STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CATHY R. HACKETT, et al.,	)	
	)	
Charging Parties,	)	Case No. SF-CO-26-S
	)	
v.	)	PERB Decision No. 1126-S
	)	
CALIFORNIA STATE EMPLOYEES ASSOCIATION,	)	December 6, 1995
	)	
Respondent.	)	
	)	

Appearances: Cathy R. Hackett, Representative, for Cathy R. Hackett, et al.; Nancy T. Yamada, Attorney, for California State Employees Association.

Before Caffrey, Chairman; Garcia and Johnson, Members.

DECISION

GARCIA, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by Cathy R. Hackett, et al. (Charging Parties)[1] and the California State Employees Association (CSEA) to a PERB administrative law judge's (ALJ) proposed decision (attached). The ALJ found that CSEA discriminated against the Charging Parties for participation in protected conduct in violation of section 3519.5(b) of the Ralph C. Dills Act (Dills Act)[2] by: (1) filing written charges,

[1]The Charging Parties are Cathy R. Hackett (Hackett), Jim Hard, Sam Jurado, Dave Weston and Doyle Harris.

[2]The Dills Act is codified at Government Code section 3512 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code. Section 3519.5 provides, in part:

> It shall be unlawful for an employee organization to:

on or about June 17, 1993, for their suspension from membership in CSEA for at least one year; (2) naming them in a civil lawsuit on or about July 2, 1993; and (3) filing written charges against the Charging Parties on or about October 1, 1993, seeking their lifetime suspension from CSEA.

The Board has reviewed the entire record, including the proposed decision, the hearing transcript and exceptions and responses filed by the parties. The Board hereby adopts the ALJ's findings of fact in the proposed decision, pp. 2-18, in its entirety as if fully set forth herein. The Board hereby affirms the ALJ's proposed decision and order consistent with the following discussion.

CHARGING PARTIES' EXCEPTIONS

Charging Parties support the ALJ's finding of a violation, but take exception to the remedy. They argue that the remedy ordered by the ALJ is inadequate and they request the Board to order additional relief; specifically, (1) that the notice of violation also be printed in Pride, a CSEA publication sent to every member and fair share fee payer; and (2) that Charging Parties be awarded attorney fees and costs.

> (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.

CSEA'S STATEMENT OF EXCEPTIONS

CSEA excepts to the ALJ's finding that the Charging Parties were engaged in activities protected by the Dills Act. In June 1992, following their suspension from CSEA, Hackett joined with others to form an organization called the Caucus for a Democratic Union (CDU). Hackett has maintained a high profile in CDU, describing themselves as "founding members" of the caucus and "active and prominent members" of CDU. Even if CDU had not begun a formal decertification process, according to CSEA, its actions are "tantamount to decertification" and are therefore unprotected by the Dills Act. Furthermore, CSEA claims, Charging Parties suffered no adverse action in this case, since no discipline of any kind ever went into effect against them. Also, CSEA argues that the ALJ's finding of unlawful motive was incorrect and that CSEA was justified in imposing discipline on the Charging Parties when they failed to return documents.

CSEA'S RESPONSE TO CHARGING PARTIES' EXCEPTIONS

Assuming arguendo that CSEA is deemed to have committed an unfair labor practice, CSEA supports the ALJ's decision not to award attorney fees and costs to the Charging Parties. The ALJ's posting order is sufficient to inform CSEA members of PERB's ruling.

CHARGING PARTIES' RESPONSE TO CSEA'S EXCEPTIONS

In response to CSEA's claim that the Charging Parties were not engaged in protected activity since their actions were "tantamount to decertification," Charging Parties state that:

> The charging parties are members and stewards in CSEA who wish to strengthen the organization through changing its leadership, structure and policies.
>
> . . . . . .
>
> In fact CDU advocates active membership in CSEA by all state workers covered by its contracts.

Regarding CSEA's claim that Charging Parties suffered no adverse action in this case, Charging Parties respond that:

> Harm has been done in terms of emotional stress, loss of reputation, hours of work preparing a defense, los[t] vacation time and costs for legal counsel. Finally, harm has been done by the violation of the charging parties['] protected, statutory rights, and the chilling effect CSEA's actions have had on all CSEA members [citation]. [Par.] CSEA "bled" the charging parties who have extremely limited resources compared to those controlled by the respondent.

In response to CSEA's exception to the ALJ's finding of unlawful motivation by CSEA, Charging Parties note that CSEA does not fully address each of the various reasons the ALJ used as rationale for his finding.

DISCUSSION

CSEA's Protected Conduct Exception

The main issue for this Board is whether the Charging Parties' conduct is protected by the Dills Act. Dills Act section 3515 plainly guarantees employees the right to "participate" in a union, and the ALJ correctly concluded that the types of participation at issue here were protected.

Although Dills Act section 3515.5[3] and PERB precedent[4] allow unions to abridge that right in certain cases, the ALJ determined the exceptions were not applicable.

As evidenced by the language in the complaint, Novato Unified School District (1982) PERB Decision No. 210 (Novato) is the standard the parties would expect PERB to apply and has long been appropriate for analyzing discrimination allegations. Using the Novato standard, the ALJ reached a result supported by the facts developed through the hearing. After review, the Board finds no reason to overturn his conclusion that Charging Parties' conduct was protected in this case.

In his dissent, Member Caffrey agrees that the Novato standard is appropriate, but would find that Charging Parties engaged in unprotected conduct because he disagrees with the Board's and ALJ's interpretation of Parisot; i.e., that dissident union member activities only become "unprotected" when undertaken in a decertification effort that is "life threatening" to the union. Instead, the dissent expands Parisot:

> . . . to conclude that protected employee activities which reach the level of seriously destabilizing the union, eroding its status

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[3]Dills Act section 3515.5 provides, in pertinent part, that:

> . . . Employee organizations may . . . make reasonable provisions for the dismissal of individuals from membership.

[4]As the ALJ noted in the proposed decision, PERB has recognized an exception in cases of official decertification efforts (California School Employees Association (Parisot) (1983) PERB Decision No. 280 (Parisot)) but no such effort was underway in this case.

> as exclusive representative, and/or threatening its purpose of representing employees as an exclusive representative, are no longer protected, even though a decertification effort is not contemplated, or has not yet been undertaken.

The dissent takes the position that seriously destabilizing activity "would justify a self-protective response by the union" even if decertification is not contemplated. Based on this standard, the dissent concludes that the Charging Parties' activities had "a serious destabilizing effect on CSEA" and thus are not protected.

First, we note that the activities of the Charging Parties in this case were a challenge to the current leadership -- not the union itself. In Parisot the Board clearly stated it would not abdicate its responsibility to determine whether an employee organization was justified in expulsion or discipline of members.

> [In Kimmett 1 we stated that we will not interfere in matters concerning the relationship of members to their union unless they have had a substantial impact on the relationship of the employees to their employer. This does not require a demonstrable impact on the employees' wages, hours or terms and conditions of employment. The relationship of employees to their employer can be manifested through and conditioned by the selection or rejection of a bargaining representative. In Kimmett, we did not intend to abdicate our jurisdictional power to determine whether an employee organization has exceeded its authority under subsection 3543.1(a) to dismiss or otherwise discipline its members. (Emphasis added.)

The broad and subjective standard the dissent attributes to Parisot and other PERB decisions would severely limit a union

member's right to differ, which is the sine qua non of democratic participation. The interpretation suggested by the dissent would confer upon a union's leadership extraordinary power to quell challenges and disagreeable opinions. Such power would effectively transform union leadership into a dictatorial or authoritarian regime.

Moreover, the subjectivity of the standard makes it difficult, if not impossible, for the parties to determine ahead of time at what point protected activity reaches the level of seriously destabilizing the union to permit a self-protective response. Discipline against the employee would be permitted only after the activity takes place and the union, or the Board, concludes the activity is "destabilizing."

Such a broad, subjective approach lends itself to unpredictable results and severely limits opposing views of union members. There is an endless variety of ways dissidents can challenge an incumbent union's leadership without threatening the existence of the union itself. At what point, or level of activity, is it legal or illegal for the union to take self-protective action?

Under the standard established by the Board in Parisot, the employees' activities remain protected and the parties have a much clearer picture of when they are exceeding limits.

CSEA's Adverse Action Exception

The Board does not accept CSEA's contention that no harm was done to Charging Parties. As the ALJ stated, it is well

established that when a party shows a clear intent to take a disputed action against another, the harm occurs at that time and not when the wrongful act is completed. The filing of written charges and a lawsuit against Charging Parties evidenced such an intent by CSEA, and the Board agrees with the ALJ that those actions constituted harm within the meaning of Novato. since:

> A person suspended from [union] membership cannot "participate" in the activities of the Union. In terms of the relationship between an employee and an employee organization, this is the greatest possible harm. [Proposed Decision, p. 28.]

Charging Parties' Remedy Exception

Charging Parties support the ALJ's conclusion but they except to the ALJ's refusal to award them attorneys' fees expended to defend the claims CSEA filed against them. They state that without that relief they will not be made whole.

Although PERB has the authority under Dills Act section 3514.5(c) to "take such affirmative action . . . as will effectuate the policies of [the Act]," the ALJ thoroughly considered the various types of relief sought by Charging Parties. He noted that:

> Attorney's fees and costs of the litigation, including lost time and wages, are not appropriate 'unless there is a showing that the respondent's unlawful conduct has been repetitive and that its defenses are without arguable merit.' (Modesto City Schools and High School District (1985) PERB Decision No. 518.) [Proposed Decision, pp. 34-35.]

The ALJ declined to order attorney's fees because there was no repetitive pattern of violations by CSEA and it could not be

said that CSEA's defense was without arguable merit. The Board defers to the ALJ's judgment on whether or not attorney's fees would have been an appropriate remedy in this case.[5] The ALJ thoroughly discussed the various types of relief sought by Charging Parties and the Board agrees with the remedy ordered.

The Board hereby AFFIRMS the ALJ's proposed decision in Case No. SF-CO-26-S.

