STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

LANA WILSON-COMBS, Charging Party, v. STATE OF CALIFORNIA (DEPARTMENT OF CONSUMER AFFAIRS), Respondent.	Case No. SA-CE-1451-S PERB Decision No. 1762-S April 15, 2005

Appearances: Chad Carlock, Attorney, for Lana Wilson-Combs; State of California (Department of Personnel Administration) by Linda D. Buzzini, Labor Relations Counsel, for State of California (Department of Consumer Affairs).

Before Duncan, Chairman; Whitehead and Shek, Members.

DECISION

WHITEHEAD, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Lana Wilson-Combs (Wilson-Combs) of a Board agent's dismissal of her unfair practice charge (attached). The unfair practice charge alleged that the State of California (Department of Consumer Affairs) (State or DCA) violated the Ralph C. Dills Act (Dills Act)[1] by refusing to meet with her and her private attorney, and by issuing a counseling memorandum to her. Wilson-Combs alleged that this conduct constituted a violation of Dills Act sections 3515, 3517 and 3519.

The Board has reviewed the entire record in this matter, including the unfair practice charge, the amended unfair practice charge, the Board agent's warning and dismissal letters,

[1]The Dills Act is codified at Government Code section 3512, et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

Wilson-Combs' appeal, and the State's response to Wilson-Combs' appeal. As a result of this review, the Board affirms the Board agent's dismissal consistent with the discussion below.[2]

BACKGROUND

Wilson-Combs works for DCA with the Bureau of Automotive Repairs (BAR). In February 2004, she filed a whistleblower complaint with the California State Auditor regarding what she believed to be improper activities by management. Shortly thereafter, the State relocated Wilson-Combs from headquarters downtown to the BAR office in Rancho Cordova. She expressed concerns to management who subsequently relocated three other employees to the BAR office in Rancho Cordova. However, two of those employees have been allowed to work at headquarters one day per week or work in Rancho Cordova only on certain days; Wilson-Combs asserts that she was not given the same opportunities. Sometimes she is the only DCA employee at BAR. The California State Employees Association (CSEA) wrote a letter dated July 28, 2004 on her behalf protesting the disparate treatment.[3] But, management has not responded to her concerns. Ultimately, Wilson-Combs retained private counsel and her attorney has requested meetings with management about her concerns at least five times since mid-July but DCA has refused to meet with him.

On September 29, 2004, management insisted that she attend a meeting with her supervisor, Cindy Wymore (Wymore), and forbid her from bringing her attorney. When she stated that she wanted representation, DCA threatened her in writing that she must show up alone for the meeting or would be found insubordinate. When her attorney attempted to attend the meeting anyway, he was turned away by the BAR receptionist. At the meeting, Wilson-

[2]Wilson-Combs' request for oral argument is denied.

[3]This letter was neither attached to the charge nor was additional detail provided as to its substance.

Combs demanded representation and Wymore terminated the meeting. On October 4, 2004, Wymore issued to Wilson-Combs a counseling memorandum regarding her insubordination, willful disobedience and unacceptable attitude. Wilson-Combs claims that the counseling memorandum was issued in retaliation for exercising her right to representation. She claims that she has not received any negative documentation in her personnel file before this memo.

In the amended unfair practice charge, Wilson-Combs further alleges that the adverse actions (relocation and counseling memo) comprised retaliation for participating in training to become a union steward, and, as the only African-American female in the office, because of her race and gender. She also claims that the State is refusing to meet and confer with her and her attorney in violation of Dills Act section 3519(c). The State further notified Wilson-Combs that it will no longer communicate with CSEA because she retained private counsel.

The charge requests that the State be required to meet with Wilson-Combs and her attorney and that the counseling memorandum be removed from her file.

BOARD AGENT'S DISMISSAL

The Board agent analyzed DCA's refusal to meet with Wilson-Combs without her attorney as an alleged violation of the Weingarten[4] rule and found no evidence that Wilson-Combs was required to attend an investigatory interview or denied a request for union representation. He explained that there is no right to representation by private counsel under the Dills Act for a meeting requested by the employer or for discussion of topics requested by the employee. The Board agent thus concluded that Wilson-Combs failed to state a prima facie violation of the Weingarten rule.

