STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

JOHN KALKO AND DAVID RUGER, Charging Parties,	)	Case No. S-CE-667-S
v.	)	PERB Decision No. 1125-S
STATE OF CALIFORNIA (DEPARTMENT OF PARKS AND RECREATION), Respondent.	)	November 30, 1995

Appearances: John Kalko and David Ruger, on their own behalf; State of California (Department of Personnel Administration) by Linda A. Mayhew, Labor Relations Counsel, for State of California (Department of Parks and Recreation).

Before Caffrey, Chairman; Carlyle and Garcia, Members.

DECISION

CARLYLE, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by John Kalko (Kalko), David Ruger (Ruger) and the State of California (Department of Parks and Recreation) (DPR or State) to a PERB administrative law judge's (ALJ) proposed decision (attached) dismissing the unfair practice charge which alleged that the State violated section 3519(a) of the Ralph C. Dills Act (Dills Act).[1] Prior to the issuance of the proposed decision, the State

[1]The Dills Act is codified at Government Code section 3512 et seq. Unless otherwise noted, all statutory references herein are to the Government Code. Section 3519 states, in pertinent part:

> It shall be unlawful for the state to do any of the following:
>
> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise

filed an appeal of the ALJ's denial of its motion to dismiss and defer to binding arbitration. The Board hereby consolidates these two cases in this decision.

After review of the entire record, including the State's motion to dismiss, Kalko and Ruger's opposition thereto, and the exceptions filed by the parties, the Board hereby affirms the ALJ's denial of the motion to dismiss to the extent consistent with the following discussion. With regards to the proposed decision, the Board finds the ALJ's findings of fact to be free from prejudicial error. We are also in agreement with, and hereby adopt, the conclusions of law set forth in the ALJ's proposed decision.

PROCEDURAL BACKGROUND

Kalko and Ruger filed an unfair practice charge against DPR in June of 1993. On August 31, 1993, after investigation, the Office of the General Counsel issued a complaint alleging that certain conduct taken against Kalko and Ruger was an illegal reprisal in violation of Section 3519(a) of the Dills Act. Informal conferences failed to resolve the dispute.

A formal hearing was conducted on March 1, 1994. DPR filed a written motion to dismiss on March 3, 1994 asserting that PERB lacked jurisdiction to issue the complaint because Kalko and Ruger failed to exhaust the contractual grievance procedure. The ALJ denied that motion on March 31, 1994. The State appealed the

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> to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.

March 31 denial and on August 31 the Board rejected the appeal of the denial as untimely filed (State of California (Department of Parks and Recreation) (1994) PERB Order No. Ad-260-S). However, the Board stated that the motion could be renewed at a later date. When the hearing was reconvened on September 8, 1994, DPR renewed its motion to dismiss and defer to binding arbitration. The motion was again denied by the ALJ. The State filed another appeal of the ALJ's order denying their motion to dismiss with the Board itself. The hearing proceeded and the ALJ's proposed decision followed. Kalko and Ruger filed exceptions regarding the ALJ's finding of facts and procedural rulings. The State filed exceptions challenging the ALJ's factual findings and conclusions of law regarding PERB's jurisdiction.

FACTUAL BACKGROUND

Kalko and Ruger are both employed as State Park Ranger I's at Crystal Cove State Park in Orange County. In July of 1992, Kalko and Ruger issued citations to two individuals at the park. In August of 1992, they met with their supervisor, Michael Eaton (Eaton), a State Park Ranger II to discuss their handling of the incident. Eaton issued corrective counseling memos to both employees addressing the issues of private person arrests and timeliness in the preparation of crime reports. As a result of these corrective counseling memos, Kalko and Ruger filed a grievance on August 16, 1992. They were represented by their exclusive representative, the California Union of Safety Employees (CAUSE).

In the grievance, Kalko and Ruger contended that the employer issued the counseling memos as reprisals against them for "the filing of grievances in the past."

The grievance alleged a violation of the "no reprisal" section of the collective bargaining agreement (CBA or agreement) between CAUSE and the State.[2] Section 2.6 of the CBA reads:

> The State and CAUSE shall not impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise interfere with, restrain, or coerce employees because of the exercise of their rights under the Ralph C. Dills Act or any right given by this Contract.

Article 6 of the CBA is the grievance and arbitration procedure which ends in binding arbitration. Only CAUSE has the right to submit a grievance to arbitration.

The grievance was processed in a timely fashion through the first four steps of the grievance procedure. When the grievance was denied at the fourth level on January 20, 1993, CAUSE notified the State on February 1, 1993 that it was exercising its right to submit the grievance to arbitration. Section 6.13 of the agreement requires CAUSE to notify the State in writing that it is requesting to jointly select an arbitrator within 14 days of a pre-arbitration meeting. Section 6.13 states, in part, "If no request is forwarded, the grievance shall be deemed withdrawn." On March 25, 1993, CAUSE and the State discussed the grievance in a pre-arbitration meeting. However, CAUSE made no

[2]The agreement was effective from July 1, 1992 through June 30, 1995.

request to jointly request an arbitrator. On April 14, 1993, CAUSE sent a letter to the grievants informing them of its decision not to pursue the matter to arbitration.

THE ALJ'S DENIAL OF RESPONDENT'S MOTION TO DISMISS

The ALJ twice denied the State's motion to dismiss and defer to the grievance/arbitration procedure, based, in part, on the State's refusal to waive procedural defenses. Additionally, the ALJ stated that the case may give PERB an opportunity to refine its standards on futility.

EMPLOYER'S POSITION ON MOTION

DPR contends that PERB has no jurisdiction to hear this dispute because it must defer to the grievance machinery provided in the CBA. According to the State, Kalko and Ruger may only demonstrate futility by prevailing in an action against CAUSE for breach of its duty of fair representation. The State also argues that as a matter of public policy, deferral to the grievance machinery is necessary to preserve the integrity of the collective bargaining system.

KALKO AND RUGER'S POSITION

Kalko and Ruger assert that futility has been demonstrated because CAUSE refused to proceed to arbitration and there was no settlement of the grievance. Section 6.6 of the CBA provides that only CAUSE has the right to move grievances to arbitration. Kalko and Ruger requested that CAUSE do so and CAUSE refused. Accordingly, futility has been demonstrated.

