his or her position, or if not, that he or she has obtained the consent of his or her appointing power to a leave of absence to commence upon reinstatement.

should pursue. Ms. Seagraves stated she would propose to Caltrans at the hearing, that the agency place you on Disability Retirement and allow you to collect Non-Industrial Disability (NDI) leave during your absence. The charge further alleges that you assumed, however, that the hearing would not take place until you were ready to return to work. Additionally, you allege you were not informed that the hearing was a "Coleman" hearing, and instead were informed that the hearing was to determine your fitness to return to work. After meeting with Caltrans representatives, Ms. Seagraves informed you that Caltrans agreed to place you on Non-Industrial leave and would be filing the appropriate paperwork regarding this decision.

On or about December 21, 1995, you contacted the Employment Development Department (EDD) to inquire about the status of your disability payments. You were informed by an EDD representative that Caltrans had yet to file the appropriate paperwork, still considering you to be on AWOL status. On this same date, you contacted Ms. Seagraves and informed her of EDD's response. Ms. Seagraves looked into the problem and assured you that the miscommunication would be taken case of as soon as possible.

On or about January 6, 1996, Mr. Guiliamino telephoned you and informed you that CSEA would be sending you the necessary paperwork to apply for disability retirement. You were further informed that the paperwork needed to be completed within 120 days from the date of harm. In mid-January 1996, you went to the Public Employees Retirement System (PERS) office to file the appropriate paperwork. A PERS employee suggested you apply for both Disability Retirement and Service Retirement, stating the Service Retirement would allow you to receive payments faster than through Disability Retirement.

Following this period of time, you met with CSEA representatives regarding your return to work at Caltrans. Ms. Seagraves informed you that Caltrans did not want you back, and although you insisted you had a right to return to Caltrans, you proposed a settlement with your employer. You stated you would not seek reemployment with Caltrans if Caltrans agreed to keep the agreement out of your State personnel file and promised to place you on NDI leave until your Disability Retirement was approved.

On or about mid-February 1996, you met with Mr. Guiliamino, Ms. Seagraves and a CSEA attorney. During this meeting, the CSEA attorney informed you that you should accept the terms Caltrans had offered (NDI leave until your Disability Retirement was approved), as your chances on appeal seemed slim. You allege you did not know an appeal was necessary, as you believed CSEA to be negotiating on your behalf without the "Coleman" hearing. You

also allege that an appeal was filed by CSEA after the statute of limitations had expired, and without your knowledge.

During this meeting, you agreed that Ms. Seagraves should draft a settlement agreement outlining the terms stated above. That is, you agreed not to return to Caltrans provided no evidence of the agreement appear in your personnel file and provided that Caltrans return your personal items still at your worksite. CSEA also provided you prior case law to consider in settling this dispute with Caltrans. Ms. Seagraves drafted the settlement agreement and forwarded a copy for you to sign. Upon reading the agreement, you determined the terms were not favorable to you and refused to sign the settlement. Instead, you made comments on the settlement agreement and returned it to Ms. Seagraves. You also requested Ms. Seagraves' assistance in seeking the return of your leave credits yet to be paid out.

Approximately two weeks after returning the settlement agreement, you received a letter from Ms. Seagraves informing you that CSEA would no longer be representing you, as you failed to sign the settlement agreement. In mid-March, 1996, Mr. Guiliamino sent you a letter stating the appeal of your "Coleman" hearing was denied and informing you that CSEA would seek a writ of mandate on your behalf. Such action was not taken by CSEA.

Based on the above stated facts, the charge, as presently written, fails to state a prima facie violation of the duty of fair representation for the reasons stated below.

Charging Party has alleged that the exclusive representative denied Charging Party the right to fair representation guaranteed by EERA section 3544.9 and thereby violated section 3543.6(b). However, the duty of fair representation is limited to contractually based remedies under the union's exclusive control. Thus, PERB will dismiss charges based on alleged union failures to pursue noncontractual administrative or judicial relief. (California Union of Safety Engineers (John) (1995) PERB Decision No. 1064-S (no duty of fair representation obligation attached to disciplinary matter before SPB); San Francisco Classroom Teachers Association (Chestangue) (1985) PERB Decision No. 544 (association need not represent teacher in a mental illness proceeding under the Education Code).)