ORDER

Upon the foregoing findings of fact and conclusions of law and the entire record in this case, the Board finds that the California State Employees Association (CSEA) violated the Ralph C. Dills Act (Dills Act), Government Code section 3519.5(b) by: (1) Filing written charges, on or about June 17, 1993, against Cathy R. Hackett (Hackett), Jim Hard (Hard), Sam Jurado (Jurado), Dave Weston (Weston) and Doyle Harris (Harris) seeking their suspension from membership in CSEA for at least one year; (2) Naming them in a civil lawsuit on or about July 2, 1993; and (3) Filing written charges against Hackett and Hard, on or about September 28, 1993, seeking their lifetime suspension from CSEA.

Pursuant to Dills Act section 3514.5(c), it is hereby ORDERED that CSEA and its representatives shall:

[5]However, the Board takes note of the fact that the ALJ did find three types of violations were committed by CSEA, and that Charging Parties were required to expend time and money defending the claims that furnished the basis for those violations.

A. CEASE AND DESIST FROM:

Retaliating against Hackett, Hard, Jurado, Weston and Harris for engaging in activities protected by the Dills Act.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE DILLS ACT:

1. Immediately withdraw the June 17, 1993, charges against Hackett, Hard, Jurado, Weston and Harris that seek their suspension from membership in CSEA for at least one year.

2. Within thirty-five (35) days following the date this Decision is no longer subject to reconsideration, post at all work locations where notices to employees are customarily placed, copies of the Notice attached as an Appendix hereto, signed by an authorized agent of CSEA. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to insure that this Notice is not reduced in size, defaced, altered or covered by any material.

3. Written notification of the actions taken to comply with this Order shall be made to the Sacramento Regional Director of the Public Employment Relations Board in accordance with his instructions.

Member Johnson joined in this Decision.

Chairman Caffrey's dissent begins on page 11.

CAFFREY, Chairman, dissenting: The California State Employees Association (CSEA) did not retaliate against Cathy Hackett (Hackett), Jim Hard (Hard), Sam Jurado, Dave Weston and Doyle Harris (Charging Parties) because of their exercise of protected rights in violation of section 3519.5(b) of the Ralph C. Dills Act (Dills Act).[1] Therefore, I would reverse the proposed decision of the Public Employment Relations Board (PERB or Board) administrative law judge (ALJ) and dismiss the unfair practice charge and complaint in Case No. SF-CO-26-S.

BACKGROUND

I find it necessary to describe the factual background of this case because facts which are key to the resolution of the issues here have been overlooked in both the majority opinion and the factual summary included in the ALJ's proposed decision.

The unfair practice charge in this case alleges that three specific actions were taken by CSEA against Charging Parties in unlawful retaliation for their protected conduct. These actions stem from incidents which resulted from the difficult and protracted 1991-92 bargaining cycle between CSEA and the State of

[1]Section 3519.5 states, in pertinent part:

> It shall be unlawful for an employee organization to:
>
> (b) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.

California. During that period, Hackett was the chair of CSEA's bargaining team for State Bargaining Unit 1. The remaining Charging Parties were either members or alternate members of the CSEA Unit 1 bargaining team.

In the spring of 1992, after a year of acrimonious bargaining, the state employer proposed a temporary reduction of employee wages, offset by an additional personal leave credit program. Several bargaining units represented by CSEA eventually agreed to the proposal at the bargaining table. Charging Parties, however, felt strongly that the state's proposal was not in the best interests of Unit 1 and CSEA members, and rejected the proposal at the bargaining table. Charging Parties then commenced an effort to convince employees in Unit 1 and other CSEA-represented bargaining units to join in their rejection of the state's proposal. They met with CSEA job stewards and employees and prepared at least two leaflets attacking the state proposal, which they distributed at state buildings in May and June of 1992. The leaflets criticized the state proposal and announced meetings for "all interested Union members."

Despite the continued opposition of the Unit 1 bargaining team, CSEA leadership became convinced that the State's proposal was the best that could be achieved and favored its acceptance. This divergence of views created the anomalous situation in late May of 1992 in which Unit 1 leaders were opposing ratification of the tentative agreements which were supported by CSEA leadership.

CSEA leadership moved to end this conflict in early June by directing the members of the Unit 1 bargaining team to halt their efforts to discourage ratification in the CSEA units then considering the proposal. CSEA based its order on bargaining ground rules between the union and the state, which required the union and its staff to recommend that the membership accept the tentative agreements.

Ignoring the requests of CSEA, Charging Parties persisted in their opposition to the tentative agreements. Consequently, CSEA suspended Charging Parties in June 1992 and replaced them on the Unit 1 bargaining team. In the letter of suspension, CSEA President Yolanda Solari indicated that the action was being taken "because in my opinion as President of CSEA, your actions pose an immediate threat to the welfare of the Association." The suspension prohibited Charging Parties from holding any CSEA office for one year.[2] The state employer's bargaining proposal was accepted and subsequently ratified by the membership of Unit l.

CSEA's June 1992 letter suspending Charging Parties included a directive that they return all CSEA materials and equipment which they had in their possession. Specifically requested were membership lists and employee rosters. CSEA representative Barbara Wilson (Wilson) testified that the primary reason the CSEA leadership wanted the documents returned was for "self-

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[2]Charging Parties unsuccessfully challenged this suspension in California State Employees Association (Hackett, et al.) (1993) PERB Decision No. 979-S (Hackett I).

preservation." The member/non-member list contained the names of each member and non-member, member home addresses and telephone numbers, and records of activity within CSEA. Wilson testified that such a document would be of great assistance to any group trying to defeat ratification of the agreement reached between CSEA and the state.

Charging Parties contested their suspensions through CSEA's internal appeal procedures, but the suspension was sustained by CSEA's highest body, the General Council, in October 1992.[3]

After CSEA and the state reached agreement on a collective bargaining agreement for Unit 1, Charging Parties, in June 1992 following their suspension, joined with others to form an organization called the Caucus for a Democratic Union (CDU). Charging Parties have maintained a high profile in CDU, describing themselves in their filings with PERB as "founding members of the caucus" and "active and prominent members of CDU."

CDU produced a newsletter, The Union Spark, beginning in June 1992. The first edition of The Union Spark indicated that CDU was formed in response to CSEA's "inability to mobilize members to take action to improve and protect their rights." "It is time for a change" the newsletter announced, and "members need to take back their union and hold the union accountable." The Union Spark was harshly critical of the way in which CSEA had

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[3]These actions were unsuccessfully challenged by Hackett in California State Employees Association (Hackett) (1993) PERB Decision No. 1012-S.

represented members in contract negotiations with the state employer.

CDU actively solicited CSEA members to become CDU members, and continued to be harshly critical of CSEA and the way in which members were being represented. In August 1992, The Union Spark published a "Declaration of Reform" which indicated that CDU sought to change CSEA from within. A CDU membership application was included, seeking $25 for a one year CDU membership and subscription to The Union Spark. The Union Spark again urged CSEA members to "take back their union" and encouraged them "to fight our employers and CSEA" in order to protect their rights. A number of CSEA job stewards and activists became members of CDU.

CDU scheduled quarterly meetings at the same time and place as CSEA's quarterly civil service division council meetings. Charging Parties attempted to meet with CSEA stewards and other elected CSEA officers to talk about the need for reform of CSEA. They distributed The Union Spark at CSEA civil service division council meetings. They solicited supporters for their campaign to change CSEA's election procedures and encouraged employees to join CDU while remaining members of CSEA in order to work for change from within the union.

CSEA leadership was fully aware of the activities of CDU and Charging Parties within it. CSEA regarded CDU as a challenge to its authority, a disruptive influence, and a forerunner to a probable decertification effort. In November 1992 CSEA demanded

that Hackett, as a principal officer of CDU, cease and desist from all unauthorized use of CSEA's name and/or logo. CDU activity continued, however, as did publication of The Union Spark. subsequent editions of which included the disclaimer: "CDU is not approved, sanctioned or controlled by CSEA/SEIU Local 1000."

Among CDU's activities was the announcement in the March 1993 edition of The Union Spark of the formation of a Steward's Council. The Council's purpose was to provide training to CSEA stewards, which CDU characterized as inadequate. The CDU-sponsored steward training was intended to cover subjects such as "How to Conduct Interviews," "How to File Charges" and "How to File Unfair Labor Practices."

The March 1993 edition of The Union Spark also announced the formation of, and solicited contributions to, the CDU Legal Defense Fund, which was needed because:

> Sometimes it is necessary to take unions to court when they refuse to follow their own rules and abuse their power, leaving members without fair representation.

Because of CSEA's continued concern over the disruptive impact CDU was having, and its view that CDU might attempt to decertify CSEA, in May 1993 the CSEA Board of Directors adopted the following resolution:

> (a) That the President direct the General Manager to investigate and take whatever steps are necessary, including seeking outside legal assistance, to bring disciplinary action or lawsuit against any member whose activities could adversely affect CSEA; and, further,

(b) That the Board of Directors delegates to the Executive Committee the full authority to act upon the recommendations of staff and to take whatever action is deemed necessary, and report that action back to the board at its next meeting.

In June 1993, a CSEA labor relations representative represented a state employee in an adverse action. A tentative settlement agreement negotiated by CSEA involving the transfer of the employee was withdrawn by the employer when a CDU leaflet was^ distributed at the employee's work site which was highly critical of the employee's supervisor. The leaflet urged employees to contact CDU with regard to concerns over working conditions. As a result of this type of activity, CSEA believed that CDU was interfering with its representation of state employees.

On June 17, 1993, CSEA advised Charging Parties that written charges had been filed against them by CSEA representative Wilson, alleging violations of various sections of CSEA's internal policies for failure to return CSEA documents as instructed at the time of the June 1992 suspension. (This is the first of the three specific actions which form the basis of the instant unfair practice charge.) The charges sought the suspension of Charging Parties from any office in CSEA for a second year.