DISCUSSION

Section 3514.5(a) of the Dills Act states, in relevant part, that PERB shall not:

> Issue a complaint against conduct also prohibited by the provisions of the [CBA in effect] between the parties until the grievance machinery of the agreement, if it exists and covers the matter at issue, has been exhausted, either by settlement or binding arbitration.

In Lake Elsinore School District (1987) PERB Decision No. 646, PERB held that Section 3541.5(a) of the Educational Employment Relations Act (EERA),[3] which contains language identical to Section 3514.5(a) of the Dills Act, established a jurisdictional rule requiring that a charge be dismissed and deferred if: (1) the grievance machinery of the agreement covers the matter at issue and culminates in binding arbitration; and (2) the conduct complained of in the unfair practice charge is prohibited by the provisions of the agreement between the parties.

These standards are met with respect to this case. First, the grievance machinery of the agreement covers the dispute raised by the unfair practice charge and culminates in binding arbitration. Second, the conduct complained of in this charge, that Kalko and Ruger were discriminated against because of their protected activity, is arguably prohibited by Section 2.6 of the CBA.

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

However, Section 3514.5(a) of the Dills Act also states:

> . . . when the charging party demonstrates that resort to the contract grievance procedure would be futile, exhaustion shall not be necessary.

In State of California (Department of Developmental Services) (1985) PERB Order No. Ad-145-S, the Board dismissed the charge of an employee who had not requested union assistance in taking a reprisal grievance to arbitration. The Board interpreted futility under those facts as requiring a showing that the union has committed itself to a position in conflict with the interests of the grievant, that the union acted to further the employer's aims, or that the union condoned the employer's alleged illegal act.

In State of California (Department of Corrections) (1986) PERB Decision No. 561-S, the Board again applied this rule to dismiss a complaint alleging illegal employer discrimination by a State employee who had not sought to pursue the matter through the contractual grievance procedure to arbitration. Thus, it is established that an employee may not bypass the procedures set forth in the CBA.

PERB has also found that a union's voluntary abandonment of a grievance does not constitute exhaustion of the grievance procedure or futility. (Eureka City School District (1988) PERB Decision No. 702 (Eureka).) In Eureka. the union abandoned its own grievance and pursued an unfair practice charge over the same conduct. The union was unable to demonstrate futility because it

had voluntarily withdrawn the grievance three days before a scheduled arbitration hearing.

In this case, Kalko and Ruger did not seek to bypass the contractual grievance procedure, nor did they voluntarily withdraw from this procedure, nor did they fail to timely file to proceed with this procedure at every step or level within their control. CAUSE refused to take Kalko and Ruger's grievance to arbitration. CAUSE is not the charging party before PERB, nor the grievant in the grievance process.

Refusal to defer to the grievance procedure in this case is consistent with both the established practice of the National Labor Relations Board (NLRB) and also with the clear language of the Dills Act. In United Technologies Corp. (1984) 268 NLRB 557 [115 LRRM 1049], the NLRB determined that it would apply the doctrine of deferral to a case of employer reprisal for protected activity. However, that decision makes clear that such charges are not to be deferred where the dispute is not promptly resolved "by amicable settlement in the grievance procedure or submitted promptly to arbitration" because of action or inaction of either the employer or the union. (Accord Whirlpool Corporation (1975) 216 NLRB 183 [88 LRRM 1329] [no deferral where the union failed to take the case to arbitration].)

The clear intent of Section 3514.5(a) is that this Board defers to the contractual resolution of disputes where such is available, and falls within the parameters of that section. Also clear is the Legislature's intent that when such resolution is

not available, and resort to it would be futile, PERB is to issue a complaint and resolve the matter.

In this case, Kalko and Ruger properly pursued their allegations through the grievance procedure and, through no fault of their own, have no mechanism available for resolution of the dispute. Deferral to arbitration would be an empty act because CAUSE has already indicated it will not present the case to an arbitrator. Thus, Kalko and Ruger have demonstrated that they have fully pursued the grievance procedure available to them; further pursuit would be futile and deferral is not appropriate in this case because there is in fact nothing to defer to.

Indeed, given the facts in this case, deferral is tantamount to leaving the grievants, Kalko and Ruger, with no forum to be heard even once on the merits of their action since the evidence in this case demonstrates that arbitration is not an alternative. To defer to a procedure that is unavailable as stated in the conclusion of the dissenting opinion is highly perplexing, if not misleading.

PERB has not had before it in any prior cases a situation where the charging parties utilized the grievance procedure but could not complete it through no fault of their own and then came to PERB to seek redress against their employer for violation of the Dills Act as alleged in their grievance. In all prior cases before PERB, the charging party either sought to bypass the grievance procedure altogether, or utilized said procedure but could not complete it because the charging party was at fault,

either by missing a filing deadline or by withdrawing its own grievance.

The dissent's heavy reliance upon a contract negotiation theory is not relevant, and appears to be designed to camouflage a unique view and interpretation as a means to an end. This is not a contract negotiation case. Kalko and Ruger are two individuals claiming a Dills Act violation by their state employer.

The dissent fails to recognize that PERB is a quasi-judicial agency that does not possess broad quasi-legislative powers. PERB's statutes, read in a manner consistent with court standards on deferral and futility, define when remedies are available or unavailable. This Board does not possess the power to make policy based on speculation and must operate within the limits granted by statute and court decisions.

The dissent concludes that futility has not been shown because none of three standards has been met. The first two standards enumerated are not relevant since they paraphrase current law developed in response to those who would bypass the grievance and arbitration procedure and seek PERB jurisdiction without utilizing said procedure at all, or by failing to complete it as a result of their own fault.

The third standard, however, is what the difference between the majority and the dissent is all about. Whereas the majority finds futility in this case because said procedure was utilized in a timely fashion and cannot be completed through no fault of

Kalko and Ruger, the dissent would not so find, creating a new standard and procedure in which Kalko and Ruger and union members in similar circumstances in the future must prove that their union "did not exercise in good faith its discretion under the contractual grievance procedure and PERB precedent to pursue or not pursue their grievance to arbitration."