[4]Weingarten refers to National Labor Relations Board v. Weingarten (1975) 420 U.S. 251 [88 L.R.R.M. 2689], the Court granted employees the right to representation during disciplinary interviews.

The Board agent also found that Wilson-Combs did not state a prima facie case of retaliation for protected activity. First, PERB does not enforce whistleblower statutes. Second, Wilson-Combs did not provide facts showing that the employer was improperly motivated by conduct protected by the Dills Act. Third, with regard to her alleged union activities, Wilson-Combs did not identify the dates or describe the nature of her union advocacy. She also did not provide facts showing the employer's knowledge of her steward training. Thus, he dismissed the allegation regarding the counseling memorandum.

Finally, with regard to the alleged violation of section 3519(c), the Board agent explained that the employer's duty to bargain is owed to the exclusive representative, not to individual employees. (Oxnard School District (Gorcey and Tripp) (1988) PERB Decision No. 667 (Oxnard).)

Consequently, the Board agent dismissed the charge.

DISCUSSION

Wilson-Combs alleges that the Board agent did not properly investigate her charge, used ex parte communications with the State in rendering his decision, and failed to determine whether the charge should be deferred to arbitration. Under PERB Regulation 32635[5]:

> The Appeal shall:
>
> (1) State the specific issues of procedure, fact, law or rationale to which the appeal is taken;
>
> (2) Identify the page or part of the dismissal to which each appeal is taken;
>
> (3) State the grounds for each issue stated.

Wilson-Combs has not provided any facts supporting these allegations. On the contrary, in its response to her appeal, the State claims that it did not communicate with the Board or Board

[5]PERB regulations are codified at California Code of Regulations, title 8, section 31001, et seq.

agent until this response to Wilson-Combs' appeal.[6] Further, contrary to her assertion on appeal, Wilson-Combs did not allege in her unfair practice charge or amended unfair practice charge that she has filed a grievance involving any of the events at issue. On review of the warning and dismissal letters, we conclude that the Board agent fulfilled the requirements of PERB Regulation 32620[7] for processing a charge.

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[6]The State however filed a notice of appearance before the warning and dismissal letters were issued.

[7]PERB Regulation 32620 provides:

> (a) When a charge is filed, it shall be assigned to a Board agent for processing.
>
> (b) The powers and duties of such Board agent shall be to:
>
> (1) Assist the charging party to state in proper form the information required by section 32615;
>
> (2) Answer procedural questions of each party regarding the processing of the case;
>
> (3) Facilitate communication and the exchange of information between the parties;
>
> (4) Make inquiries and review the charge and any accompanying materials to determine whether an unfair practice has been, or is being, committed, and determine whether the charge is subject to deferral to arbitration, or to dismissal for lack of timeliness.
>
> (5) Dismiss the charge or any part thereof as provided in Section 32630 if it is determined that the charge or the evidence is insufficient to establish a prima facie case; or if it is determined that a complaint may not be issued in light of Government Code Sections 3514.5, 3541.5, 3563.2, 71639.1(c) or 71825(c).
>
> (6) Place the charge in abeyance if the dispute arises under MMBA, HEERA, TEERA, Trial Court Act or Court Interpreter Act and is subject to final and binding arbitration pursuant to a collective bargaining agreement, and dismiss the charge at the conclusion of the arbitration process unless the charging party demonstrates that the settlement or arbitration award is repugnant to the purposes of MMBA, HEERA, TEERA, Trial Court Act or Court Interpreter Act, as provided in section 32661.