On July 1, 1993, CSEA published the CSEA Update with a headline "The Spark Arrestor." The newsletter was CSEA's response to The Union Spark and was "dedicated to keeping the union from being blown up from within." The newsletter disputed many of the allegations and statements contained in The Union

Spark, and asserted that a small group of CDU dissidents was "diverting our attention from the real issues facing us" and "undermining the union."

On July 2, 1993, CSEA filed a lawsuit against Hackett and the other Charging Parties. (This is the second of the three specific actions under attack here.) The lawsuit alleged that Charging Parties were wrongfully in possession of certain specified CSEA documents, and that Charging Parties had refused to return the documents despite CSEA's specific requests. CSEA sought return of the documents and compensatory and punitive damages. CSEA withdrew the lawsuit in March 1994 because some of the documents had been returned to CSEA, and CSEA could not prove that Charging Parties still possessed the remainder.

In the July 1993 edition of The Union Spark, CDU announced the formation of "a fair representation committee" out of concern for "the many members who have been abused by their employers or by the union and who have not received fair representation." Members who felt they had not received fair representation from CSEA were invited to contact CDU.

At a September 1993 meeting of the CSEA civil service division council, members adopted a resolution seeking action against The Union Spark. The resolution declared the publication "contrary to the goals and objectives" of the civil service division and asked the Board of Directors "to take appropriate action against those responsible."

On September 28, 1993, Hackett and Hard were notified that charges had been filed against them by four CSEA members. (This is the third of the three specific actions under attack here.) The charges accused Hackett and Hard of distributing The Union Spark, and disrupting a CSEA civil service division meeting of September 17 through 19. The complaint requested "permanent suspension of membership." On November 29, 1993, the complaining parties withdrew their accusations and the proceedings were dismissed by CSEA.

DISCUSSION

The Board must determine in this case whether the actions taken by CSEA against Charging Parties constitute discrimination or retaliation against them for their exercise of protected rights in violation of Dills Act section 3519.5(b).

State employees have the right to participate in the activities of employee organizations for the purpose of representation on matters of employer-employee relations (Dills Act section 3515). However, the Board has not interpreted the Dills Act as protecting all participation in employee organization activities, or as providing PERB with unlimited authority to review the internal affairs of employee organizations. In Service Employees International Union, Local 99 (Kimmett) (1979) PERB Decision No. 106 (Kimmett), the Board examined the identical right provided under the Educational Employment Relations Act (EERA)[4] to determine if employees have

[4]EERA is codified at Government Code section 3540 et seq.

any protected right "to have an employee organization structured or operated in any particular way." The Board stated:

> The EERA gives employees the right to 'join and participate in activities of employee organizations' (sec. 3543)[5] and employee organizations are prevented from interfering with employees because of the exercise of their rights (sec. 3543.6(b)).[6] Read broadly, these sections could be construed as prohibiting any employee organization conduct which would prevent or limit employee's participation in any of its activities. The internal organization structure could be scrutinized as could the conduct of elections for union officers to ensure conformance with an idealized participatory standard. However laudable such a result might be, the Board finds such intervention in union affairs to be beyond the legislative intent in enacting the EERA. There is nothing in the EERA comparable to the Labor-Management Reporting and Disclosure Act of 1959, [Fn. omitted] which regulates certain internal conduct of unions operating in the private sector. The EERA does not describe the internal workings or structure of employee organizations nor does it define the internal rights of organization members. We cannot believe that by the use of the phrase 'participate in the activities of employee organizations . . . for the purpose of representation on all matters of employer-employee relations' in section 3543, the Legislature intended this Board to create a regulatory set of standards governing the solely internal relationship between a union and its members.

In Kimmett, the Board concluded that under the statute employees have no protected rights in the organization of their exclusive representative unless the internal activities of the employee

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[5]Dills Act section 3515 gives state employees the same right.

[6]Dills Act section 3519.5(b) is identical to EERA section 3543.6(b).

organization have a substantial impact on the employees' relationship with their employer.

However, the Board subsequently held that it is appropriate to review internal union activities when allegations of retaliation against employees for protected activity are involved. (California State Employees' Association (O'Connell) (1989) PERB Decision No. 753-H.) In California Union of Safety Employees (Coelho) (1994) PERB Decision No. 1032-S (CAUSE (Coelho)), the Board stated:

> . . . any alleged employee organization discrimination or retaliation against employees because of their protected activity is within the Board's statutory authority to review to determine if a violation has occurred. [Citation.]

In these cases, the Board applies the test it established in Novato Unified School District (1982) PERB Decision No. 210) (Novato) to determine if unlawful retaliation has occurred. Under the Novato test, Charging Parties must demonstrate that they engaged in protected activity, that CSEA was aware of their protected activity and took adverse action against them, and that CSEA's adverse action against them was motivated by Charging Parties' protected activity.

In applying the Novato test, the ALJ noted that the most critical question in this case is whether Charging Parties were engaged in protected activity. I agree with the ALJ's assessment of the key issue presented by this case. However, I reach a different result than that reached by the ALJ and the majority in considering it.

While the Dills Act provides to employees the right to join and participate in employee organizations for the purpose of representation on matters of employer-employee relations, and protects them from retaliation for exercising protected rights, it also provides employee organizations with the right to restrict employees from joining and participating. Dills Act section 3515.5 states, in pertinent part:

> Employee organizations may establish reasonable restrictions regarding who may join and may make reasonable provisions for the dismissal of individuals from membership.

In discussing the identical EERA provision, the Board in California School Employees Association and its Shasta College Chapter #381 (Parisot) (1983) PERB Decision No. 280 (CSEA (Parisot)) concluded that a provision which sanctions the dismissal of individuals from membership must also allow suspension from membership, a lesser form of discipline. The Board stated:

> The right to represent employees as an exclusive representative is an essential objective and purpose of a labor organization. [Citation.] An act by its own members which is directed against this purpose threatens the very existence of the organization and is of sufficient seriousness to justify a self-protective response. [Citations.]

The Board further stated:

> A member has an inherent obligation to his organization to be loyal, and for him to engage in conduct, such as a decertification drive, which attempts to thwart the fundamental objectives of that organization is a breach of his duty.

In California Union of Safety Employees (John) (1994) PERB Decision No. 1064-S (CAUSE (John)). the Board noted that the exclusive representative's right to self-protection is based on a policy supporting "the union's ability to eliminate further internal attempts to destabilize the union." In that case, the Board concluded that mere membership in a rival employee organization was insufficient to justify a self-protective response by the union against the employee.

An employee organization's right to protect itself against actions which threaten its status as exclusive representative has also been recognized in cases considered by the National Labor Relations Board (NLRB). An attack on the organization's position as exclusive representative is "in a very real sense an attack on the very existence of the union." (Price v. NLRB (9th Cir. 1967) 373 F.2d 443 [64 LRRM 2495, 2496], cert. den. (1968) 392 U.S. 904 [20 L.Ed.2d 1363].) Moreover, if employees opposed to the representation being provided by the exclusive representative have the right to insist on continued membership in the union, it would render meaningless the union's right to determine the qualifications of membership. (Machine Stone Workers. Local 89 (1982) 265 NLRB 496 [111 LRRM 1609].) As the United States Supreme Court recognized in NLRB v. Allis-Chalmers Mfg. Co. (1967) 388 U.S. 175, 180-181 [65 LRRM 2449], the union's right to protect itself against the erosion of its status as exclusive representative is an integral component of national labor policy.

As these cases indicate, the protected right of employees to join and participate in employee organizations for the purpose of representation on matters of employer-employee relations is not without limits. The ALJ and the majority interpret the Board's decision in CSEA (Parisot) narrowly, concluding that in order to become "life-threatening" to the employee organization and "unprotected," an employee's activities must reach the level of a decertification effort. I disagree. I interpret CSEA (Parisot) and the other cited cases to conclude that protected employee activities which reach the level of seriously destabilizing the union, eroding its status as exclusive representative, and/or threatening its purpose of representing employees as an exclusive representative, are no longer protected, even if a decertification effort is not contemplated, or has not yet been undertaken. Furthermore, these activities justify a self-protective response by the union.

In this case, therefore, the activities of Charging Parties were not protected by the Dills Act if they reached the level of seriously destabilizing CSEA, eroding its status, and/or threatening its essential purpose of representing employees as their exclusive representative. If the activities of Charging Parties are determined to have reached this level, a self-protective response by CSEA was justified.

The facts of this case establish that a conflict between Charging Parties and CSEA arose initially during the final stages of a difficult round of bargaining with the state employer.

CSEA, which represents multiple state bargaining units, had reached agreement with the state employer on the final key bargaining issues. Charging Parties, as members of the Unit 1 bargaining team, not only rejected the final proposal at the bargaining table, but, ignoring CSEA's requests to the contrary, actively campaigned against ratification of the tentative agreements in other bargaining units. Charging Parties distributed leaflets attacking the state proposal and independently called meetings for "all interested Union members." This conduct was contrary to ground rules between CSEA and the state employer, which required CSEA to recommend that the membership accept the tentative agreement, and led to the original suspension of Charging Parties by CSEA. As noted above, the Board affirmed the dismissal of Charging Parties' unfair practice charge which challenged their suspensions.

Following their suspension, Charging Parties formed CDU with the stated goal of "taking back" the union and reforming it internally, and began to actively solicit CSEA members to join CDU. CDU was harsh in its criticism of CSEA, and challenged the fairness and effectiveness of CSEA's representation of employees with the state employer. In the August 1992 Union Spark, CDU stated that "we have to fight our employers and CSEA if we want to protect our rights."

An effort to reform a union from within, by organizing members, criticizing the union and urging members to pursue an agenda to "take back" their union, does not in and of itself

seriously destabilize the union or erode the exclusive representative's status. But the actions of Charging Parties here went far beyond this type of activity.