In other words, under the dissent's view, if the charging parties (union members) utilize the grievance procedure but cannot complete it through no fault of their own, they must then file two charges with PERB. The first one is against the state employer for the gravamen contained in the grievance (this charge is filed to prevent a statute of limitations problem and is held by PERB in abeyance). The second one is against the charging parties' own union alleging a violation of their union's duty of fair representation for failing to take their grievance to arbitration.

Assuming that many months later the charging parties in question ultimately prevail against their union and PERB concludes that such a duty of fair representation was violated, the charging parties will have then demonstrated futility. They can then have their charge against the state employer taken out of abeyance and can then begin the whole process all over again.

Unfortunately for the charging parties in question, the immediate legal position of the state employer upon PERB finding such a violation will most likely be that said violation is prima facie evidence of manipulation between the charging parties and

their union to forum shop as feared by the dissent and, as such, the charging parties should not benefit from such deceit.

Of course, if the charging parties fail in their attempt to prove a union violation, then their charge against the state employer is unceremoniously dismissed, because under the dissent's view the charging parties have not proved futility.

Section 3514.5(a) of the Dills Act statutorily creates an exception to having to complete the contract grievance procedure if futility can be demonstrated. Obviously, this is not an exception which is utilized by the state employer. Further, unless the state employer announces by word or deed that it will not agree to arbitrate anything, this is not an exception which is utilized by the union.[4]

Therefore, this statutory exception has as its main beneficiary the union member. Meeting the test of futility should not be easy or automatic. However, the position held by the dissent would create a process so formidable and counter-productive to union stability as to render this statutory exception virtually unattainable once the grievance procedure has been initiated but cannot be completed through no fault of the union member.

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[4]All collective bargaining agreements entered into between the state employer and the union provide that only the union, and not the employee, can decide whether or not to take a grievance to arbitration.

ORDER

The motion to dismiss and defer is hereby DENIED. The complaint and unfair practice charge in Case No. S-CE-667-S are hereby DISMISSED.

Member Garcia joined in this Decision.

Chairman Caffrey's dissent begins on page 14.

CAFFREY, Chairman, dissenting: John Kalko (Kalko) and David Ruger (Ruger) have failed to demonstrate in this case that resort to the contractual grievance procedure would be futile within the meaning of section 3514.5(a) of the Ralph C. Dills Act (Dills Act). Therefore, the Public Employment Relations Board (PERB or Board) is without jurisdiction to consider Kalko and Ruger's unfair practice charge, and I would reverse the administrative law judge's (ALJ) denial of the State of California (Department of Parks and Recreation) (State) motion to dismiss and defer this matter to the contractual grievance and arbitration procedure.

The Dills Act describes as its primary purpose in section 3512 "providing a reasonable method of resolving disputes . . . between the state and public employee organizations." Dills Act section 3515 gives employees the right to select an employee organization to represent them in their employment relations with the state employer. Section 3515.5 provides that once an employee organization is recognized as the exclusive representative of an appropriate bargaining unit, only that employee organization has the right to represent the bargaining unit in employment relations with the employer. The state employer and the exclusive representative are required to meet and confer in good faith regarding wages, hours, and other terms and conditions of employment. (See Dills Act sections 3517, 3519 and 3519.5(c).)

The U.S. Supreme Court in Ford Motor Co. v. Huffman (1953) 345 U.S. 330 [31 LRRM 2548, 2551] (Ford Motor Co.) addressed the

authority of an exclusive representative to negotiate in good faith on behalf of its bargaining unit members:

> Any authority to negotiate derives its principal strength from a delegation to the negotiators of a discretion to make such concessions and accept such advantages as, in the light of all relevant considerations, they believe will best serve the interests of the parties represented. A major responsibility of negotiators is to weigh the relative advantages and disadvantages of differing proposals. . . . Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion.

Thus, the discretion to make concessions and accept advantages in order to serve the interests of the employees represented, is the principal strength of the exclusive representative's authority. The exercise of this discretion includes the authority to negotiate a contract provision governing the dispute resolution process which the parties have agreed to utilize; that is, a grievance and arbitration procedure.

In Vaca v. Sipes (1967) 386 U.S. 171, 190 [64 LRRM 2369] (Vaca), the U.S. Supreme Court addressed the necessity of requiring adherence to a contractual grievance and arbitration procedure which provides the exclusive representative with the authority to determine whether a grievance should proceed to arbitration:

> If the individual employee could compel arbitration of his grievance regardless of its merit, the settlement machinery provided by the contract would be substantially undermined, thus destroying the employer's confidence in the union's authority and returning the individual grievant to the vagaries of independent and unsystematic negotiation. Moreover, under such a rule, a significantly greater number of grievances would proceed to arbitration. [Fn. omitted.] This would greatly increase the cost of the grievance machinery and could so overburden the arbitration process as to prevent it from functioning successfully. [Id. at p. 2377.]

It is clear from these Supreme Court decisions that the exclusive representative has the authority to negotiate a contractual process for resolving employee disputes with the employer, which the exclusive representative, and not the individual employee, may decide how to utilize in any particular case. Moreover, allowing individual employees to make such a decision may undermine the purposes of collective negotiations.

Consistent with the Court's guidance in Ford Motor Co. and Vaca. PERB has consistently held that an exclusive representative is accorded considerable discretion in the negotiations process to obtain terms and conditions of employment which are in the best interests of the bargaining unit members it represents. (American Federation of State. County and Municipal Employees, Council 10 (Alvarez) (1993) PERB Decision No. 984-H.) In fact, the Board has held that this discretion includes the authority to agree to contract provisions which adversely impact certain employees, provided that there is a rational basis for the

exclusive representative's action. (Mt. Diablo Education Association (DeFrates) (1984) PERB Decision No. 422.)

Under the Dills Act, once a tentative agreement has been negotiated by the exclusive representative and the state employer, employees typically have the opportunity to either ratify or reject the agreement. The agreement is also submitted jointly by the state employer and the exclusive representative to the California Legislature for ratification. Upon ratification the state employer and the exclusive representative, and the represented employees within the bargaining unit, are bound by the terms of the collective bargaining agreement (CBA). Individual employees are not permitted to repudiate the terms of the agreement, or to bargain directly with the employer in an attempt to achieve more favorable employment rights and/or terms and conditions of employment. (Oxnard School District (1988) PERB Decision No. 667.)