Second, Wilson-Combs argues that Dills Act section 3515.5 provides a protected right to self-representation and her right to self-representation was violated when the State refused to meet and confer with her and her attorney. Section 3515.5 provides, in pertinent part:

> Employee organizations shall have the right to represent their members in their employment relations with the state, except that once an employee organization is recognized as the exclusive representative of an appropriate unit, the recognized employee organization is the only organization that may represent that unit in employment relations with the state. Employee organizations may establish reasonable restrictions regarding who may join and may make reasonable provisions for the dismissal of individuals from membership. Nothing in this section shall prohibit any employee from appearing in his own behalf in his employment relations with the state.
> (Emphasis added.)

In Lillebo v. Davis (1990) 222 Cal.App.3d 1421, 1445-1446 [272 Cal.Rptr. 638], the court opined:

> (7) Issue a complaint pursuant to Section 32640.
>
> (c) The respondent shall be apprised of the allegations, and may state its position on the charge during the course of the inquiries. Any written response must be signed under penalty of perjury by the party or its agent with the declaration that the response is true and complete to the best of the respondent's knowledge and belief. Service and proof of service pursuant to Section 32140 are required.
>
> (d) Facts obtained from oral responses that reveal potential deficiencies in the allegations must be communicated to the charging party before dismissal of a charge under Section 32630. The Board agent shall advise the charging party in writing of the deficiencies in the charge in a warning letter, unless otherwise agreed by the Board agent and the charging party. The warning letter shall identify the facts obtained from any response which reveal a deficiency in the charge. Responses which are obtained after the warning letter and which support dismissal of the charge must be communicated to the charging party before the dismissal is issued under Section 32630. The dismissal must identify the deficiencies in the charging party's allegations.

> The declared purposes of the Dills Act do not aid us in supplying meaning to the individualistic portions of these Janus-like statutes, as section 3512 is entirely focused on the establishment of relations between the state employer and union, of a means for selection of unions and a means for certifying the unions as exclusive representatives of their units, and of a means for providing financial support for the unions. Not a word regarding individual representation rights appears. Nor does the Dills Act otherwise provide any affirmative delineation of these rights to "represent" or "appear" in one's own behalf.
>
> In point of fact, the Dills Act makes quite clear what an individual employee *cannot* do effectively when part of an appropriate unit certified by the Public Employment Relations Board . . . with an exclusive representative selected by a majority of the employees in that unit . . . . First, the duty imposed on the Governor to meet and confer regarding terms and conditions of employment is specifically limited to the exclusive representative. (§ 3517.) Second, there is no statutory right to present grievances regarding terms and conditions of employment as determined by the meet-and-confer process; thus individual employees at best have the right to a grievance procedure (in which the employer is bound to respond) only to the extent is is created by the contract negotiated and administered by the union. Hence, in these two primary areas, the employee might attempt to act independently, but nothing requires anyone to pay any attention.
> (Emphasis in *italics* in original; emphasis underlined added.)

Under the court's reasoning, under Section 3515.5, while Wilson-Combs has the right to meet with her employer without the union, the State is not required to meet and confer with her over terms and conditions of employment. PERB reached the same conclusion, holding that the duty to meet and confer is between the exclusive representative and the employer. Thus, individual employees do not have standing to allege the employer failed or refused to meet and confer in good faith. (Oxnard.) Accordingly, we conclude that Wilson-Combs' right to self-representation under the Dills Act does not include the right to be represented by private counsel and meet and confer with the State.

Wilson-Combs also claims that the State violated her Weingarten rights to representation when she was called to a meeting with her supervisor on September 29, 2004.

Wilson-Combs requested to be represented by her attorney at the meeting. PERB adopted the Weingarten rule in Rio Hondo Community College District (1982) PERB Decision No. 260 (Rio Hondo). In order to establish a violation of this right, the charging party must demonstrate: (a) the employee requested representation; (b) for an investigatory meeting; (c) which the employee reasonably believed might result in disciplinary action; and (d) the employer denied the request. (See Redwoods Community College District v. PERB (1984) 159 Cal.App.3d 617 [205 Cal.Rptr. 523] (Redwoods); Fremont Union High School District (1983) PERB Decision No. 301.)