Under the leadership of Charging Parties, CDU announced the formation of a Steward's Council. CDU indicated that it intended to use this forum to "train" CSEA job stewards. CDU formed a Legal Defense Fund, specifically for the purpose of taking CSEA to court to challenge its representation of members. CDU competed with CSEA for the representation of individual employees, and urged employees to contact CDU to discuss concerns with working conditions. CDU formed a "fair representation committee," inviting members who believed they had not received adequate or fair representation from CSEA to contact CDU.

The exclusive representative's right to self-protection is based on a policy supporting the union's ability to eliminate further internal activities which seriously destabilize the union or erode its status as exclusive representative. Establishing a CDU training course for CSEA job stewards, creating a Legal Defense Fund in order to file legal challenges against CSEA and its representation of employees, actively competing with CSEA for the representation of employees, and forming a CDU fair representation committee to provide to CSEA members an alternative to CSEA representation, are actions which directly challenge CSEA's purpose as exclusive representative to represent state employees. Presented in a context in which Charging Parties, as active and prominent members of CDU, are urging CSEA

members to join CDU because they must fight their union to protect their rights, these activities clearly rise to the level at which they have a serious destabilizing effect on CSEA. These activities erode CSEA's status and constitute a threat to CSEA's right and purpose to represent employees as their exclusive representative. Therefore, these activities are not protected by the Dills Act, and a self-protective response from CSEA is justified.

Accordingly, I conclude that Charging Parties have not demonstrated that they were engaged in protected activity, as is required by the first element of the Board's Novato test. Therefore, I would reverse the proposed decision of the ALJ and dismiss the unfair practice charge.

Furthermore, in my view, this case presents another important issue which should be addressed by the Board. That issue is the extent to which PERB has the statutory authority to review the internal activities of employee organizations.

In recent cases, the Board has reiterated that there are limits on its statutory authority to intervene in matters involving the solely internal activities or relationships of an employee organization which do not impact employer-employee relations. In Hackett I, as noted above, the Board dismissed an earlier charge filed by Charging Parties. In rejecting the request for reconsideration of that decision filed by Hackett, the Board specifically referred to a portion of the charge challenging CSEA's internal discipline procedures as "an area

into which the Board will not intervene except where the internal activities of the employee organization have a substantial impact upon employees' relationships with their employer." (California State Employees Association (Hackett) (1993) PERB Decision No. 979a-S.) Similarly, in California State Employees Association (Garcia) (1993) PERB Decision No. 1014-S (CSEA (Garcia)). the Board affirmed a Board agent's dismissal of charges relating to alleged union election irregularities and union discipline procedures because there was no showing of a substantial impact on the charging party's relationship with her employer.[7]

Conversely, in cases in which the Board has intervened in the internal actions of a union and found evidence of an unlawful retaliation against its members for their protected activities, the conduct has involved the employment relationship, and not solely internal union activities or relations. In CAUSE (Coelho). the Board found a violation in the union's retaliatory filing with the employer of a citizen's complaint against an employee, and in its subsequent refusal to represent the employee in the resulting investigation conducted by the employer. The union's conduct directly impacted the employee's relationship with his employer and was beyond the solely internal relationship

[7]The Board in CSEA (Garcia) reversed the Board agent's dismissal and ordered issuance of a complaint based on the sole allegation in the charge that the union retaliated against the employee because she had filed an unfair practice charge with PERB against the union. This matter clearly is beyond a solely internal union activity.

of the employee and union. In CAUSE (John), the Board found a violation in the union's retaliatory refusal to provide representation to a member in his appeal to the State Personnel Board of the employer's adverse action against him. Again, actions .beyond the solely internal relationship of the employee and the union were involved.

The approach taken by the Board in these recent cases is the appropriate one. Dills Act section 3515 provides employees with the right to participate in the activities of employee organizations "for the purpose of representation on all matters of employer-employee relations." (Emphasis added.) As noted by the Board in Kimmett, this section should not be read to protect any and all employee participation in employee organization activities. The Kimmett Board determined that the solely internal relationship between a union and its members, which does not involve employer-employee relations, was not intended by the Legislature to be regulated by PERB under this section. Instead, the Board held that there must be a showing of substantial impact on employer-employee relations before the participation in the employee organization becomes protected.

In this case, there has been no demonstration by Charging Parties, and no finding by the majority or the ALJ, that Charging Parties' participation in the employee organization had any impact, substantial or otherwise, on their relationship with their employer. Instead, it appears that the activities of Charging Parties, and CSEA's actions in response to those

activities, relate largely, if not solely, to their internal relationships within the employee organization.

By not considering the extent, if any, to which the activities of Charging Parties impact on employer-employee relations, the Board majority suggests that any and all employee organization participation by employees is protected by the Dills Act. I wish to state clearly that I do not subscribe to that view. Instead, I believe the Board should have a clear policy of not interjecting itself into internal employee organization matters which have no impact on the employer-employee relationship and, thereby, heed the guidance of the Kimmett Board which stated:

> . . . the Board finds such intervention in union affairs to be beyond the legislative intent in enacting the EERA.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD
An agency of the State of California

After a hearing in Unfair Practice Case No. SF-CO-26-S, Cathy R. Hackett, et al. v. California State Employees Association, in which all parties had the right to participate, it has been found that the California State Employees Association (CSEA) violated the Ralph C. Dills Act (Dills Act), Government Code section 3519.5(b) by: (1) Filing written charges, on or about June 17, 1993, against Cathy R. Hackett (Hackett), Jim Hard (Hard), Sam Jurado (Jurado), Dave Weston (Weston) and Doyle Harris (Harris) seeking their suspension from membership in CSEA for at least one year; (2) Naming them in a civil lawsuit on or about July 2, 1993; and (3) Filing written charges against Hackett and Hard, on or about September 28, 1993, seeking their lifetime suspension from CSEA.

As a result of this conduct, we have been ordered to post this notice and we will:

A. CEASE AND DESIST FROM:

Retaliating against Hackett, Hard, Jurado, Weston and Harris for engaging in activities protected by the Dills Act.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE DILLS ACT:

1. Immediately withdraw the June 17, 1993, charges against Hackett, Hard, Jurado, Weston and Harris that seek their suspension from membership in CSEA for at least one year.

Dated: _____ CALIFORNIA STATE EMPLOYEES ASSOCIATION

By: _____
Authorized Representative

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR AT LEAST THIRTY (30) CONSECUTIVE WORKDAYS FROM THE DATE OF POSTING AND MUST NOT BE REDUCED IN SIZE, DEFACED, ALTERED OR COVERED BY ANY MATERIAL.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

CATHY R. HACKETT, et al.,	)	
	)	
Charging Parties,	)	Unfair Practice
	)	Case No. SF-CO-26-S
v.	)	
	)	PROPOSED DECISION
CALIFORNIA STATE EMPLOYEES ASSOCIATION,	)	(6/21/94)
	)	
Respondent.	)	
	)	

Appearances: Cathy R. Hackett and Jim Hard, in pro per; Darrell Steinberg, Esq., for the California State Employees Association.

Before Ronald E. Blubaugh, Administrative Law Judge.

PROCEDURAL HISTORY

The former members of a union bargaining committee contend here that the union has taken a series of discriminatory actions against them in retaliation for various protected acts. They seek to have the union blocked from further actions against them. The union replies that it committed no unlawful acts and that the charging parties are seeking to re-litigate here matters already resolved in other proceedings.

The unfair practice charge which gave rise to this action was filed on July 2, 1993, against the California State Employees Association (CSEA or Union) by Cathy Hackett, Jim Hard, Sam Jurado, Dave Weston and Doyle Harris.[1] The general counsel of

[1]This charge is one of four filed against CSEA in which Ms. Hackett was either the lone charging party or the first-named party. The other charges, S-CO-147-S, S-CO-151-S and S-CO-153-S, were all dismissed by the Office of the General Counsel of the Public Employment Relations Board. Ms. Hackett appealed the dismissals of S-CO-147-S and S-CO-153-S but the dismissals were upheld by the Board in California State Employees Association

the Public Employment Relations Board (PERB or Board) followed on August 20, 1993, with a complaint against the Union. The Union answered the complaint on September 13, 1993, admitting the primary factual allegations but denying that it had committed an unfair practice. Ms. Hackett filed a first amended charge on October 22, 1993. A first amended complaint was issued by the undersigned on January 12, 1994, at the start of the hearing.

The complaint, as amended, alleges that following various protected activities by the charging parties, agents for the Union filed charges seeking a one-year suspension of charging parties from membership in CSEA, filed a civil lawsuit against charging parties, and filed additional charges seeking a life-time suspension of charging parties from CSEA. These actions were alleged to be in violation of section 3519.5(b) of the Ralph C. Dills Act.[2]

(Hackett et al.) (1993) PERB Decision No. 979-S (Hackett I) and California State Employees Association (Hackett) (1993) PERB Decision No. 1012-S. Ms. Hackett did not appeal the dismissal of charge S-CO-151-S and the dismissal became final on January 25, 1993.

[2]Unless otherwise indicated, all statutory references are to the Government Code. The Ralph C. Dills Act (Dills Act) is codified at Government Code section 3512 et seq. In relevant part, section 3519.5 provides as follows:

> It shall be unlawful for an employee organization to:
>
> . . . . . .
>
> (b) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights

A hearing was conducted in Sacramento on January 12-13 and March 7 and 9, 1994. With the filing of briefs, the matter was submitted for decision on June 8, 1994.

FINDINGS OF FACT

Cathy Hackett, Jim Hard, Sam Jurado, Dave Weston and Doyle Harris, the charging parties, at all times relevant have been employees of the State of California (State). Their various jobs throughout the relevant period placed them in State bargaining unit 1, professional, administrative, financial and staff services. CSEA, at all times relevant, has been the exclusive representative of unit 1 and eight other State employee bargaining units. Unit 1 is composed of some 33,000 State employees working in some 600 job classifications.

The events at issue sprang from a difficult and protracted round of negotiations that commenced in 1991 between the State and CSEA. Pressed by a budget deficit, the State sought major concessions in pay and benefits from the various exclusive representatives of its employees. CSEA resisted the State's demands and its members and representatives engaged in numerous activities designed to demonstrate the Union's resistance. Throughout this period, Ms. Hackett was the chair of the CSEA bargaining team for unit 1. Jim Hard, Sam Jurado and Dave Weston were members of the unit 1 bargaining team and Doyle Harris was an alternate.