The Dills Act provides any employee, employee organization or employer with the right to file an unfair practice charge, subject to two specific statutory limitations. Dills Act section 3514.5(a) provides, in pertinent part, that the Board shall not:

> (1) issue a complaint in respect of any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge; (2) issue a complaint against conduct also prohibited by the provisions of the agreement between the parties until the grievance machinery of the agreement, if it exists and covers the matter at issue, has been exhausted, either by settlement or binding arbitration.

The first statutory limitation of PERB's jurisdiction over alleged unfair practices is a procedural or timeliness limitation. In Lake Elsinore School District (1987) PERB Decision No. 646 (Lake Elsinore), the Board ruled that the second statutory limitation set out in section 3541.5(a) of the Educational Employment Relations Act[1] also establishes a nondiscretionary, jurisdictional bar to the Board's authority to issue a complaint. The Board held that it must dismiss and defer an unfair practice charge if: (1) grievance machinery exists within the agreement between the employer and employee organization which covers the matter at issue and culminates in binding arbitration; and (2) the conduct complained of in the unfair practice charge is prohibited by the provisions of the agreement.

Therefore, the Dills Act specifically provides that the right of an individual employee to file an unfair practice charge at PERB is limited both Procedurally and by the agreement of the state employer and the exclusive representative to a contractual grievance and arbitration procedure.

It is important to note that the Board in Lake Elsinore expressly distinguished decisions of the National Labor Relations Board (NLRB) in considering when PERB's deferral to a contractual grievance procedure is statutorily mandated. The NLRB employs a discretionary deferral policy for which there is no underlying statutory basis. (Collyer Insulated Wire (1971) 192 NLRB 837

[1]Dills Act section 3514.5(a) contains identical language.

[77 LRRM 1931].) The Board in Lake Elsinore specifically distinguished PERB's statutory jurisdictional limitation from provisions of the National Labor Relations Act (NLRA),[2] noting that the federal act expressly permits the NLRB to disregard contractual grievance procedures. The NLRA provides that:

> The [NLRB] is empowered . . . to prevent any person from engaging in any unfair labor practice . . . . This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise. (29 U.S.C, sec. 160(a), emphasis added.)

The Lake Elsinore Board stated that this section of the NLRA:

> . . . constitutes an expression of Congress' intention for the NLRB's jurisdiction to be paramount over any system which might be devised by the parties to settle their disputes, including binding arbitration pursuant to a provision under the collective bargaining agreement. [Citations.] Therefore, quite unlike the jurisdiction of PERB, that of the NLRB is not displaced by the presence of an arbitration provision within the parties' agreement covering the matter at issue. On the contrary, even though a breach of contract remediable through arbitration occurs, the NLRB may still, if it so chooses, exercise its jurisdiction under the NLRA to prosecute conduct which also constitutes an unfair labor practice. [Citations.] (Id. at p. 29, emphasis added.)

The majority's reliance on "the established practice" of the NLRB to support its refusal to defer the instant charge ignores this fundamental distinction. NLRB policies governing the exercise of its discretionary jurisdiction can not be relied upon to lift the

[2]The NLRA is codified at 29 U.S.C, section 141 et seq.

statutory bar to PERB's jurisdiction, and are not determinative of the issue presented by the instant case.

It is undisputed that under Lake Elsinore, PERB's mandatory deferral standard has been met in the instant case, requiring PERB to defer the unfair practice charge to the contractual grievance and arbitration procedure. However, section 3514.5(a) of the Dills Act further provides that:

> . . . when the charging party demonstrates that resort to the contract grievance procedure would be futile, exhaustion shall not be necessary.

The charging parties here argue that the futility of resorting to the contract grievance procedure has been demonstrated, making exhaustion of that procedure unnecessary.

In the instant case, Kalko and Ruger filed a grievance alleging that they received counseling memos in retaliation for filing grievances in the past. Section 2.6 of. the CBA prohibits retaliation by the State against employees because of the exercise of their rights under the Dills Act or the CBA. Article 6 of the CBA sets out the grievance procedure which culminates in binding arbitration. This provision gives the exclusive representative, the California Union of Safety Employees (CAUSE), the exclusive right to submit a grievance to arbitration.

Kalko and Ruger's grievance advanced through four levels of the grievance procedure. The grievance was denied at the fourth level on January 20, 1993. On February 1, 1993, CAUSE notified the State that it was exercising its right to submit the

grievance to arbitration. CAUSE and the State discussed the grievance at a pre-arbitration settlement meeting on March 25, 1993. Section 6.13 of the CBA requires CAUSE, within 14 days of the pre-arbitration meeting, to "notify the State in writing that it is requesting to meet with [the State] to jointly select an arbitrator. If no request is forwarded, the grievance shall be deemed withdrawn." CAUSE did not notify the State within the 14-day period that it desired to meet for the purpose of selecting an arbitrator as required by section 6.13. In an April 14, 1993, letter to Kalko and Ruger, CAUSE informed them that it had decided, based on the lack of merit of their case, not to pursue their grievance to arbitration.

Based on these facts, Kalko and Ruger argue that futility exists in this case because the contractual arbitration procedure is unavailable to them due to CAUSE'S decision, in accordance with the CBA, not to pursue their grievance to arbitration. They assert, therefore, that they have the right to pursue their charge at PERB.

The Board has previously considered circumstances in which arbitration under a contractual procedure has been unavailable, and the resulting exhaustion or futility of that procedure has been at issue. In Eureka City School District (1988) PERB Decision No. 702 (Eureka), the union withdrew its grievance three days prior to the arbitration proceedings and filed an unfair practice charge with PERB. The union argued that, since the district refused to waive its procedural defense that the

grievance was untimely under the contractual procedure, arbitration was unavailable and PERB should assume jurisdiction. The Board disagreed and held that the employer's waiver or non-waiver of procedural defenses to arbitration is irrelevant to deferral under the statute. The Board concluded that:

> . . . PERB has no legislative authority to exercise its jurisdiction to issue a complaint until or unless the grievance process is exhausted or futility is demonstrated, irrespective of respondent's willingness to waive procedural defenses. (Emphasis added.)