In Rio Hondo, the Board cited with approval Baton Rouge Water Works Company (1979) 246 NLRB 995 [103 LRRM 1056], which provided:

> the right to representation applies to a disciplinary interview, whether labelled investigatory or not, so long as the interview in question is not merely for the purpose of informing the employee that he or she is being disciplined.

In approving the Weingarten rule, the U.S. Supreme Court noted that the National Labor Relations Board would not apply it to "such run-of-the-mill shop-floor conversations as, for example, the giving of instructions or training or needed corrections of work techniques." (Weingarten, quoting Quality Manufacturing Co. (1972) 195 NLRB 197, 199 [79 LRRM 1269, 1271].)

A right to union representation may be held to exist, in the absence of an objectively reasonable fear of discipline, only under "highly unusual circumstances." (Redwoods.) The finding of "highly unusual circumstances" in the Redwoods case was based on the requirement that the employee attend a meeting which she no longer sought over her appeal of a negative performance rating; the fact that the interview was investigatory and formal; the interview was held by a high-ranking official of the employer; and the hostile attitude of the official toward the employee.

Again, Wilson-Combs claims as part of her right to representation under Weingarten that she is entitled to the representation of private counsel, instead of her exclusive representative. However, this right is grounded in the employee's right to "participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations" and the corresponding right of employee organizations to "represent their members in their employment relations with public school employers." (Rio Hondo, p. 16, citing Educational Employment Relations Act (EERA)[8] sec. 3543, which parallels Dills Act sec. 3515, and EERA sec. 3543.1(a), which is virtually identical to Dills Act sec. 3515.5.) We therefore conclude that under the Dills Act, Weingarten does not confer a right to representation by private counsel and consequently, Wilson-Combs did not state a prima facie case for interference, as alleged in the complaint.

Accordingly, we find that Wilson-Combs has not stated a prima facie violation of the Dills Act for violation of her Weingarten rights or for the State's refusal to meet with her or her private counsel.

Next, Wilson-Combs argues on appeal that although she did not specify the dates of her alleged union activity or events showing the State's knowledge of her activity, the Board should presume unlawful motivation for purposes of finding a prima facie case. PERB Regulation 32615(a)(5) requires that a charge must contain "[a] clear and concise statement of the facts and conduct alleged to constitute an unfair practice." Under this regulation, a charge must contain the "who, what, when, where and how" of an unfair practice. (State of California (Department of Food and Agriculture) (1994) PERB Decision No. 1071-S; United Teachers-Los Angeles (Ragsdale) (1992) PERB Decision No. 944.) Mere legal conclusions are insufficient to state a prima facie case. (Ibid.) As a result, we conclude that Wilson-Combs'

[8]EERA is codified at section 3540, et seq.

argument that we must presume the State's unlawful motivation lacks merit. For the above reasons, we find that Wilson-Combs has failed to state a prima facie case of retaliation under the Dills Act.

Wilson-Combs does not address the claims of race or gender discrimination in her appeal. Even if she had, the Board lacks jurisdiction to adjudicate such claims unless they also allege an independent violation of the Dills Act. (State of California (Department of Transportation) (2005) PERB Decision No. 1735-S; Antelope Valley College Federation of Teachers (Stryker) (2004) PERB Decision No. 1624, citing California School Employees Association, Chapter 245 (Waymire) (2001) PERB Decision No. 1448.) Wilson-Combs did not allege facts showing that discrimination on the basis of race or gender also violated the Dills Act. We therefore dismiss this allegation.

ORDER

The unfair practice charge in Case No. SA-CE-1451-S is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chairman Duncan and Member Shek joined in this Decision.

STATE OF CALIFORNIA ARNOLD SCHWARZENEGGER, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
1031 18th Street
Sacramento, CA 95814-4174
Telephone: (916) 327-8386
Fax: (916) 327-6377

November 30, 2004

Chad Carlock, Attorney
260 Russell Boulevard, Suite D
Davis, CA 95616

Re: Lana Wilson-Combs v. State of California (Department of Consumer Affairs)
Unfair Practice Charge No. SA-CE-1451-S
DISMISSAL LETTER

Dear Mr. Carlock:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on October 19, 2004. Lana Wilson-Combs alleges that the State of California (Department of Consumer Affairs) violated the Ralph C. Dills Act (Dills Act)[1] by refusing to meet with her and her attorney and by issuing a counseling memorandum to her

I indicated to you in my attached letter dated November 18, 2004, 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 29, 2004, the charge would be dismissed. I received your amended charge on November 29.