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guaranteed by this chapter.

After a year of acrimony, the State in May of 1992 made a proposal to CSEA and the other exclusive representatives that was intended to break the impasse. The proposal included creation of a personal leave program under which employees would forfeit one day of pay per month for 18 months. In return, they would be entitled to later take the time off with pay or, under some circumstances, be paid for the lost time. The State proposal also called for a pay increase at the end of the 18-month period and another pay increase one year later.

CSEA units 4 and 15 soon reached tentative agreement on the basis of the State's proposal. They were followed shortly by CSEA units 20 and 21. Some of the other exclusive representatives also accepted the plan at approximately the same time.

Despite this support for the proposal from elsewhere in CSEA, Ms. Hackett and the other members of the unit 1 bargaining team opposed the State's proposal and rejected it at the bargaining table. They then commenced an effort to convince employees in the various bargaining units to join in their rejection of the proposal. They met with CSEA job stewards and gatherings of employees, urging them to reject the proposal. They called employees by telephone, urging rejection of the proposal. They prepared at least two leaflets attacking the State proposal which they distributed at State buildings in May and June of 1992.

The first of the leaflets criticized the State proposal and announced noon hour meetings for "all interested Union members" to be held on May 20, 21, 22 and 28, 1992. The second leaflet, entitled "Reject Wilson's Take-Back Proposal," contained further criticism of the proposal and announced another meeting on June 8, 1992, for members of unit 1.

Despite the continued opposition of the unit 1 team, the CSEA leadership became convinced that the State's proposal was the best that could be achieved and favored its acceptance. The divergence of views created the anomalous situation in late May of 1992 where unit 1 leaders were opposing ratification of the tentative agreements which were supported by CSEA leadership.

The CSEA leadership moved to end this conflict in early June by directing the members of the unit 1 bargaining team to halt their efforts to discourage ratification in the four units then considering the proposal. CSEA based its order on bargaining ground rules between the Union and the State which required the Union and its staff to recommend membership acceptance of tentative agreements.

Ignoring the requests of the CSEA leadership, the members of the unit 1 negotiating team persisted in their opposition to the tentative agreements. On June 22, 1992, CSEA President Yolanda Solari wrote to Ms. Hackett and the others notifying them that they were "summarily suspended" from membership in CSEA effective at 12:01 a.m. on June 23. "This action is taken," Ms. Solari wrote, "because in my opinion as President of CSEA, your actions

pose an immediate threat to the welfare of the Association." The letter directed Ms. Hackett and the others by June 24 to return to CSEA all materials and equipment in their possession. Specifically identified were "membership lists and rosters which you were authorized to receive while your membership was in good standing." The letter advised Ms. Hackett and the others that the suspension would be terminated in ten days unless written charges were filed against them within that time period.

Written charges, signed by CSEA civil service division director Perry Kenny, followed on July 2, 1992. The charges sought removal from office of Ms. Hackett and the other members of the unit 1 negotiating team. Ms. Hackett and the other charging parties contested their removal from office through CSEA's internal appeal procedures. However, the charges were sustained in October of 1992, first by the CSEA Board of Directors and then by CSEA's highest body, the General Council. Ms. Hackett, Mr. Hard, Mr. Jurado, Mr. Weston and Mr. Harris were removed from their leadership roles in unit 1. They also were barred from holding any CSEA office for one year commencing on June 23, 1992.[3]

Following the action of the General Council, CSEA General Manager Robert Zenz by letter of October 19 again demanded that Ms. Hackett and the others immediately return "all CSEA documents

[3]These actions were unsuccessfully challenged by Ms. Hackett in PERB unfair practice case no. S-CO-153-S. (See California State Employees Association (Hackett), supra, PERB Decision No. 1012-S.)

in your possession." Ms. Hackett was sent a separate letter demanding return of a CSEA lap top computer which she had checked out. The demand for the return of the documents and computer was recommended by the General Council appeals committee and adopted by the CSEA Board of Directors on October 7, 1992.

The charging parties never took seriously the demand that they return "all CSEA documents in your possession." This broad request would have included copies of CSEA newspapers and routine membership mailings, as well as membership lists. Because the demand was so broad and because they considered most of the documents in their possession to be obsolete, the charging parties admit that they paid little attention to it. One who attempted to comply was Doyle Harris, an alternate to the negotiating committee. He tried to contact Mr. Zenz to find out exactly which documents Mr. Zenz wanted returned. His telephone calls were not returned.

The demand that the charging parties return documents to CSEA was without precedent. At that time, CSEA had no rules requiring bargaining unit negotiators or stewards to return documents upon leaving office. There was no past practice of outgoing negotiators returning documents. Nor were there any rules or practices about the confidentiality of CSEA documents. Various witnesses testified that they considered old documents to be obsolete and either threw them away or kept them in boxes at home. There was not even a prior practice of requiring persons suspended from office to turn over CSEA materials. Linda

Roberts, who was suspended from CSEA office for one year beginning in April of 1992, testified that she was not asked to return any documents. The only practice on turning over documents which any witness could recall was for outgoing treasurers to turn over financial records and checkbooks.

Barbara Wilson, CSEA civil service division alternate deputy director for bargaining, testified that the primary reason the Union leadership wanted the documents returned was for "self-preservation." The most sensitive of the desired documents was a report variously described as the "work site profile" or the "member/non-member list." This report contains the names of each member and non-member, their home addresses and telephone numbers and record of activity within CSEA. Ms. Wilson testified that such a document would be of great assistance to any group trying to defeat ratification of the agreement between CSEA and the State. She also said that various documents were expensive to reproduce so there was a cost factor in their recovery. Finally, she testified, the mere perception among CSEA leaders that the documents were being used against the Union, even if they were not, was disruptive. Ms. Hackett and the charging parties did not respond to the June or October requests for the return of documents. She did return the computer on October 27, 1992.

Although CSEA and the State reached an agreement not long after the removal of the unit 1 bargaining team, CSEA's internal turmoil continued. In June of 1992, Ms. Hackett and the former members of the unit 1 bargaining team joined with others to form

an organization they called the Caucus for a Democratic Union (Caucus). They created a newsletter they named The Union Spark which Ms. Hackett and the other former bargaining team members distributed to State employees and at CSEA meetings. The first edition of The Union Spark was published in June of 1992. Publication of the newsletter has continued on a regular basis ever since.

It was apparent from the first issue of The Union Spark that the new Caucus considered itself to be an organization within CSEA formed to "advance an open and democratic union." But the publication has been harsh in its criticism of both CSEA and the governor. It has criticized the manner CSEA has represented employees and regularly attacks the influence of supervisors, managers and retirees in the Union.

In the August 1992 issue of The Union Spark, the Caucus set out a "declaration of reform" and a "rank and file bill of rights" which were adopted at a meeting on August 8 and 9. The organization professed itself "committed to the restoration of the rights, authority, dignity and power of our union's rank and file membership." It stated its objective as "to strengthen CSEA/SEIU Local 1000 from within by building a unified movement of rank and file state employees." It set out as the first in a series of 11 rank and file rights, the "direct election of officers."

Ms. Hackett and the other charging parties have maintained a high profile in the Caucus. They have appeared in pictures in

The Union Spark and they openly have continued to distribute the publication to State employees. The Caucus has scheduled quarterly meetings at the same time and place as CSEA's quarterly civil service division council meetings. Ms. Hackett, Mr. Hard and others have attempted to meet with CSEA stewards and other elected CSEA officers to talk about the need for reform of CSEA. They have distributed The Union Spark at CSEA civil service division council meetings. They have solicited supporters for their campaign to change CSEA's election procedures and have encouraged sympathizers to join or remain members of CSEA to work for change within. They have campaigned for the election of sympathizers to CSEA office.

A number of CSEA job stewards and activists have joined the Caucus and have been portrayed in pictures in The Union Spark. Ms. Hackett also identified four presidents of CSEA labor councils who are members of the Caucus. Others who have joined in the Caucus include some members of the unit 1 bargaining committee who succeeded Ms. Hackett and the other charging parties.

The evidence is clear that the CSEA Board of Directors and leadership are fully aware of the activities of the Caucus and the role of the charging parties in it. Joe Elwell-Scardino, a member of the CSEA board, testified that directors had discussed the Caucus at board meetings and formulated plans about how to deal with it and its leaders. In addition, CSEA has published a

newsletter criticizing The Union Spark that demonstrated a full awareness of the activities of the Caucus.

From early on, some in the CSEA leadership have suspected Ms. Hackett, Mr. Hard and others in the Caucus of planning an attempt to decertify CSEA as exclusive representative of unit 1. CSEA labor relations representative Rosmarie Duffy testified that she twice heard Mr. Hard make references to decertification. The first occasion was during an April 1992 meeting before bargaining when the team was discussing their frustration in getting the other CSEA units to hold out for a better proposal. She said Mr. Hard commented in what she described as an "offhand" remark, "Well, we could always decertify." The second occasion was in June of 1992 when, she testified, Mr. Hard stated at a meeting of job agents, "We had looked into trying to decertify CSEA, but found that the law isn't really helpful in that area, and so instead we're going to urge people to join CSEA so that we can reform it from the inside."[4]

As further evidence of the purported decertification threat CSEA introduced a leaflet which Mr. Hard distributed in front of a State building on February 7, 1994. The leaflet attacked the influence of supervisors, managers and retirees in establishing CSEA policies. The leaflet reads in part:

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[4]Mr. Hard testified that the question of decertification was raised by others who were unhappy with CSEA's representation. He said all he was trying to do was to tell them that instead of decertification they should get involved in a reform movement. He said he spoke against decertification.

> We need to take control of CSEA to make it represent us. We need a democratic organization to work for the just concerns of state employees. In order to have this, we need to restructure CSEA to make it our organization. That is the purpose of CDU. . . .

