

The Board has reviewed the entire record in this case, including the original and amended unfair practice charge, the Board agent's warning and dismissal letters, Opong-Mensah's appeal and CAPS' response thereto. The Board finds the warning and dismissal letters to be free of prejudicial error and adopts them as the decision of the Board itself.

The unfair practice charge in Case No. SA-CO-205-S is DISMISSED WITHOUT LEAVE TO AMEND.

Members Dyer and Jackson joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD



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



July 16, 1998

Kofi Opong-Mensah

Re: Kofi Opong-Mensah v. California Association of Professional
Scientists
Unfair Practice Charge No. SA-CO-205-S
DISMISSAL LETTER

Dear Mr. Opong-Mensah:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board on January 13, 1998. The charge alleges that the California Association of Professional Scientists (CAPS) violated the Ralph C. Dills Act, Government Code section 3519.5(b), by failing to fairly represent you concerning your termination in proceedings before the Superior Court.

I indicated to you, in my attached letter dated May 11, 1998, 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 May 19, 1998, the charge would be dismissed.

At your request, the charge was placed in abeyance on May 26, 1998. I met with you on June 30, 1998, to discuss the status of this charge. On July 1, 1998, the charge was withdrawn from abeyance and you were notified that you should file an amended charge by July 14, 1998. On July 13, 1998, I received an amended charge.

On July 15, 1998, we discussed the allegations in this charge. You continue to allege that CAPS failed to adequately represent you in your termination proceedings in the Superior Court and refused to assist you in your claims for unemployment benefits and non-industrial disability benefits (NDI). You claim that CAPS' failure to represent you was discriminatory.

As I discussed in the attached warning letter, an exclusive representative does not owe a duty of fair representation to a bargaining unit member in a forum over which the union does not exclusively control the means to a particular remedy.

(California State Employees Association (Parisi) (1989) PERB Decision No. 733-S.) This is because a unit member may seek representation outside of the exclusive representative in extra-contractual forums. Accordingly, the Board has held that the duty of fair representation does not attach to an exclusive representative in proceedings involving a "Coleman" hearing and in filing a writ of mandate in the Superior Court to challenge a denial of reinstatement. (California State Employees Association (Carrillo) (1997) PERB Decision No. 1199-S.) Nor does the duty of fair representation require an exclusive representative to assist you in obtaining unemployment benefits or NDI. (California School Employees Association (LeFountain) (1992) PERB Decision No. 925.) Because CAPS does not owe you a duty of fair representation in these forums, your charge fails to demonstrate a prima facie violation of the Dills Act on the basis that CAPS breached its duty of fair representation to you. Accordingly, the charge must be dismissed.

Based upon the allegations in your amended charge, you may also be alleging that CAPS discriminated against you in failing to represent you.

To demonstrate that an exclusive representative discriminated against a charging party in violation of Dills Act section 3519.5(b), the charging must show that: (1) the unit member exercised rights under the Dills Act; (2) the exclusive representative had knowledge of the exercise of those rights; and (3) the exclusive representative imposed or threatened to impose reprisals, discriminated or threatened to discriminate, or otherwise interfered with, restrained or coerced the unit member 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; California Union of Safety Employees (John) (1994) PERB Decision No. 1064-S.)

Although the timing of the exclusive representative's adverse action in close temporal proximity to the unit member'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) disparate treatment of the unit member; (2) departure from established procedures and standards when dealing with the unit member; (3) inconsistent or contradictory justifications for its actions; (4) cursory investigation of the unit member's misconduct; (5) failure to offer the unit member

justification at the time it took action or the offering of exaggerated, vague, or ambiguous reasons; or (6) any other facts which might demonstrate the exclusive representative's unlawful motive. (Novato Unified School District, supra; North Sacramento School District (1982) PERB Decision No. 264.) As presently-written, this charge fails to allege facts which demonstrate that CAPS refused to represent you because of your participation in protected conduct. Therefore, your charge does not state a prima facie case of discrimination in violation of the Dills Act.

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

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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

Robin E. Wright
Regional Attorney

Attachment

cc: Steven B. Bassoff

PUBLIC EMPLOYMENT RELATIONS BOARD



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



May 11, 1998

Kofi Opong-Mensah

Re: Kofi Opona-Mensah v. California Association of Professional
Scientists
Unfair Practice Charge No. SA-CO-205-S
WARNING LETTER

Dear Mr. Opong-Mensah:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board on January 13, 1998. The charge alleges that the California Association of Professional Scientists (CAPS) violated the Ralph C. Dills Act, Government Code section 3519.5(b), by failing to fairly represent you concerning your termination in proceedings before the Superior Court.

