



Having carefully reviewed the complete record in this matter, the Board hereby adopts the ALJ's findings of fact and conclusions of law as the Decision of the Board itself. We do find it necessary, however, to briefly address one exception raised by the Charging Party.

Charging Party claims that, in allowing the Respondent's late payment in this matter, PERB has interfered with Charging Party's right to a formal hearing on the merits of the underlying complaint herein. Charging Party argues that the late payment constitutes noncompliance with the agreement's terms, thus providing Charging Party with the right to cancel the agreement and proceed to formal hearing on the complaint. The ALJ concluded that Charging Party was attempting, in bad faith, to rescind the settlement agreement inasmuch as Charging Party clearly changed his mind with respect to the agreement several hours after its execution. This was before he could possibly have known that he would receive the payment several days late. Moreover, the ALJ found that Respondent had in good faith attempted to comply with the agreement by mailing the check to Charging Party in a timely fashion, as well as rendering timely performance of the remainder of its contractual obligations. Charging Party, on the other hand, failed to perform any of his promises under the contract.

We would further add the following to the ALJ's conclusions of law with respect to this issue. In addition to the fact

that the Respondent acted in good faith in rendering its performance under the agreement, it is clear that, pursuant to the terms of the contract, time was not of the essence. Furthermore, Charging Party was not prejudiced in any way as a result of the delay in his receipt of the payment. These factors, taken together, lead to the inescapable conclusion that there was no material breach or failure of condition when Charging Party received Respondent's check five days late. Delay in performance is a material failure only if time is of the essence due to the express contractual language or the very nature of the contract. (Henck v. Lake Hemet Water Co. (1937) 9 Cal.2d 136, 143-144; Johnson v. Alexander (1976) 63 Cal.App.3d 806, 813, hg. den. [134 Cal.Rptr. 101]; 1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts; sec: 759; p: 689.)

Consequently, Charging Party did not have the ability to cancel the settlement agreement on the ground that he received Respondent's payment several days late.

#### ORDER

Charging Party's petition to calendar a formal hearing on PERB Case No. S-CO-42-S is DENIED and Case No. S-CO-42-S is hereby DISMISSED.

Chairperson Hesse and Member Shank joined in this Decision.

STATE OF CALIFORNIA  
PUBLIC EMPLOYMENT RELATIONS BOARD



GEORGE S. STEWART. D.D.S.	)	
	)	Unfair Practice
Charging Party.	)	Case No. S-CO-42-S
	)	
v.	)	
	)	
UNION OF AMERICAN PHYSICIANS	)	PROPOSED DECISION
AND DENTISTS.	)	(5/23/86)
	)	
Respondent.	)	
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Appearances: George S. Stewart. D.D.S.. in pro per. and Constance Stewart, for Charging Party; Gary Robinson, Executive Administrator, and Joan Bryant. Field Representative, for Union of American Physicians and Dentists.

Before: James W. Tamm, Administrative Law Judge

PROCEDURAL HISTORY

This charge was originally filed on February 5. 1985 by Dr. George S. Stewart (hereafter Stewart) against the Union of American Physicians and Dentists (hereafter UAPD), alleging violations of section 3519.5(b) of the State Employer-Employee Relations Act (SEERA).<sup>1</sup>

Stewart, a dentist at Folsom Prison, has been a member of unit 16 (Physicians. Dentists and Podiatrists), which is

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<sup>1</sup>The SEERA is codified at Government Code section 3512 et seq. Section 3519.5 reads in pertinent part as follows:

It shall be unlawful for an employee organization to:

. . . . .

(b) Impose or threaten to impose reprisals

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This Board agent decision has been appealed to the Board itself and is not final. Only to the extent the Board itself adopts this decision and rationale may it be cited as precedent.

represented by UAPD as exclusive representative. Stewart had been involved in a dispute with UAPD over payment of dues to that organization. In his charge. Stewart alleged that UAPD unlawfully denied him membership and placed him on "fair share" status at a time he was a dues-paying union member. He also claimed that UAPD discriminated against him by fraudulently overcharging him membership dues. Finally, Stewart alleged that UAPD had taken reprisals against him because he had sued UAPD in Small Claims Court regarding a dues dispute.