Barbara Wilson testified that she interpreted the phrase about taking control as evidence of a possible attempt to decertify CSEA.

The CSEA leadership also believed that the Caucus was interfering with CSEA's representation of State employees. As evidence of this conclusion, CSEA introduced the testimony of its labor relations representative Gerri Conway. In June of 1993, Ms. Conway represented a State employee named Joyce Fox in an adverse action. She testified that she worked out a tentative agreement involving the transfer of Ms. Fox which was destroyed by a leaflet distributed at the building where Ms. Fox worked. The leaflet, which was highly critical of Ms. Fox's supervisor, concluded with the following:

> If you know of anyone being harassed and/or subjected to unreasonable working conditions contact the Caucus for a Democratic Union [telephone number omitted]. We will return your call.

Ms. Conway testified that Ms. Fox had been aware of the leaflet and approved of its distribution. Because of the leaflet, Ms. Conway testified, State management withdrew from the settlement.

Consistent with their view that the Caucus might attempt to decertify CSEA, the Union's leaders have not taken the challenges from the Caucus lightly. Indeed, the Union has fought back from

early on. By letter of November 18, 1992, CSEA President Solari demanded that Ms. Hackett, as a member and principal officer of the Caucus, cease and desist from all unauthorized use of CSEA's name or logo. Citing California law on the unauthorized use of a union name or logo, Ms. Solari warned:

> CSEA intends to enforce its rights to the fullest extent of the law against any individual or organization engaged in the unauthorized publication or distribution of its name.

But Ms. Hackett and the other charging parties continued their activity in the Caucus and continued to publish The Union Spark.

In May of 1993, the CSEA Board of Directors responded by adopting the following resolution:

> (a) That the President direct the General Manager to investigate and take whatever steps are necessary, including seeking outside legal assistance, to bring disciplinary action or lawsuit against any member whose activities could adversely affect CSEA; and, further,
>
> (b) That the Board of Directors delegates to the Executive Committee the full authority to act upon the recommendations of staff and to take whatever action is deemed necessary, and report that action back to the board at its next meeting.

According to Mr. Elwell-Scardino, who was present when the resolution was adopted, at least one director identified the "Hackett and Hard group" as the target of the resolution.

There followed on June 17, 1993, letters from CSEA to Ms. Hackett and the other charging parties advising them that

written charges had been filed against them.[5] The charges, which were signed by Barbara Wilson, alleged violations of various sections of CSEA's internal policies for failure to return CSEA documents. As of the conclusion of the hearing in the present matter, CSEA had yet to conduct a hearing on the charges filed by Ms. Wilson and the matter remained unresolved.

The documents which gave rise to Ms. Wilson's charges were those requested in the Solari letter of June 22, 1992, and the Zenz letter of October 19, 1992. The charges filed by Ms. Wilson asked that the suspension of the charging parties from any office in CSEA be extended for a second year. She testified that she filed the charges because it was her responsibility as deputy director for bargaining to ensure that orders of the General Council were carried out. She said that prior to filing the charges she checked with various people and determined that the documents had not been returned. She did not check with Ms. Hackett or the other charging parties.

Ms. Hackett and the others testified that they did not consider such CSEA documents as they had in their possession to be of any significance. Many of the documents were out of date. They had discarded other documents. However, when CSEA continued to make demands they went through boxes and piles of documents in their homes and gathered everything they believed relevant to the CSEA requests. On June 17, 1993, they gave these

[5]This is the first of the three actions under attack here.

documents to J. J. Jelincic, successor to Ms. Hackett as chair of the unit 1 bargaining committee.

By memo the following day, Ms. Hackett and the others advised the CSEA Board of Directors that they had given documents to Mr. Jelincic. The memo identifies various documents which were turned over, including a partial 1990 member/nonmember list for the Sacramento area. The documents turned over by the charging parties did not include the pay or class print out for May of 1992 nor a member/nonmember list for that year. Ms. Hackett testified that she did not recall if she had a member/nonmember list for 1992, although a CSEA employee testified that she mailed one to Ms. Hackett in the spring of 1992. Even if Ms. Hackett had been given a member/nonmember list, there was no evidence that the other four charging parties ever had that document or any of the documents listed in the Solari letter.

Mr. Jelincic, who described what Ms. Hackett turned over to him as "boxes of materials," prepared a lengthy inventory of the documents. He then gave the documents to Nancy Broadhurst, the assistant controller of CSEA. Ms. Broadhurst signed for the documents on October 19, 1993. The inventory identifies as one of the items turned over, a "copy of unit 1 member/non-member list, dated 8/8/90."

The charging parties each testified that what Ms. Hackett gave to Mr. Jelincic was all of the information requested by CSEA that they possessed. Initially, Ms. Hackett testified, she and

the others focused on the demand for the return of the lap top computer. After the computer was returned on October 27, 1992, Ms. Hackett concluded that she had satisfied the critical demand.

On July 2, 1993, CSEA filed a lawsuit against Ms. Hackett and the other charging parties.[6] The lawsuit, since withdrawn, alleged that Ms. Hackett, Mr. Hard, Mr. Jurado, Mr. Harris and Mr. Weston were in wrongful possession of certain specified CSEA documents. The lawsuit alleged that the charging parties had refused to return the documents despite CSEA's specific requests. CSEA asked for return of the documents and for compensatory and punitive damages.[7] However, CSEA withdrew the lawsuit in early

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[6]This is the second of the three actions under attack here.

[7]In the lawsuit CSEA sought the return of the following materials from the 1991 and 1992 bargaining between unit 1 and the State:

> 1) Bargaining proposals and bargaining binders;
>
> 2) Copies of bargaining notes typed by the note-taker hired to transcribe these notes;
>
> 3) Copies of memorandums, grievances, letters to the State, and classification changes pertaining to bargaining issues.

CSEA also sought return of the following computer generated lists:

> 1) A work site profile from spring of 1992 showing all Unit 1 work sites and employee names, home phone numbers and job classifications;
>
> 2) Pay classifications of Unit 1 employees by department and by number of persons in each classification, total salaries, and differentials.

March of 1994. Mark DeBoer, CSEA assistant chief counsel, said the lawsuit was dropped because some of the material had been returned and the Union could not prove that the defendants still possessed the remainder.

Although CSEA's stated reason for the continuing actions against Ms. Hackett and the others was their refusal/failure to return CSEA documents, this was not the only cause. At a September 18-19, 1993, meeting of the CSEA civil service division council, members adopted a resolution seeking action against The Union Spark. The resolution declared the publication "contrary to the goals and objectives" of the civil service division and asked the Board of Directors "to take appropriate action against those responsible."

There followed a September 28, 1993, notice to Ms. Hackett and Mr. Hard that charges had been filed against them by four CSEA members.[8] The charges accused Ms. Hackett and Mr. Hard of distributing The Union Spark between the hours of 7:15 a.m. and 7:45 a.m. on September 16, 1993, in front of a State building at 450 N Street in Sacramento. The charges also accused Ms. Hackett and Mr. Hard of disrupting a CSEA civil service division meeting of September 17 through 19. The complaint requested "permanent suspension of membership." The four CSEA members who signed the charges are officers of CSEA labor council 782. On November 29, 1993, the complaining parties withdrew their accusations and the proceedings were dismissed by CSEA.

[8]This is the third of the three actions under attack here.

CSEA presented evidence that under the Union's rules, any member of CSEA can file charges against any other member. The mere filing of disciplinary charges does not affect the membership status of a member while the charges are pending. CSEA rules provide for the right to a hearing and an appeal.

LEGAL ISSUE

Did CSEA discriminate against Cathy Hackett, Jim Hard, Sam Jurado, Dave Weston and Doyle Harris for participation in protected conduct in violation of Dills Act section 3519.5(b) by:

1) Filing written charges, on or about June 17, 1993, for their suspension from membership in CSEA for at least one year?

2) Naming them in a civil lawsuit on or about July 2, 1993?

3) Filing written charges against Ms. Hackett and Mr. Hard, on or about October 1, 1993,[9] seeking their lifetime suspension from CSEA?

CONCLUSIONS OF LAW

State employees have the right under the Dills Act to "form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations."[10] It is an unfair practice under section 3519.5(b) for an employee organization "to

[9]These are the charges set out in the September 28, 1993, letter to Ms. Hackett and Mr. Hard.

[10]Section 3515.

interfere with, restrain, or coerce employees because of their exercise of" protected rights.

The PERB has eschewed use of these sections as a vehicle for reviewing the internal affairs of unions in duty of fair representation cases. (See Service Employees International Union, Local 99 (Kimmett) (1979) PERB Decision No. 106.) But the Board has been willing to review internal union activities for two other purposes: 1) to determine the "reasonableness" of disciplinary action under section 3515.5,[11] and 2) to determine whether a union's action against an employee constituted a retaliation for engaging in protected conduct.[12] The complaint here is based upon the second of these theories.

It is useful to note initially that the protected rights section of the Dills Act differs from section 7 of the National Labor Relations Act. Dills Act section 3515 protects the right of State employees,

> . . . to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of

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[11]In relevant part, section 3515.5 provides as follows:

> . . . Employee organizations may establish reasonable restrictions regarding who may join and may make reasonable provisions for the dismissal of individuals from membership. . . .

For the application of this section, see California Correctional Peace Officers Association (Colman) (1989) PERB Decision No. 755-S and cases cited therein.

[12]See California State Employees Association (O'Connell) (1989) PERB Decision No. 753-H.

> representation on all matters of employer-employee relations . . . .

Section 7, by contrast, protects the right of private sector employees,

> . . . to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . .

Nothing in section 7 sets out an employee right to "participate in the activities of employee organizations." For this reason, the PERB has not found entirely persuasive those National Labor Relations Board (NLRB) decisions that shun any review of internal union activities.

Exactly what "participate" means is not yet clear in Board decisions. In its broadest, dictionary meaning, "to participate" is to take part in something, join or share with others. Defined this way, any exclusion of an employee from organizational activities would be a denial of participation and potential unfair practice. The Board has not taken such an expansive approach.