In my prior letter I stated,

> You have provided no facts which demonstrate that Wilson-Combs was required to attend an investigatory meeting or was denied a request for union representation. I am aware of no statutory or case authority interpreting the Dills Act to provide a right to representation by private counsel at a meeting requested by the employer or for discussion of topics requested by the employee.
>
> Nor have you demonstrated that the counseling memorandum was a reprisal for activity protected by the Dills Act.

[1] The Dills Act is codified at Government Code section 3512 et seq. The text of the Dills Act and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

To demonstrate a violation of Dills Act section 3519(a), the charging party must show that: (1) the employee exercised rights under the Dills Act; (2) the employer had knowledge of the exercise of those rights; and (3) the employer 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 (Novato); Carlsbad Unified School District (1979) PERB Decision No. 89.)

Although the timing of the employer's adverse action in close temporal proximity to the employee's protected conduct is an important factor (North Sacramento School District (1982) PERB Decision No. 264), 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 employer's disparate treatment of the employee (State of California (Department of Transportation) (1984) PERB Decision No. 459-S); (2) the employer's departure from established procedures and standards when dealing with the employee (Santa Clara Unified School District (1979) PERB Decision No. 104.); (3) the employer's inconsistent or contradictory justifications for its actions (State of California (Department of Parks and Recreation) (1983) PERB Decision No. 328-S; (4) the employer's cursory investigation of the employee's misconduct; (5) the employer's failure to offer the employee justification at the time it took action or the offering of exaggerated, vague, or ambiguous reasons; (6) employer animosity towards union activists (Cupertino Union Elementary School District) (1986) PERB Decision No. 572.); or (7) any other facts which might demonstrate the employer's unlawful motive. (Novato; North Sacramento School District, supra, PERB Decision No. 264.)

Evidence of adverse action is also required to support a claim of discrimination or reprisal under the Novato standard. (Palo Verde Unified School District (1988) PERB Decision No. 689.) In determining whether such evidence is established, the Board uses an objective test and will not rely upon the subjective reactions of the employee. (Ibid.) In a later decision, the Board further explained that:

The test which must be satisfied is not whether the employee found the employer's action to be adverse, but whether a

> reasonable person under the same circumstances would consider the action to have an adverse impact on the employee's employment. [Newark Unified School District (1991) PERB Decision No. 864; emphasis added; footnote omitted.]
>
> Your charge does not provide facts that demonstrate that the Wilson-Combs engaged in activity protected by the Dills Act, union activity or employment relations activity. This agency does not enforce whistleblower rights as described in your charge. You may have a remedy for that elsewhere. Additionally, you have not demonstrated that the employer was improperly motivated by the employee activity protected by the Dills Act. Without such facts the allegation regarding the counseling memorandum must also be dismissed.

With your amended charge, you state that Ms. Wilson-Combs "also participated in labor relations trainings to become a union steward, and learned about advocating for employee rights." She believes that "the adverse actions described in this narrative were also motivated by retaliation for my active participation in union activities and advocacy." However, you provide no dates or describe her union advocacy. Nor do you provide facts that demonstrate that the employer had any knowledge of her training to become a steward.[2]

You also assert that the employer refused to meet and confer with Ms. Wilson-Combs and her attorney in violation of Government Code section 3519(c). The employer has informed her that, because she retained private counsel, it "will no longer communicate with CSEA regarding [her] complaints." You appear to be contending that the employer also refuses to bargain with CSEA. However, PERB has determined that the employer's obligation to bargain is owed to the exclusive representative union. Individual employees have no standing to file unfair practice charges alleging a violation of the employer's obligation to bargain. Oxnard School District (Gorcey and Tripp) (1988) PERB Decision No. 667.