On April 16, 1985. Stewart's charge was dismissed in its entirety by a regional attorney of the Public Employment Relations Board (PERB or Board) for failure to state a prima facie violation.

Stewart appealed that dismissal, and on December 5, 1985 PERB partially overturned the dismissal.<sup>2</sup> The Board held that Stewart had stated a prima facie violation by alleging that he had been denied membership, despite tender of the full amount of dues, because of his Small Claims Court suit against UAPD.

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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.

2Union of American Physicians and Dentists (Stewart)  
(1985) PERB Decision No. 539-S.

A complaint was issued and an informal settlement conference was held on February 20, 1986. The parties reached agreement at the informal conference. A withdrawal of the complaint signed by Stewart was to become effective upon completion of certain actions by the parties.

Stewart subsequently alleged noncompliance on the part of UAPD and requested that a formal hearing regarding the unfair practice charge be held. A hearing was scheduled for May 6, 1986, not only on the underlying unfair practice charge, but also on whether the charge should be dismissed pursuant to the settlement agreement reached on February 20, 1986. At the conclusion of the first day of hearing, and after both parties had rested their cases on the issue of whether the complaint should be dismissed pursuant to the settlement agreement, the hearing was recessed pending a ruling on UAPD's motion to dismiss. The parties waived transcripts and briefs, and the matter was submitted for decision immediately.

#### FINDINGS OF FACT

##### Underlying Dispute.

By way of background,<sup>3</sup> the underlying case involves a dispute between Stewart and UAPD over payment of membership

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<sup>3</sup>This background is taken partially from the pleadings in this case and not entirely from evidence submitted on the record. Thus, no factual findings are made as to the truth or accuracy of each party's position regarding the underlying dispute.

dues. Stewart argued that he had been paying an unlawfully high dues rate because he paid dues directly, rather than at a lower rate through payroll deduction.<sup>4</sup> When Stewart was unable to get the dues rate lowered, he successfully sued UAPD in Small Claims Court for the excess. Then, according to Stewart, when he refused to continue direct dues payment at the higher level. UAPD fraudulently denied him membership and caused the State Controller to automatically deduct "fair share" payments from his salary.<sup>5</sup> Furthermore. Stewart argued that when he once again offered to pay the full amount of dues at the higher direct dues payment level, UAPD refused to remove him from "fair share" salary deductions.

UAPD countered that it legitimately had two dues rate structures, a lower rate for payroll deduction payees, and a higher rate for those who paid "direct dues" through a billing process. According to UAPD, Stewart wanted to pay the lower rate while utilizing the direct dues-payment method, rather than automatic payroll deductions. When UAPD lost Stewart's

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<sup>4</sup>The rates for direct dues involving a billing process are \$360.00 per year, as contrasted to the dues paid by payroll deductions which are \$282.00 per year.

<sup>5</sup>"Fair share" deductions are authorized by Senate Bill 1419, which allowed exclusive representatives to negotiate fair share agreements with the State. Once conditions of SB 1419 are satisfied, the State Controller's office is required to withhold fair share deductions for the exclusive representative. Under SB 1419, fair share fees do not require employee authorization for payroll deductions, therefore, fair share deductions cannot be cancelled by employees.

Small Claims action it appealed that judgment seeking a trial de novo in Sacramento Superior Court.

According to UAPD, when Stewart refused to tender the full "direct dues" amount, UAPD legitimately had "fair share" deductions made from his salary. When Stewart finally did tender the direct dues amount, he refused to sign either a payroll deduction authorization card or a membership card notifying the Union that he would be a direct dues-paying member. Therefore, according to UAPD, it did not change Stewart's status from "fair share" payee because of Stewart's refusal to clarify his status in spite of numerous requests by UAPD.

Settlement Conference.

The settlement conference in question was held on February 20, 1986 in the Sacramento PERB Regional Office. In attendance were Stewart, representing himself. Joan Bryant and Gary Robinson, representing UAPD, and PERB Administrative Law Judge Terry Filliman. Neither party chose to be represented by an attorney, although both parties were aware of that right.