The Board has also declined to find futility where arbitration is unavailable because the grievant has failed to avail himself of the contractual grievance procedure at all. (State of California (Department of Corrections) (1986) PERB Decision No. 561-S (Corrections).) However, where there is evidence that an arbitrator lacks authority to resolve the dispute under the contract or the integrity of the arbitration process itself is at issue, the Board will find futility and refuse to defer to the contractual grievance procedure. (California State University (1984) PERB Decision No. 392-H (CSU).)

In addition, the Board has found that the exclusive representative may exercise the discretion to refuse to pursue a grievance to arbitration under the contractual procedure. In United Teachers of Los Angeles (Collins) (1982) PERB Decision No. 258, the Board held that:

> A union may exercise its discretion to determine how far to pursue a grievance in

> the employee's behalf as long as it does not arbitrarily ignore a meritorious grievance or process a grievance in a perfunctory fashion. A union is also not required to process an employee's grievance if the chances for success are minimal.

The Board has adopted the court's statement in Vaca of the exclusive representative's discretion within the contractual grievance and arbitration process. (Sacramento City Teachers Association (Fanning, et al.) (1984) PERB Decision No. 428.) In United Teachers of Los Angeles (Clark) (1990) PERB Decision No. 796 (UTLA (Clark)), the Board stated:

> Nor must a union take even a meritorious grievance to arbitration. In determining whether or not to take a grievance to arbitration (or to file a grievance in the first place) the union is free to consider whether the grievance victory would damage terms and conditions of employment for the bargaining unit as a whole. [Citation.]

However, where the exclusive representative has decided not to pursue an employee's grievance to arbitration for arbitrary, discriminatory or other bad faith reasons (UTLA (Clark)), including antagonism between the exclusive representative and the employee (State of California (Department of Developmental Services) (1985) PERB Order No. Ad-145-S), the Board will find that the employee's resort to the contractual procedure would be futile. In making this determination the Board will consider evidence that the union committed itself to a position in conflict with the employee, or acted to further the employer's aims, or condoned the employer's actions. (Corrections.)

The Board must determine in this case whether Dills Act section 3514.5 mandates that individual employees have access to either binding arbitration under a contractual procedure, or PERB's process, in all grievances which also arguably constitute unfair practices. If so, the unavailability of arbitration under the contractual procedure here due to CAUSE'S decision, constitutes a demonstration that resort to that procedure would be futile within the meaning of Dills Act section 3514.5(a), thereby reinstating PERB's jurisdiction over the dispute at issue.

The majority concludes that employees do have a statutory right to either arbitration under the contractual procedure or PERB's unfair practice charge process to adjudicate their disputes with the employer, unless they void that right by some action of their own. Therefore, when arbitration under the contractual grievance procedure is unavailable to employees because the exclusive representative declines to take a grievance to arbitration, further pursuit of that procedure would be futile within the meaning of Dills Act section 3514.5(a), and deferral to it is inappropriate. Thus, the majority adopts an "arbitration unavailable through no fault of their own" futility standard under which the good faith adherence to the contractual procedure by the parties to the collective bargaining agreement is irrelevant to the employee's statutory right to pursue a charge against the employer to arbitration or at PERB.

I reject this view. The Dills Act provides no employee entitlement to either binding arbitration under the parties' contract or PERB's unfair practice charge process in all cases, irrespective of the good faith application of provisions of the parties' collective bargaining agreement. It does not provide that the contractual grievance procedure must result in binding arbitration of every employee grievance in order to bar PERB's jurisdiction over the matter. Quite the contrary, the Dills Act provides that the exclusive representative has the authority to negotiate a contractual dispute resolution procedure on behalf of the members of the bargaining unit. Further, the Dills Act specifically provides that employee access to PERB's process may be limited by the existence of such a contractual procedure. Therefore, when the agreement between the state employer and exclusive representative includes a grievance and arbitration procedure to which PERB must otherwise defer under Dills Act section 3514.5(a), futility is not demonstrated simply by the fact that the good faith adherence to the contractual procedure makes arbitration unavailable to individual employees in a particular case.

There are several reasons why this approach is preferable to the futility standard embraced by the majority.

First, it is consistent with the fundamental purposes of collective bargaining and the Dills Act. Good faith, give-and-take negotiations are the very essence of collective bargaining. Collective bargaining agreements are the products of those

negotiations; they are the products of compromise. It is in this context that the Dills Act states as its primary purpose, providing a method for the state employer and employee organizations to resolve disputes. Here, the State and CAUSE entered into a collective bargaining agreement which includes a grievance and arbitration procedure to which they agreed in the give-and-take of collective negotiations. Accordingly, the parties have agreed to be bound by a method for resolving disputes which bars PERB's jurisdiction over matters which the procedure covers, in accordance with Dills Act section 3514.5(a). Among the elements of the procedure negotiated by the parties is the provision that "Employees shall not have the right to move grievances to arbitration without the approval of CAUSE." (CBA Article 6.6.) The union's authority to agree to this provision and make decisions pursuant to it reinforces its status as exclusive representative, and the employer's confidence in its status, both of which are essential to successful collective bargaining. Furthermore, the Dills Act clearly allows the parties to agree to a contractual dispute resolution process which bars PERB's jurisdiction over an individual employee's unfair practice charge. It does not limit the bar to PERB's jurisdiction to cases in which the employee grievance is pursued through binding arbitration, or not pursued "through the fault" of the employee. Instead, the Dills Act provides the parties with broad authority and discretion to agree in good faith to a

method other than PERB's process for resolving disputes, the primary purpose of the Dills Act.

Conversely, it is inconsistent with the purposes of collective bargaining and the Dills Act to conclude that individual employees must, in all cases, have access to either binding arbitration or PERB to resolve their disputes with the employer. To do so is to allow individual employees to circumvent the collectively negotiated dispute resolution process in circumstances in which they are not satisfied with the results of the good faith exercise of the exclusive representative's discretion under that process. Essentially, Kalko and Ruger seek to circumvent the agreement by CAUSE and the State to CBA Article 6.6, extract themselves from the contractual,grievance and arbitration procedure, and pursue an unfair practice charge at PERB. Such an action undercuts the statutory authority of both the exclusive representative and the employer to exercise their discretion in good faith to serve the interests of those they represent. The interests of the employer, the employee organization and employees are served by securing the benefit of consistent, stable labor relations which results from adherence by the parties to the terms of a collectively negotiated agreement. This benefit, which extends to the public as well, is diminished if the terms of the contractual dispute resolution process, agreed to and adhered to in good faith by the State and CAUSE, can be so easily circumvented by individual employees.