For these facts and reasons, and those discussed in my letter of November 18, 2004, I am dismissing the charge.

Right to Appeal

Pursuant to PERB Regulations,[3] 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. (Regulation 32635(a).) Any document filed with the Board must contain the case name and number, and the original and five (5) copies of all documents must be provided to the Board.

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[2] In addition, it is not stated that she became a steward or dates of such service.

[3] PERB's Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

A document is considered "filed" when actually received before the close of business (5 p.m.) on the last day set for filing. (Regulations 32135(a) and 32130.) A document is also considered "filed" when received by facsimile transmission before the close of business on the last day for filing together with a Facsimile Transmission Cover Sheet which meets the requirements of Regulation 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Regulations 32135(b), (c) and (d); see also Regulations 32090 and 32130.)

The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95814-4174
FAX: (916) 327-7960

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. (Regulation 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 Regulation 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. A document filed by facsimile transmission may be concurrently served via facsimile transmission on all parties to the proceeding. (Regulation 32135(c).)

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. (Regulation 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
General Counsel

By _
Bernard McMonigle
Regional Attorney

Attachment

cc: Linda D. Buzzini, Labor Relations Counsel

STATE OF CALIFORNIA ARNOLD SCHWARZENEGGER, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
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November 18, 2004

Chad Carlock, Attorney
260 Russell Boulevard, Suite D
Davis, CA 95616

Re: Lana Wilson-Combs v. State of California (Department of Consumer Affairs)
Unfair Practice Charge No. SA-CE-1451-S
WARNING LETTER

Dear Mr. Carlock:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on October 19, 2004. Lana Wilson-Combs alleges that the State of California (Department of Consumer Affairs) violated the Ralph C. Dills Act (Dills Act)[1] by refusing to meet with her and her attorney and by issuing a counseling memorandum to her.

The charge states the following. Wilson-Combs is employed by the DCA at the Bureau of Automotive Repairs. In February 2004, she filed a whistleblower complaint with the California State Auditor regarding what she believed were improper activities by management.

In the following months Wilson-Combs became concerned about changes in her job location and duties. She retained private counsel to discuss these matters with management. DCA management refused to meet with her or her attorney to discuss her concerns about retaliation for her whistleblower complaint. Her attorney had informed her that she was entitled to representation at such meetings because the issues included hours and conditions of employment.

Wilson-Combs was directed to attend a meeting with manager Cindy Wymore on September 29. Wilson-Combs informed management that she was "invoking my right to representation and wished to have her attorney present." She was directed to attend the meeting without her attorney. On September 29, her attorney was denied entrance to the meeting. Wilson-Combs "appeared for the meeting, and invoked my right to counsel, at which time the meeting was terminated by Cindy Wymore." On October 4, Wilson-Combs received a counseling memorandum for insubordination, willful disobedience, and unacceptable attitude.

The charge requests that PERB order the employer to meet with Wilson-Combs and her chosen representative and have the counseling memorandum removed from her file.

[1] The Dills Act is codified at Government Code section 3512 et seq. The text of the Dills Act and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

The PERB is a quasi-judicial administrative agency charged with administering the collective bargaining statutes covering public employees in California, including employees of the State of California under the Dills Act. PERB is charged with preventing and remedying unfair labor practices and interpret and protect the rights and responsibilities of employers, employees and employee organizations under the Acts.

Generally, the Acts administered by PERB, including the Dills Act, grant employees the right to join and participate in unions in order to be represented in labor relations. Under certain conditions the Dills Act provides employees a right to be represented at meetings with the employer.

An employee required to attend an investigatory interview with the employer is entitled to union representation where the employee has a reasonable basis to believe discipline may result from the meeting. PERB adopted the Weingarten[2] rule in Rio Hondo Community College District (1982) PERB Decision No. 260. In order to establish a violation of this right, the charging party must demonstrate: (a) the employee requested representation, (b) for an investigatory meeting, (c) which the employee reasonably believed might result in disciplinary action; and (d) the employer denied the request. (See Redwoods Community College District v. Public Employment Relations Board (1984) 159 Cal.App.3d 617.; Fremont Union High School District (1983) PERB Decision No. 301.)