The conference started at 10:00 a.m. and lasted until approximately 4:30 p.m. By mutual agreement of the parties, they continued meeting throughout the day without taking a lunch break. However, occasional short breaks allowed the parties to obtain snacks from a nearby employee lunch room.

During the morning session of the settlement conference.



Judge Filliman met with both parties at the same time, discussing the issues which needed to be settled. After one of the short afternoon breaks. Judge Filliman met with each side separately regarding their individual concerns.

After meeting with each side separately. Judge Filliman drafted a settlement agreement which he discussed with both parties in joint session. During that session, the parties discussed each paragraph of the draft, and Stewart requested the inclusion of an additional paragraph to give him what he felt was greater protection.

After inclusion of Stewart's paragraph and correction of some typographical errors, both parties signed the settlement agreement. Stewart also signed a withdrawal of his complaint with prejudice. Prior to signing the withdrawal. Stewart asked questions regarding the legal ramifications of withdrawing with or without prejudice. Judge Filliman answered Stewart's questions to Stewart's satisfaction, and Stewart signed the withdrawal.

#### The Settlement Agreement.

The settlement agreement itself contained numerous requirements to be carried out by each party. UAPD agreed to reinstate Stewart to union membership and to waive any additional fees beyond what was already paid. UAPD also agreed to Stewart's demand that he not be required to sign a new membership application. UAPD was also required to terminate

its request to the State Controller for Stewart's fair share deductions effective March 1986.

Stewart agreed that his obligation to pay membership dues would commence March 1, 1986. Stewart was allowed to choose to continue payment of dues by direct dues payment, or to commence payment by payroll deduction. However, Stewart was explicitly required to notify UAPD prior to March 1, 1986 of which method he would elect.

Stewart agreed to dismiss his complaint and resulting Small Claims Court judgment with prejudice, and UAPD agreed to withdraw its appeal of Stewart's judgment to the Sacramento Superior Court. The withdrawal of the court proceeding was to be done within ten days of the settlement. Stewart also waived any right to challenge UAPD's dues structure in any court suit, unless it was raised as a defense to a union suit against Stewart.

Also within ten days, UAPD was to pay Stewart \$400.

Both parties also agreed to abide by provisions of the UAPD constitution and bylaws.

#### Actions of UAPD.

Following the settlement conference, UAPD took action necessary to reinstate Stewart to membership and waived any additional fees. It also began the process of removing Stewart from "fair share" payroll deductions through the State Controller's office. This was completed so that Stewart had no

March deduction from his payroll check, as required in the settlement agreement.

On February 26. Robinson made out a \$400 check to Stewart, and sent it to Daniel Yamshon. the UAPD attorney, who was to forward it to Stewart. According to Deborah Wiese. Yamshon's legal secretary, she deposited the check to Stewart, along with a proof of service, into a mailbox near the office prior to 5:00 p.m. on February 28, 1986. Wiese chose that particular mailbox because she was aware there was supposed to be a 5:00 p.m. pickup on Friday afternoons at that mailbox. Although the proof of service was dated February 28, the envelope in which Stewart eventually received the check was not postmarked until March 5, 1986.<sup>6</sup> Wiese testified that the law firm had been having other problems with postmarks on mail deposited at an earlier date. Wiese had spoken to the regular postman, who had explained to Wiese that the problems may have been caused by temporary employees filling in for regular postal employees on vacation.

Yamshon also prepared the papers necessary for Stewart to withdraw his Small Claims Court judgment and the Superior Court appeal, and sent them to Stewart for his signature.

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<sup>6</sup>A copy of the check sent to PERB at the same time as the one sent to Stewart was also postmarked March 5. with the proof of service dated February 28, 1986.

Actions of Stewart.

In contrast to UAPD's efforts to carry out the settlement agreement. Stewart did nothing at all to implement the agreement. Although Stewart testified early in the hearing that he had decided to renege on the settlement agreement only after UAPD's \$400 payment was late, the evidence clearly shows

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that quite the contrary is true.<sup>7</sup>

Within hours after signing the agreement, Stewart began having feelings of settlement remorse. On cross-examination, Stewart admitted that after having dinner on the 20th, he reflected upon the settlement and decided he did not like it. He felt it put him in a bad light, and required him to do a great deal, and UAPD to do very little.