To the extent that your charge alleges CSEA failed to fairly represent you with regard to the "Coleman" hearing and its subsequent appeal, the charge fails to state a prima facie case.

When the state exercises its statutory authority under Government Code section 19996.2(a) to treat an employee's unexcused absence

from state employment for five consecutive working days as an "automatic resignation", the state must give notice to the employee of the facts supporting the resignation and an opportunity to respond. (Coleman v. Department of Personnel Administration (1991) 52 Cal.3d 1102, 1122-23.) If the employee challenges the accuracy of the state's factual basis, the state must, as soon as practicable, give the employee an opportunity to present his or her version of the facts in front of a neutral fact finder. (Id.) Pursuant to Government Code section 19996.2, as quoted above, in order to proceed to a "Coleman" hearing, the employee must file a timely formal appeal of the resignation with the Department of Personnel Administration and be ready, willing and able to report to work. In the instant case, a "Coleman" hearing was not held, as you were not ready, willing and able to report to work and continue your prior job duties.

As stated above, PERB will dismiss charges based on alleged union failures to pursue noncontractual administrative relief. Additionally, although CSEA chose to represent you prior to the "Coleman" hearing, PERB's jurisdiction is limited to examining CSEA's role as an exclusive representative. Thus, PERB cannot pass judgment on CSEA's duties which may arise by virtue of its fiduciary duty to its members outside the exclusive representative setting. (California State Employees Association (Parisi) (1989) PERB Decision No. 733-S.) For this reason, your assertion that CSEA failed to fairly represent you with regard to the "Coleman" hearing and the writ of mandate fail to state a prima facie case.

Assuming, however, CSEA owed you a duty of fair representation in the matters following your "automatic resignation" in October of 1995, the charge fails to state a prima facie case. In order to state a prima facie violation of this section of EERA, Charging Party must show that the Association's conduct was arbitrary, discriminatory or in bad faith. In United Teachers of Los Angeles (Collins), the Public Employment Relations Board 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. [Citations.]
>
> A union may exercise its discretion to determine how far to pursue a grievance in 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. (Emphasis added.)" [Reed District Teachers Association. CTA/NEA (Reyes) (1983) PERB Decision No. 332, p. 9, citing Rocklin Teachers Professional Association (Romero) (1980) PERB Decision No. 124.]

The charge fails to demonstrate CSEA's conduct was without a rational basis or devoid of honest judgment. CSEA provided you with advice regarding the Coleman hearing and the proposed settlement options. CSEA representatives negotiated with Caltrans on your behalf and drafted a settlement agreement containing terms you had agreed to, although a copy of the settlement agreement was not provided with the charge. In late February 1996, you rejected the settlement agreement CSEA drafted and CSEA informed you that they would no longer represent you in this matter. You do not assert facts demonstrating CSEA's actions in representing you or their refusal to continue to represent you after your rejection of the settlement was arbitrary, discriminatory or in bad faith.[2]

Additionally, the charge points to CSEA's filing of the appeal after the statute of limitations as evidence of CSEA's failure to represent you. However, a breach of the duty of fair representation is not stated merely because a union negligently forgets to file a timely appeal. (San Francisco Classroom Teachers Association (Bramell) (1984) PERB Decision No. 430.) Mere negligence by a union in grievance handling does not constitute a breach of the duty of fair representation. (California School Employees Association (1984) PERB Decision No.

---

[2] Section 6(c) of the unfair practice charge states CSEA also discriminated against Charging Party based on her national origin and gender. PERB lacks jurisdiction over federal and state claims based on such discrimination. Additionally, the charge narrative does not include any facts demonstrating discriminatory behavior on CSEA's part.

427.) Moreover, the appeal to request a "Coleman" hearing is predicated upon an employee's ability and willingness to return to their prior position. As stated in the charge, you informed CSEA that you did not want to return to Caltrans, and instead would seek Disability Retirement. Such a decision makes a written appeal for a "Coleman" hearing unnecessary. Thus, CSEA's action in filing an untimely request for a "Coleman" hearing is not arbitrary.

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 additional facts which would correct the deficiencies explained above, please amend the charge. 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 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 January 17. 1997. I shall dismiss your charge. If you have any questions, please call me at (415) 439-6940.

Kristin L. Rosi
Regional Attorney