Investigation of the charge revealed the following information. You were employed by the Department of Food and Agriculture as an Agricultural Chemist II. In April 1996, you were notified that you had been separated from your employment based on a charge that you were absent without leave (AWOL).

A "Coleman" hearing was held before the Department of Personnel Administration (DPA) in June 1996 to consider your reinstatement. John Sikora, CAPS Labor Relations Consultant, represented you at the hearing. Following the hearing, DPA issued a decision denying your reinstatement.

At your request, CAPS agreed, to challenge the DPA decision with a writ of mandate in Superior Court. Steven Bassoff, CAPS Labor Relations Counsel, was assigned to the case. A hearing on the writ of mandate was held in Superior Court on September 19, 1997. The court denied the writ, in effect upholding the DPA decision and denying your reinstatement.

Your charge alleges that Bassoff failed to fairly represent you in the Superior Court proceedings. Specifically, you allege that Bassoff failed to meet with you to discuss the case; ignored your discovery questions and the materials you prepared for the case; failed to use any of your proposed witnesses; refused your request to obtain certain documents through discovery; failed to rebut false statements made by opposing counsel; and failed to introduce and argue certain facts. The charge also alleges that

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CAPS denied your request to appeal the trial courts' decision to the court of appeal.

Based on the facts stated above your charge fails to demonstrate a prima facie violation of the Dills Act on the basis that CAPS breached its duty of fair representation to you.

Under the Dills Act, an exclusive representative, selected by the bargaining unit members, is given the exclusive right to deal with the employer in matters involving contract negotiations, administration of the collective bargaining agreement and grievance handling. Since the union has the exclusive authority to deal with the employer over these matters, the Dills Act imposes upon an exclusive representative a duty to fairly represent all bargaining unit members in these areas.

However, an exclusive representative does not owe a duty of fair representation to a unit member in a forum over which the union does not exclusively control the means to a particular remedy. (California State Employees Association (Parisi) (1989) PERB Decision No. 733-S.) This is because a unit member may seek representation outside of the exclusive representative in extra-contractual forums. Accordingly, the Board has held that the duty of fair representation does not attach to an exclusive representative in proceedings involving a "Coleman" hearing and in filing a writ of mandate in the Superior Court to challenge a denial of reinstatement. (California State Employees Association (Carrillo) (1997) PERB Decision No. 1199-S.) For this reason, your assertion that CAPS failed to fairly represent you in either the "Coleman" hearing or the writ of mandate before the Superior Court fails to state a prima facie violation of the duty of fair representation.

Even, assuming CAPS owed you a duty of fair representation concerning the AWOL proceedings, the charge fails to state a prima facie case. To state a prima facie violation of the duty of fair representation under the Dills Act, a charging party must show that the exclusive representative's conduct was arbitrary, discriminatory or in bad faith. (Rocklin Teachers Professional Association (Romero) (1980) PERB Decision No. 124.) Mere negligence or poor judgment does not demonstrate a breach of the duty of fair representation. (United Teachers of Los Angeles (Collins) (1982) PERB Decision No. 258.) To demonstrate arbitrary conduct, 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), supra, PERB Decision No. 124.]

You allege in your charge that Bassoff failed to fairly represent you in the Superior Court proceedings by failing to meet with you to discuss the case; ignoring your discovery questions and the materials you prepared for the case; failing to use any of your proposed witnesses; refusing your request to obtain certain documents through discovery; failing to rebut false statements made by opposing counsel; and failing to introduce and argue certain facts.

However, the Board has held that a union's decision to conduct an arbitration hearing contrary to the wishes of the charging party, by failing to meet with the charging party before the hearing and failing to present certain evidence, does not violate the duty of fair representation. (United Teachers-Los Angeles (1992) PERB Decision No. 932.) Nor does a union's refusal to call witnesses or subpoena records requested by the charging party demonstrate a breach of the duty of fair representation. (California Faculty Association (Pomerantsev) (1988) PERB Decision No. 698-H; Los Angeles City and County School Employees Union (1987) PERB Decision No. 645.)

The charge fails to allege facts which demonstrate that Bassoff's decision to conduct the hearing in a manner contrary to your wishes was arbitrary, discriminatory or in bad faith. Accordingly, the charge fails to state a prima facie case and must be dismissed.

Based on the facts you provided and the above discussion, 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 have the case number written on the top right hand corner of the charge form. The amended charge must be served on the respondent's representative and the original proof of service must be filed

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with PERB. If I do not receive an amended charge or withdrawal from you before May 19, 1998, I shall dismiss your charge. If you have any questions, please call me at (916) 322-3198, ext. 305.

Robin E. Wright
Regional Attorney