Stewart testified that he had not read the two-page settlement agreement well enough to fully comprehend the agreement. He said normally he would have read such an important document at least four times before signing, but because it was getting late, he only read it once before signing the settlement agreement.<sup>8</sup>

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<sup>7</sup>Throughout the hearing, Stewart blatantly contradicted his own testimony, thereby rendering him a completely unbelievable witness. His testimony was also inconsistent with many of his earlier actions. Stewart often failed to give any plausible explanation for those inconsistencies.

<sup>8</sup>on cross-examination. Stewart admitted that he had a total of ten years of college education. Stewart had also been elected to the board of trustees for the Los Rios Community College District four times, for a total of 16 years of service as a trustee. Thus, I conclude that Stewart, a dentist, was quite capable of understanding the agreement.

The next morning at 8:30 a.m.. Stewart called Judge Filliman seeking to get out of the agreement, but was told the agreement was binding. Stewart then spoke about the matter with his attorney. Thomas Lynch, who the following day wrote to Judge Filliman. The letter indicated in relevant parts the following:

George S. Stewart does hereby both withdraw and rescind the so-called settlement he executed at approximately 4:00 p.m. on this 20 February 1986.

The reasons given for Stewart's rescission of the agreement are in essence as follows. (1) The length of the hearing was unusually long, from 10:00 a.m. to 4:00 p.m., without a lunch break; (2) Judge Filliman had close communication with UAPD representative Joan Bryant and a correlative lack of communication with Stewart "who, after all, caused the hearing to be brought"; (3) Judge Filliman had commented about the probable outcome of an appeal of Stewart's suit against UAPD, thereby taking a clear position for one party and against another; and. (4) Stewart felt pressured and coerced into signing the settlement agreement.

According to Lynch,

For these reasons and other reasons,<sup>9</sup> that settlement agreement is a nullity.

From that day on, Stewart never gave any indication that his position regarding rescission of the settlement agreement had changed.

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<sup>9</sup>None of those "other reasons" were given.

Judge Filliman responded on February 28, 1986. In essence, he noted that Stewart's participation in the settlement was voluntary, with full knowledge of his rights and obligations, that both the purpose of the conference and the normal operating procedures were carefully explained to both parties prior to and during the course of discussions, and that the conference was conducted in a fair and impartial manner consistent with the normal operating procedures of the PERB. Judge Filliman indicated that the agreement was binding upon the parties when the other party tendered performance of its conditions in a timely manner. If Stewart refused to perform. Judge Filliman cautioned, the complaint could be dismissed.

Judge Filliman also suggested that Lynch raise his concerns of inappropriate conduct on Judge Filliman's part with the PERB chief administrative law judge. Neither Lynch nor Stewart, however, pursued those allegations with the chief administrative law judge.

Stewart took no action to notify UAPD of his election of dues payment method as required by the agreement. Stewart also refused to sign the papers necessary to withdraw his Small Claims Court action.

On March 4, Lynch called Yamshon to ask about the union's \$400 check and was told that it had already been mailed. By March 7, Stewart had not yet received UAPD's check. That same day, Stewart prepared a sworn declaration stating that he had

not received the check and that he had not performed nor tendered performance of any of his promises contained in the settlement agreement.

Stewart testified that he received UAPD's \$400 check on March 8, 1986.

#### ISSUE

Should the complaint be dismissed because of Stewart's refusal to implement the settlement agreement entered into on February 20, 1986?

#### DISCUSSION

The Board has dealt with this issue in the past. In Victor Valley Joint Union High School District (1980) PERB Decision No. 148, the Board dismissed the charging party's unfair practice charges when it refused to withdraw its charges as required by a settlement agreement. The Board held that its policy of encouraging the parties to reach voluntary settlement would be seriously undermined if a party refused to honor an agreement to withdraw its unfair practice charge.