Thus, although an individual employee has a protected right to attempt the decertification of an incumbent exclusive representative, the Board will not find the organization guilty of unlawful retaliation if it expels the employee. The Board has found to be "reasonable" employee organization rules providing for the suspension from membership of persons engaged in decertification activities. (California School Employees

Association (Parisot) (1983) PERB Decision No. 280.) This is because decertification "threatens the very existence of the organization and is of sufficient seriousness to justify a self-protective response." (Ibid.) In essence, the Board has granted an exception to the rule that an employee organization may not retaliate against an employee for engaging in protected conduct. Where the very life of the organization is in jeopardy, the union may retaliate against the employee as an act of self-preservation.

In cases involving alleged discrimination by an employee organization, the Board applies the same analytical test as it uses in cases involving discrimination by an employer. (See California Union of Safety Employees (Coelho) (1994) PERB Decision No. 1032-S and cases cited therein.) Therefore, in order to prove discrimination, the charging parties first must demonstrate that they engaged in protected conduct. They then must show that CSEA knew of their protected activity[13] and took an adverse action against them. The adverse action cannot be speculative but must be an actual harm.[14]

Upon a showing of protected conduct and adverse action, the charging parties then must make a prima facie showing that the respondent's action against them was motivated by their protected activity. (Novato Unified School District (1982) PERB Decision

[13]Moreland Elementary School District (1982) PERB Decision No. 227.

[14]Palo Verde Unified School District (1988) PERB Decision No. 689.

No. 210.) Motivation is determined by a review of direct and circumstantial evidence[15] to see whether, but for the exercise of protected rights, the disputed action would not have been taken against the charging parties.[16]

If charging parties establish a prima facie showing sufficient to support an inference of unlawful motive, the burden shifts to the respondent to produce evidence that the action "would have occurred in any event." (Martori Brothers Distributors v. Agricultural Labor Relations Bd., supra. 29 Cal.3d at p. 730.) If the respondent then shows misconduct on the part of the charging parties, the respondent's action will not be deemed an unfair practice unless the evidence establishes the action would not have been taken against the charging parties "but for" their protected activity.

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[15]Indications of unlawful motivation have been found in many aspects of a respondent's conduct. Words indicating retaliatory intent can be persuasive evidence of unlawful motivation. (Santa Clara Unified School District (1979) PERB Decision No. 104.) Other indications of unlawful motivation have been found in a respondent's failure to follow usual procedures (Ibid.); shifting justifications and cursory investigation (State of California (Department of Parks and Recreation) (1983) PERB Decision No. 328-S); disparate treatment of the charging party (State of California (Department of Transportation) (1984) PERB Decision No. 459-S); timing of the action (North Sacramento School District (19 82) PERB Decision No. 264); and pattern of antagonism toward persons engaging in protected activity (Cupertino Union Elementary School District (1986) PERB Decision No. 572).

[16]See Martori Brothers Distributors v. Agricultural Labor Relations Board (1981) 29 Cal.3d 721, 727-730 [175 Cal.Rptr. 626]; Wright Line, Inc. (1980) 251 NLRB 1083 [105 LRRM 1169] enf., in relevant part, (1st Cir. 1981) 662 F.2d 899 [108 LRRM 2513].

The first and perhaps most critical question here is whether the charging parties have engaged in protected conduct. In a case involving these same parties, the Board upheld the dismissal of a charge challenging the removal of Ms. Hackett and the others as negotiators for unit 1. (Hackett I), supra, PERB Decision No. 979-S.) In dismissing the charge, the regional attorney found insufficient to state a prima facie case allegations that the charging parties were dismissed for opposing ratification of the unit 1 agreement. The regional attorney found inadequacy both in the allegations of protected conduct and of unlawful motivation.

Nevertheless, the charging parties argue that in the present action, they have demonstrated protected conduct. Specifically, they point to their role in organizing and actively participating in the Caucus. They note they have organized and actively participated in an effort to revise CSEA's election procedures. They have written for and openly distributed The Union Spark, a publication that is critical of CSEA's organizational structure and some of its representational practices. They have solicited supporters for their campaign to change CSEA's election procedures, even to the point of encouraging sympathizers to join or remain members of CSEA. They have supported the election to CSEA offices of candidates sympathetic to their views.

CSEA agrees that the charging parties have done all of these things and more. CSEA finds in these activities a desire to thwart the fundamental objectives of CSEA, to impeach CSEA's

credibility and disrupt the Union's representational obligations. CSEA argues that PERB must draw a line separating freedom of speech and dissent from disloyalty to the Union. CSEA argues that the conduct of the charging parties clearly crosses into disloyalty which should not be protected. Citing Hackett I, supra, PERB Decision No. 979-S, CSEA argues that if circulating leaflets opposed to ratification was not protected, then surely circulation of copies of The Union Spark also must be unprotected. Finally, CSEA argues, although the charging parties profess not to be interested in decertifying CSEA, they have placed themselves in a representational role by inviting members with problems to call the Caucus.

As CSEA appropriately observes, this case requires the drawing of a line between permissible and impermissible conduct. CSEA describes the choice as one between dissent and disloyalty. But that is a much narrower choice than suggested by California School Employees Association (Parisot), supra, PERB Decision No. 280. What the Board found unprotected in that case was conduct that "threatens the very existence of the organization." Thus, the level of disloyalty required to remove protection from dissent much be such as to threaten the life of an employee organization. This is more than internal union politics.

While it is clear that the conduct of the charging parties has caused discomfort to CSEA's leadership, it would be a substantial reach to characterize it as life-threatening to CSEA. CSEA concedes that charging parties have not mounted a

decertification campaign or taken any steps toward one. There is no evidence that Ms. Hackett, Mr. Hard or any other Caucus activist ever circulated representation cards or took any other actions consistent with an attempted decertification.

What Ms. Hackett, Mr. Hard and others have underway is an attempt to take over CSEA, not destroy it. What they seek to do is to convert CSEA to their view of unionism. While this may be threatening to some in the organization, it is not threatening to the organization itself. Such disloyalty as it evidences is not to CSEA but to those in charge of the union. I find that the charging parties engaged in protected conduct in the formation of the Caucus, their campaign to reform election procedures and their preparation and distribution of The Union Spark.

A contrary result is not compelled by Hackett I. At most, Hackett I stands for the proposition that a union can remove from office union leaders who campaign against ratification of an agreement in contravention to ground rules agreed upon between the union and the employer. The decision also can be read as nothing more than a failure of pleading. The regional attorney's dismissal letter, which was adopted by the Board, notes that except for a reference to the circulation of flyers by "unit 1" the charging parties "have failed to mention that flyers were published and distributed by them." Nor, the regional attorney continues, did charging parties allege that the circulation of flyers was protected conduct nor cite cases in support of such a contention.

There is indisputable evidence that CSEA knew of the protected activities by charging parties. The charging parties distributed copies of The Union Spark at CSEA meetings and in front of State buildings. Indeed, Mr. Hard handed Ms. Wilson one copy of the publication in front of a State building. CSEA President Solari wrote to Ms. Hackett demanding the Caucus cease using CSEA's name and logo in publications, plainly establishing that CSEA knew about Ms. Hackett's role in the Caucus and with The Union Spark. Mr. Elwell-Scardino testified that the Union's Board of Directors was well aware of the activities of the charging parties.

The charging parties next argue that CSEA's actions against them constituted harm within the standard of Palo Verde Unified School District, supra, PERB Decision No. 689. They cite the suspension from membership and denial of the right to run for office, a loss of reputation and prosecution of a frivolous lawsuit. They argue that all of these acts by CSEA caused them loss of time from work, loss of income, emotional damages, attorneys fees and costs.

CSEA contends that the charging parties have not demonstrated adverse action. CSEA argues that the charging parties have not suffered any loss of membership status nor limitation on running for office nor suffered any judgment from a court or administrative agency. Moreover, CSEA continues, the charging parties have recourse to CSEA's internal procedures to contest the allegations against them.

It is important to focus on the three actions that are contested here: the written charges filed on June 17, 1993, which seek suspension of the charging parties from membership for one year, charges yet to be heard under CSEA's internal procedures; the lawsuit filed on July 2, 1993, and withdrawn in March of 1994; and the written charges filed on September 28, 1993, and withdrawn on November 29, 1993. None of these actions has resulted in the suspension of charging parties and none of these actions has prevented them from seeking CSEA office. So the question here is whether the actions themselves are sufficient to constitute harm.

It is difficult to imagine that if this were a case in which five State employees faced suspension for allegedly participating in protected conduct, CSEA would agree they had not been harmed. I think it implausible that CSEA would accept an argument by the State that actionable harm does not occur until after the completion of a dismissal hearing. Nor have PERB cases involving employers so held. Indeed, the statutory requirement of timely filing[17] is not tolled while a charging party waits until the disputed conduct goes into effect.[18] A party with knowledge of an impending wrongful act waits at its peril if it does not file

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[17]See Dills Act section 3514.5(a)(1).

[18]The period of limitations begins to run on the date the charging party has actual or constructive notice of the respondent's clear intent to take the disputed action, provided that nothing subsequent evidences a wavering of that intent. (The Regents of the University of California (1990) PERB Decision No. 826-H.)

until after the wrongful act is completed. The harm occurs, not when the wrongful act is completed, but when the respondent has displayed clear intent to take the disputed action. Subsequent withdrawal of the wrongful act does not moot the cause of action.

In support of its contention that the charging parties suffered no harm, CSEA also cites the case of California School Employees Association (Harmening) (1984) PERB Decision No. 442 (Harmening). There, in adopting a regional attorney's dismissal of a charge, the Board found no prima facie case in an allegation that the charging party was recalled from his union office. That decision is easily distinguishable from the facts here. Harmening predates California State Employees Association (O'Connell), supra, PERB Decision No. 753-H and is based on an improper discipline theory. There is no allegation in Harmening that the charging party was removed from office in retaliation for protected conduct.