Second, a finding that futility has not been demonstrated by Kalko and Ruger is completely consistent with prior Board decisions. In this case, CAUSE failed to notify the State within 14 days of the pre-arbitration settlement meeting, that it was requesting joint selection of an arbitrator, as required by the contractual procedure. As noted in Eureka, the employer is not required to waive its procedural defenses while asserting that the contractual procedure has not been exhausted. In that case, the Board specifically held that the unwillingness to waive procedural defenses does not constitute exhaustion or futility and does not lift the bar to PERB's jurisdiction. From the standpoint of the State, this case presents circumstances identical to those of Eureka: the exclusive representative has failed to meet the contractual timeline for proceeding to arbitration. The State's unwillingness to waive this procedural defense does not lift the statutory bar to PERB's jurisdiction in this case.

Further, PERB has never found a contract grievance procedure to be futile where there has been no showing that that procedure's integrity or authority to resolve the dispute (CSU), or the good faith efforts of the exclusive representative (Corrections), are in question. Instead, the Board has held that the exclusive representative has the discretion in good faith not to process an employee's grievance, and not to take "even a meritorious grievance to arbitration." (UTLA (Clark).) In my view, it is inconsistent and confusing for PERB to simultaneously

hold that the Dills Act permits the exclusive representative to exercise its discretion in good faith pursuant to the contractual grievance procedure to drop an employee grievance,[3] and that this same good faith decision demonstrates the futility of the contractual grievance procedure under the Dills Act.

Third, dismissal and deferral of the instant case insures that the provisions of a collective bargaining agreement apply to the parties to that agreement consistently and equally. The State and CAUSE agreed to a contractual dispute resolution process which bars PERB's jurisdiction over disputes covered by that process. When that process is followed in good faith, the parties have the right to expect that its conclusion, at whatever point it occurs, represents the termination of the process for resolving that dispute. Unfortunately, under the approach advanced here by the majority, the parties can no longer consistently rely on that result. Under collective bargaining agreements which require an exclusive representative's approval to proceed to grievance arbitration, individual employees can now opt for PERB's process when the exclusive representative exercises its discretion to terminate the contractual process prior to arbitration. The state employer is now faced with the prospect of responding to an unfair practice charge at PERB based

[3]I find it unnecessary to reach the merits of the unfair practice charge here. I note, however, that both the ALJ and the majority find the charge to be without merit, and dismiss it. Clearly, if an exclusive representative can exercise its discretion in good faith not to pursue a meritorious grievance to arbitration, it can make a good faith decision not to pursue a grievance it considers to be without merit.

on the same allegations which have been pursued under the contractual procedure to a point of conclusion. The state employer can no longer assume that the good faith termination of the contractual procedure by the exclusive representative consistently constitutes the conclusion of the dispute resolution process. From the exclusive representative's standpoint, the knowledge that the good faith exercise of its discretion under the contractual procedure may allow individual employees to pursue disputes through PERB's process, can lead to inconsistent and uneven grievance handling and decision making, depending upon the circumstances and employees involved. Moreover, this type of inconsistency and unevenness can ultimately lead to manipulation and forum shopping, as individual employees and/or the exclusive representative simply decide whether the contractual arbitration procedure or PERB is the preferred forum for a particular employee grievance, and then act to effectuate that result.

Finally, PERB's jurisdiction over disputes under Dills Act section 3514.5(a) must be determined consistently by PERB. It is axiomatic that no party to a collective bargaining agreement should have the unilateral authority to activate or deactivate the statutory limitation on PERB's jurisdiction. Yet, the majority's approach leads to that result by allowing an exclusive representative the ability to defer an employee dispute with the employer to PERB's jurisdiction by declining to exercise its discretion under the contract to pursue the matter to arbitration.

Returning to the instant case, Kalko and Ruger have not demonstrated that the integrity of the contractual grievance procedure is in question here, or that the authority to resolve the dispute under the procedure is at issue. Nor have they demonstrated that CAUSE did not exercise in good faith its discretion under the contractual grievance procedure and PERB precedent to pursue or not pursue their grievance to arbitration. Therefore, Kalko and Ruger have not demonstrated that resort to the contractual procedure would be futile within the meaning of the Dills Act. Accordingly, I would dismiss and defer the unfair practice charge to the contractual grievance and arbitration procedure.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

JOHN KALKO AND DAVID RUGER, Charging Parties, v. STATE OF CALIFORNIA (DEPARTMENT OF PARKS AND RECREATION), Respondent.	)	Unfair Practice Case No. S-CE-667-S PROPOSED DECISION (11/18/94)

Appearances; John Kalko and David Ruger, on their own behalf; Linda A. Mayhew, Labor Relations Counsel, for State of California (Department of Parks and Recreation).

Before W. Jean Thomas, Administrative Law Judge.

INTRODUCTION

In this case two state park rangers contend that they were disciplined in retaliation for their past grievance activity and complaints about alleged misconduct of co-workers. They assert that the discipline, which took the form of corrective counseling memos, was motivated by the employer's disparate treatment of employees engaged in such activity.

The employer admits issuing the memos, but denies that they constituted "discipline" or had an adverse impact on the rangers' employment status. The employer further argues that its actions were an appropriate way to address a specific performance problem, and the same actions would have been taken irrespective of the rangers' participation in protected activities.

PROCEDURAL HISTORY

On June 28, 1993, John Kalko (Kalko) and David Ruger (Ruger or Charging Parties) filed an unfair practice charge with the Public Employment Relations Board (PERB or Board) against the State of California (State) (Department of Parks and Recreation) (DPR). The charge alleged that DPR engaged in conduct against Kalko and Ruger that violated the Ralph C. Dills Act (Dills Act).[1]

On August 31, 1993, the Office of the General Counsel of PERB issued a complaint alleging that the State violated section 3519(a)[2] of the Dills Act.