The Board cited National Labor Relations Board precedent consistent with its holding. In George Banta Co., Inc. and Graphic Arts Union (1978) 236 NLRB 1559 [98 LRRM 1581], the NLRB refused to allow a party to withdraw from a settlement agreement. The NLRB held:

. . . Finally, policy considerations militate against granting respondents the right to withdraw from formal settlement stipulations executed with the General

Counsel pending Board approval. Such a right would undermine the continued efficacy of the settlement process which, as an alternative to lengthy adjudication, allows the Board as well as respondents and charging parties to save time, expense and the inevitable risk of litigation.

The same policy considerations weigh heavily in favor of dismissal of Stewart's charge in this case. Stewart's bad faith actions in renegeing on the settlement agreement should not create a new opportunity to litigate the underlying unfair practice charge. Stewart's testimony that he renegeed on the settlement agreement for the sole reason that UAPD's \$400 check was late is simply too outrageous to be believed in light of his other actions. Stewart changed his mind almost immediately. He had his lawyer rescind the agreement two days later. He failed to notify UAPD of his dues payment election as required, and he refused to take the steps necessary to withdraw his Small Claims Court judgment. This was all prior to the time Stewart could have even known whether UAPD's check was late.

During this same period. UAPD had reinstated Stewart's membership and waived additional fees; had removed him from the "fair share" payment, thus losing income; started the process to withdraw its Superior Court appeal; and had made out a \$400 check to Stewart.

Even if the check had been mailed late, it should not change the outcome of this case for two reasons. First,



Stewart failed to demonstrate that he suffered any prejudice whatsoever because the check was late. Second. Stewart's action prior to the check's due date made implementation of the settlement agreement an impossibility, even if the check had been received in time. Stewart's actions in refusing to tender performance on any of his promises rendered any of UAPD's tender of performance meaningless.

Stewart's claim that he did not fully comprehend the agreement is also not credible. A reading of the document reveals that it is not particularly complicated. Furthermore, Stewart is not inexperienced in reviewing important documents. He was a community college trustee for 16 years, and has 10 years of formal college education. Stewart also failed to give any evidence of which portions of the settlement agreement he didn't comprehend.

There was ample evidence that Stewart participated fully in the settlement negotiations, discussed each paragraph of the agreement, asked questions when he was unclear about the ramifications of specific language, and requested additional settlement language to his benefit, which was adopted as part of the settlement.

Stewart also failed to offer any evidence supporting Lynch's earlier claim of February 22 that Stewart was coerced into the agreement. To the contrary, at the hearing Stewart testified that he entered into the agreement willingly.

if any. relied upon for such exceptions. See California Administrative Code title 8. part III, section 32300. Such statement of exceptions and supporting brief must be actually received by the Public Employment Relations Board at its headquarters office in Sacramento before the close of business (5:00 p.m.) on June 12, 1986. or sent by telegraph or certified or Express United States mail, postmarked not later than the last day for filing in order to be timely filed. See California Administrative Code, title 8, part III, section 32135. Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall be filed with the Board itself. See California Administrative Code, title 8, part III, sections 32300 and 32305.

Dated: May 23, 1986

JAMES W. TAMM  
Administrative Law Judge

Stewart also testified that the only reason causing him to renege on the settlement agreement was the delay in receiving UAPD's check, thus nullifying any claim of coercion at the settlement conference. Furthermore, when Judge Filliman suggested that Lynch raise any claim of inappropriate settlement conduct with the chief administrative law judge, neither Lynch nor Stewart pursued the matter.

#### CONCLUSION

In summary, the evidence indicates that the parties willingly entered into a negotiated settlement agreement. UAPD sought to implement the agreement. Although Stewart received UAPD's \$400 check a few days late, he had already reneged on the agreement prior to the check due date. If Stewart is allowed to now litigate the underlying unfair practice complaint, the integrity of the settlement process will be seriously damaged. Parties will know that settlement agreements may be rejected at any time and are, in fact, meaningless. For that reason, Stewart's complaint is hereby dismissed.

Pursuant to California Administrative Code, title 8, part III. section 32305. this Proposed Decision and Order shall become final on June 17, 1986. unless a party files a timely statement of exceptions. In accordance with PERB regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record.