A person suspended from membership cannot "participate" in the activities of the Union. In terms of the relationship between an employee and an employee organization, this is the greatest possible harm. The Board also has found harm in the prosecution of "a baseless lawsuit with the intent of retaliating against employees for their exercise of protected rights." (Inglewood Unified School District (1990) PERB Decision No. 792. See also Bill Johnson's Restaurants v. NLRB (1983) 461 U.S. 731 [113 LRRM 2647].)

Although CSEA presented evidence that any member of the Union can file a charge against any other member, it is clear that all three of the challenged acts can be attributed to the Union. Ms. Wilson, a deputy director of CSEA's civil service division, testified that she filed the June 17, 1993, charges because it was her responsibility to ensure that the orders of the General Council were carried out. She was, therefore, acting within the scope of her authority as a CSEA officer. The July 2 lawsuit was filed in the name of CSEA and was obviously an act of the organization. The September 28 charges were filed by four officers of the CSEA civil service division and followed by ten days a resolution of the civil service division declaring The Union Spark contrary to the goals of the organization. I conclude that the September 28 charges were intended to carry out the resolution adopted by the civil service division.

Finally, the charging parties argue that CSEA's motive for filing charges and the lawsuit against them was to retaliate for their protected conduct. Ms. Hackett and the others argue that CSEA would not have waited nearly a year to take action against them if recovery of the documents was the true motivation for the Wilson charges and the lawsuit. Obviously, the charging parties argue, this justification for the Wilson charges and the lawsuit was pretextural. The true reason, they continue, was to prolong the ban from holding office in CSEA. "CSEA's lawsuit and internal charges practically coincide with the end of the

charging parties first suspension and their restored eligibility to run for union office," they argue.

CSEA argues the failure to return the documents was the single reason for the Wilson charges and the lawsuit. CSEA contends it had legitimate justification to seek return of the documents. It argues that the some of the documents contained sensitive information including home addresses and telephone numbers of all unit 1 members. CSEA argues that the information contained in the documents could be used against the best interests of the union. CSEA argues that the lawsuit was a well-founded attempt to recover its property from persons who were no longer entitled to possess it.

Charging parties contention that retaliatory motive was the real reason for CSEA's action against them is well supported by the evidence. Evidence of unlawful motivation is apparent in the resolution by the CSEA Board of Directors. It instructed the Union president and general manager to "take whatever steps are necessary . . . to bring disciplinary action or lawsuit against any member whose activities could adversely affect CSEA." At least one director identified the "Hackett and Hard group" as the target of the resolution. There is no evidence of any activities by the "Hackett and Hard group" at the time the resolution was passed other than activities here found to have been protected. Clearly, the charging parties were not engaging in a decertification campaign or any other actions threatening to the life of CSEA.

There also is evidence of unlawful motivation in the timing of the Wilson charges and the lawsuit. Both followed close in time to the resolution by the CSEA Board of Directors. Even more significantly, the Wilson charges were filed just six days before the expiration of the one-year ban against Ms. Hackett, Mr. Hard and the others from holding CSEA office. The charges sought as a remedy, a one-year extension in the prohibition against charging parties from holding office in CSEA.

I find CSEA's justification for the Wilson charges and the lawsuit entirely unpersuasive. It is hard to believe that the documents could be as critical as CSEA now contends when for nearly a year the Union virtually ignored the failure of the charging parties to return them. CSEA's first request for the return of the documents was made in the Solari letter of June 22, 1992. The charging parties did not return the documents and CSEA did nothing about it. Four months later, CSEA made a second request for the documents in the Zenz letter of October 19, 1992. Again, the charging parties did not return the documents and CSEA did nothing about it. Eight more months passed while the supposedly critical documents remained in the possession of the charging parties and CSEA did nothing about it. If the charges really had been intended to secure the return of documents, one would expect them to have been filed much closer in time to the initial demands for their return. As charging parties point out, it was only when the ban on their service in CSEA office was about to expire that CSEA acted. Given this timing, it seems far

more probable that the Wilson charges were intended to keep charging parties from running for CSEA office than to recover the documents.

One also would expect that if the critical documents were so sensitive, CSEA would have a past history of recovering such documents from others who had left CSEA office either voluntarily or after the filing of charges. One further would expect that CSEA would not allow even its friends to retain truly sensitive documents for which they no longer had a need. Yet there is no evidence that CSEA ever previously asked for the return of documents such as those at issue here, even from Linda Roberts who was suspended from CSEA office at about the same time as charging parties.

I find in this complete break with past practice on the return of documents further evidence of retaliatory motivation. The actual purpose of the Wilson charges, I conclude, was to keep charging parties out of CSEA office for another year in retaliation for their protected activities. For these same reasons, I conclude that the filing of the lawsuit similarly was motivated by retaliatory intent.

Finally, the motivation for the September 28 charges is self-evident. The charges sought "permanent suspension" of the charging parties from membership. The reason given for this harsh action was the distribution by the charging parties of The Union Spark in front of a State building on September 16, 1993. It is obvious, initially, that the penalty sought is

astonishingly grave for the alleged offense. This distorted relationship is of itself evidence of unlawful motivation. In addition, I already have concluded that the distribution of The Union Spark is protected conduct. On their face, therefore, the September 28 charges constituted retaliation for engaging in protected conduct.

Accordingly, I conclude that by filing the June 17 and September 23 charges and the July 2 lawsuit, CSEA discriminated against the charging parties in retaliation for protected conduct. By these actions, CSEA violated section 3519.5(b).

REMEDY

The PERB in section 3514.5(c) is given:

> . . . the power to issue a decision and order directing an offending party to cease and desist from the unfair practice and to take such affirmative action, including but not limited to the reinstatement of employees with or without back pay, as will effectuate the policies of this chapter.

The charging parties ask that CSEA be directed to sign a notice agreeing to cease and desist from its actions against them. They ask that the notice be posted where CSEA normally posts its notices and that the notice also be printed in the CSEA publication Pride. They also ask that they be made whole for lost wages and vacation time and attorney's fees and legal costs incurred in defending against the lawsuit and in bringing the present action. They also ask for compensatory damages of $30,000 each "for emotional suffering and loss of reputation."

It is appropriate that CSEA be directed to cease and desist from its discriminatory actions against charging parties or otherwise denying them the right to participate. It is further appropriate that CSEA be directed to post a notice incorporating the terms of the order. Posting of such a notice, signed by an authorized agent of CSEA, will provide employees with notice that CSEA has acted in an unlawful manner, is being required to cease and desist from this activity, and will comply with the order. It effectuates the purposes of the Dills Act that employees be informed of the resolution of this controversy and the State's readiness to comply with the ordered remedy. (Placerville Union School District (1978) PERB Decision No. 69.)

Charging parties have made no showing why the posting of a notice is not sufficient to inform employees of the result of this action and why CSEA should be directed to grant the further remedy of publication of the notice in Pride. Absent a showing that such a remedy is justified, it will not be granted.

The claim for damages is a request for a personal injury remedy. Tort remedies are not available in unfair practice proceedings where the scope of the remedy is limited to stopping unlawful conduct and restoring the aggrieved party to his/her pre-injury position. The claim for damages is denied.

Attorney's fees and costs of the litigation, including lost time and wages, are not appropriate "unless there is a showing that the respondent's unlawful conduct has been repetitive and that its defenses are without arguable merit." (Modesto City

Schools and High School District (1985) PERB Decision No. 518.) This is the first action between these parties in which a finding has been found against CSEA. There is no pattern of repetitive findings of violations against CSEA and it cannot be said that CSEA's defense was without arguable merit. Accordingly, attorneys fees and other costs of litigation, including lost time and wages, are denied.

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law and the entire record in the case, it is found that the California State Employees Association (CSEA) has violated section 3519.5(b) of the Ralph C. Dills Act by:

1. Filing written charges, on or about June 17, 1993, against Cathy Hackett, Jim Hard, Sam Jurado, Dave Weston and Doyle Harris seeking their suspension from membership in CSEA for at least one year;

2. Naming them in a civil lawsuit on or about July 2, 1993;

3. Filing written charges against Ms. Hackett and Mr. Hard, on or about September 28, 1993, seeking their lifetime suspension from CSEA.

Pursuant to section 3514.5(c) of the Government Code, it hereby is ORDERED that CSEA and its representatives shall:

A. CEASE AND DESIST FROM:

Retaliating against Cathy Hackett, Jim Hard, Sam Jurado, Dave Weston and Doyle Harris for engaging in activities

protected by the Ralph C. Dills Act.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE ACT:

1. Immediately withdraw the June 17, 1993, charges against Cathy Hackett, Jim Hard, Sam Jurado, Dave Weston and Doyle Harris that seek their suspension from membership in CSEA for at least one year. The lawsuit and September 28, 1993, charges already having been withdrawn by CSEA, no other action is necessary.

2. Within ten (10) workdays of the service of a final decision in this matter, post at all work locations where notices customarily are posted for employees represented by CSEA, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of CSEA, indicating that CSEA will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced or covered with any other material.

3. Upon issuance of a final decision, make written notification of the actions taken to comply with this Order to the Sacramento Regional Director of the Public Employment Relations Board in accord with the director's instructions.

In accordance with PERB regulations, the statement of exceptions must be filed with the Board itself within 20 days of service of this Decision or upon service of the transcript at the headquarters office in Sacramento. The statement of exceptions

should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. (Cal. Code of Regs., tit. 8, sec. 32300.) A document is considered "filed" when actually received before the close of business (5:00 p.m.) on the last day set for filing ". . .or when sent by telegraph or certified or Express United States mail, postmarked not later than the last day set for filing . . ." (Cal. Code of Regs., tit. 8, sec. 32135; Cal. Code of Civ. Proc, sec. 1013 shall apply.) Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or filed with the Board itself. (Cal. Code of Regs., tit. 8, secs. 32300, 32305 and 32140.)

Ronald E. Blubaugh
Administrative Law Judge