In Rio Hondo Community College District (1982) PERB Decision No. 260, the Board cited with approval Baton Rouge Water Works Company (1979) 246 NLRB 995, which provided:

> the right to representation applies to a disciplinary interview, whether labeled as investigatory or not, so long as the interview in question is not merely for the purpose of informing the employee that he or she is being disciplined.

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A right to union representation may be held to exist, in the absence of an objectively reasonable fear of discipline, only under "highly unusual circumstances." (Redwoods Community College District v. PERB (1984) 159 Cal.App.3d 617 [205 Cal.Rptr. 523].) The finding of "highly unusual circumstances" in the Redwoods case was based on the requirement that the employee attend a meeting which she no longer sought over her appeal of a negative

[2]In National Labor Relations Board v. Weingarten (1975) 420 U.S. 251 (Weingarten), the Court granted employees the right to representation during disciplinary interviews.

performance rating; the fact that the interview was investigatory and formal; the interview was held by a high-ranking official of the employer; and the hostile attitude of the official toward the employee.

You have provided no facts which demonstrate that Wilson-Combs was required to attend an investigatory meeting or was denied a request for union representation. I am aware of no statutory or case authority interpreting the Dills Act to provide a right to representation by private counsel at a meeting requested by the employer or for discussion of topics requested by the employee.

Nor have you demonstrated that the counseling memorandum was a reprisal for activity protected by the Dills Act.

To demonstrate a violation of Dills Act section 3519(a), the charging party must show that: (1) the employee exercised rights under the Dills Act; (2) the employer had knowledge of the exercise of those rights; and (3) the employer 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 (Novato); Carlsbad Unified School District (1979) PERB Decision No. 89.)

Although the timing of the employer's adverse action in close temporal proximity to the employee's protected conduct is an important factor (North Sacramento School District (1982) PERB Decision No. 264), 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 employer's disparate treatment of the employee (State of California (Department of Transportation) (1984) PERB Decision No. 459-S); (2) the employer's departure from established procedures and standards when dealing with the employee (Santa Clara Unified School District (1979) PERB Decision No. 104.); (3) the employer's inconsistent or contradictory justifications for its actions (State of California (Department of Parks and Recreation) (1983) PERB Decision No. 328-S; (4) the employer's cursory investigation of the employee's misconduct; (5) the employer's failure to offer the employee justification at the time it took action or the offering of exaggerated, vague, or ambiguous reasons; (6) employer animosity towards union activists (Cupertino Union Elementary School District) (1986) PERB Decision No. 572.); or (7) any other facts which might demonstrate the employer's unlawful motive. (Novato; North Sacramento School District, supra, PERB Decision No. 264.)

Evidence of adverse action is also required to support a claim of discrimination or reprisal under the Novato standard. (Palo Verde Unified School District (1988) PERB Decision No. 689.) In determining whether such evidence is established, the Board uses an objective test and will not rely upon the subjective reactions of the employee. (Ibid.) In a later decision, the Board further explained that:

> The test which must be satisfied is not whether the employee found the employer's action to be adverse, but whether a reasonable person under the same circumstances would consider the action to have an adverse impact on the employee's employment. [Newark Unified School District (1991) PERB Decision No. 864; emphasis added; footnote omitted.]

Your charge does not provide facts that demonstrate that the Wilson-Combs engaged in activity protected by the Dills Act, union activity or employment relations activity. This agency does not enforce whistleblower rights as described in your charge. You may have a remedy for that elsewhere. Additionally, you have not demonstrated that the employer was improperly motivated by the employee activity protected by the Dills Act. Without such facts the allegation regarding the counseling memorandum must also be dismissed.

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 that 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 with PERB. If I do not receive an amended charge or withdrawal from you before November 29, 2004, I shall dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Bernard McMonigle
Regional Attorney

BMC