The State answered the complaint on September 20, 1993, denying all material allegations of unfair conduct and asserting affirmative defenses.

Informal conferences on October 19, November 10 and November 24, 1993, failed to resolve the dispute.

A formal hearing was commenced before the undersigned on March 31, 1994. Prior to the hearing, the State filed a written

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[1]The Dills Act is codified at Government Code section 3512 et seq. All statutory references herein are to the Government Code unless otherwise noted.

[2]Section 3519 provides, in relevant part:

> It shall be unlawful for the state to do any of the following:
>
> (a) 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. . .. .

motion to dismiss on March 3, 1994, asserting that PERB lacked jurisdiction to issue the complaint because Kalko and Ruger had failed to exhaust the contractual grievance procedure.[3] At the beginning of the hearing, the parties presented oral arguments on the motion and the motion was denied. Thereafter, the hearing proceeded and the Charging Parties concluded their case-in-chief. The hearing was then recessed and scheduled to reconvene for the State's case-in-chief and conclusion on June 9, 1994.

On April 20, 1994, the State requested a continuance of the hearing. The request was granted with the concurrence of Kalko and Ruger and the hearing was rescheduled to convene on July 7, 1994.

On May 20, 1994, the State requested a second continuance which was granted with the concurrence of the Charging Parties. The matter was rescheduled for hearing on July 21, 1994.

Thereafter, on June 22, 1994, Kalko requested a continuance, which was granted with the concurrence of all parties, and the hearing reset to convene on September 8, 1994.

On July 8, 1994, the State filed an appeal of the March 31, 1994, denial of its motion to dismiss and defer to binding arbitration and requested that the Board stay the hearing.

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[3]This argument was grounded on the existence of a grievance procedure in the collective bargaining agreement (Contract) between the State of California and the California Union of Safety Employees (CAUSE), Charging Parties' exclusive representative. This grievance procedure terminates in final and binding arbitration.

On August 31, 1994, the Board issued PERB Order No. Ad-230-S, wherein it denied the State's appeal as untimely. The Board also denied the State's request for a stay of the hearing.

Thereafter, on September 8, 1994, the hearing was reconvened. At the beginning of the hearing, the State renewed its motion to dismiss and defer to binding arbitration. The motion was again denied by the undersigned administrative law judge.

The State put on its case-in-chief and all parties presented oral summations on the record. No briefs were filed. At the conclusion of the hearing, the case was submitted for proposed decision.

FINDINGS OF FACT

Background

The parties stipulated, and it is therefore found, that Kalko and Ruger are State employees and that the State is an employer as those terms are defined by the Dills Act. Kalko and Ruger are employed by the DPR as state park rangers (SPR) I's. Kalko has been with the DPR for 25 years and works on a permanent intermittent basis. Ruger has worked for the DPR 19 years and is a full-time employee. Both employees have peace officer status.

Kalko and Ruger are both assigned to Crystal Cove State Park (CCSP), located in the Orange Coast State Park District (District), which is headquartered in San Clemente. Their duties include patrol of the parks and beaches in CCSP. They coordinate their patrol activities with the lifeguards assigned to the beach

areas. Some of the lifeguards are seasonal employees. Seasonal lifeguards do not have peace officer status.

Michael Eaton (Eaton), a SPR II, has been the immediate supervisor of both employees for almost four years. Ken Kramer (Kramer), a lifeguard supervisor (LGS) I, is the first level supervisor of the lifeguards who work with Kalko and Ruger. Kramer and Eaton both report to Joseph Milligan (Milligan), a LGS III who serves as the District's chief of visitor services. Milligan, in turn, reports to Jack Roggenbuck (Roggenbuck), the District superintendent. Roggenbuck has served in this capacity since 1989.

Kalko and Ruger are members of State Bargaining Unit 7 (Protective Services and Public Safety), which is exclusively represented by CAUSE. The current Contract between CAUSE and the State has an effective term from July 1, 1992 through June 30, 1995.[4]

Protected Activities

The parties stipulated that Kalko and Ruger have engaged in various activities that are "protected" within the meaning of the Dills Act. Both Kalko and Ruger have a history with the DPR of filing grievances and complaints about alleged illegal or inappropriate activities by other DPR employees. Specifics of relevant grievance/complaint activities are set forth below.

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[4]Official notice is taken of the Contract, a copy of which is maintained in the PERB Los Angeles Regional Office case files.

On or about November 2, 1990, Kalko received a notice of intent to take adverse action (six month's salary reduction) against him based on his alleged non-adherence to a DPR policy regarding the wearing of low profile peace officer protective equipment. After consulting with Ruger, Kalko grieved the adverse action on November 18, 1990, in what he refers to as the "gun belt" grievance. In this grievance he alleged that the proposed adverse action was reprisal based on earlier protected activity.

Following a "Skelly" pre-disciplinary action hearing,[5] the DPR notified Kalko by letter on November 21, 1990, that the adverse action had been rescinded. Nonetheless, because (1) the letter refused to acknowledge that the supervisor had acted inappropriately, and (2) stated that DPR manager, George Cook, had concerns about Kalko's delay in conforming to the weapons policy, Kalko refused to withdraw his grievance. The grievance was pursued through all steps of the contractual grievance procedure except arbitration.

In this grievance, Kalko asserted that he was being subjected to "disparate treatment" with regard to disciplinary actions imposed on employees. In support of this charge he cited allegedly illegal activities by DPR lifeguards that had not been addressed by management.

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[5]Skelly v. State Personnel Board (1975) 15 Cal.3d 194 [124 Cal.Rptr. 14].

On or about January 2, 1992, Kalko became aware that his allegations had been shared with other DPR employees who had "no need to know" information about the grievance. Kalko filed another grievance on January 27, 1992, concerning this alleged disclosure of confidential grievance information, asserting that the disclosure of information was a form of reprisal against him for having filed earlier grievances.

In an attempt to resolve the grievance, John Kelso-Shelton, then CCSP park superintendent, issued a "confidentiality" memo to all CCSP staff on January 27, 1992, stressing the importance of staff maintaining confidentiality of the details of investigations of misconduct allegations. The specifics of the problem giving rise to the memo were purposely left vague to protect Kalko from recriminations. This memo, however, did not satisfy Kalko and he pursued the grievance through all steps of the grievance procedure except arbitration.[6]

Ruger's grievance activity prior to August 16, 1992, was primarily limited to assisting Kalko with representation during the processing of Kalko's grievances. Ruger did prepare a letter regarding the "gun belt" issue in 1990. Kalko used this letter at his "Skelly" hearing with DPR management.

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[6]Official notice is taken of an earlier unfair practice charge (LA-CE-277-S) filed by Kalko against the State (DPR) on March 2, 1993, alleging discrimination and reprisal actions (employer disclosure of information from a grievance to grievant's co-workers) because of his exercise of rights protected by the Dills Act. In PERB Decision No. 1031-S (1994), the Board summarily affirmed a Board agent's dismissal of the charge for failure to state a prima facie violation of section 3519(a).

In May 1991, Ruger filed a complaint against Roggenbuck with the State Auditor General's office. Ruger alleged, among other things, misuse of State property, inexcusable neglect of duty, and inappropriate use of State employees' time. The outcome of this complaint was not revealed in the record.

In early July 1991, Ruger wrote an anonymous memo to Roggenbuck reporting after-hours partying by DPR employees at Bolsa Chica State Beach which he asserted was illegal. At about the same time of Ruger's memo, Roggenbuck issued a memo to all personnel on July 10, 1991, regarding management's awareness of possible misconduct by employees. This memo emphasized the need for all employees to adhere to the DPR's standards of good conduct whether on or off-duty. Ruger speculates that his memo, along with other input submitted to management, was the impetus for Roggenbuck's decision to issue the July 1991 memo. In any event, the unlawful after-hours beach activities involving employees ceased after Roggenbuck's memo.

The July 18, 1992, Incident

On Saturday, July 18, 1992, while on patrol, Ruger received a radio call from seasonal lifeguards Steve Rogers (Rogers) and Lee Graham (Graham) regarding a possible assault and brandishing of a weapon on lifeguards by two male visitors at a CCSP beach area. Ruger contacted Kalko, who was patrolling in a separate vehicle, and asked him to meet Ruger to plan a strategy for dealing with the situation.

After locating the two suspects, Kalko and Ruger detained them, checked for weapons, and ran an identification check through the DPR dispatcher. While checking for weapons, Ruger observed several beer cans scattered in the area where one of the suspects was located and also noticed that the suspect's breath smelled of alcohol. Ruger also found a knife near the barbecue unit being used by the suspects. After obtaining additional information on the scene from lifeguards Paul Barnes (Barnes), Graham and Timothy Shaw (Shaw), and evaluating the situation, Kalko and Ruger decided to issue citations to the suspects and eject them from the park.

Ruger cited one suspect for the following misdemeanors: (1) violation of a posted order prohibiting alcoholic beverages, (2) false identification, and (3) assault on a lifeguard (a misdemeanor not committed in his presence). Kalko cited the other suspect for: (1) violation of a posted order prohibiting alcoholic beverages, and (2) assault on a lifeguard (a misdemeanor not committed in his presence). This latter charge was later amended to brandishing a weapon (knife).[7]

Issuance of the Counseling Memos

Eaton first heard of the July 18, 1992, incident from Kramer on July 20, 1992. Kramer had heard about the incident from some

[7]These citations, along with a crime report and written statements submitted by the lifeguards, were eventually forwarded by DPR to the Orange County District Attorney's office. A formal complaint was issued against both suspects on or about September 29, 1992, ordering them to appear in the Municipal Court South Judicial District of Orange County for possible prosecution.

of the lifeguards on the previous day. He expressed strong displeasure to Eaton about the manner in which Kalko and Ruger had allegedly handled the matter in terms of law enforcement contact. Kramer voiced his belief that it should have been handled differently, i.e., as a felony, and asked Eaton to look into the matter. Eaton promised to do so and get back to Kramer.

Eaton spoke with Kalko about the incident later that same day when Kalko reported for work. He asked for details, including who was going to prepare the written report. Kalko indicated that since Ruger was the lead officer on the suspect contact, he would be preparing the report.

Eaton spoke with Ruger on July 25, 1992, which was the first time that they worked together after July 18. Eaton obtained further information from Ruger about the incident.

Between the dates that Eaton spoke with Kalko and Ruger, he had not received copies of either the citations or any kind of written report about the incident. However, he did receive a telephone call from Milligan who stated that he had received a written complaint from Kramer about the July 18 incident. Kramer's memo, dated July 25, 1992, raised several questions about Kalko's and Ruger's handling of the situation. After directing Eaton to look into the matter, Milligan sent him a memo on July 27, 1992, requesting a written report addressing the questions in his memo.

Eaton held informal conversations with both employees, in his supervisory capacity, to elicit information regarding the

complaint about their job performance. He insists that he did not initiate a formal investigation of the incident. He does acknowledge that had a formal investigation been initiated, he would have been required to apprise Kalko and Ruger of their rights under the public safety officers' procedural bill of rights (POBAR).[8] Eaton also insists that, after speaking with

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[8]The Public Safety Officer's Procedural Bill of Rights Act, commonly referred to as POBAR, provides certain rights and protection to State employees designated by law as peace officers. POBAR is codified at section 3300 et seq. Section 3303 states in pertinent part:

> When any public safety officer is under investigation and subjected to interrogation by his. commanding officer, or any other member of the employing safety department, which could lead to punitive action, such interrogation shall be conducted under the following conditions. For the purpose of this chapter, punitive action is defined as any action which may lead to dismissal, demotion, suspension, reduction in salary, written reprimand or transfer for purposes of punishment.
>
> This section shall not apply to any interrogation of a public safety officer in the normal course of duty, counseling, instruction, or informal verbal admonishment by, or other routine or unplanned contact with, a supervisor or any other pubic safety officer, nor shall this section apply to an investigation concerned solely and directly with alleged criminal activities.

Section 3305 and Section 3306 prohibit the placement of adverse comments into a public safety officer's personnel file or any other file used for any personnel purposes without the public safety officer having first read and signed the instrument containing the adverse comment indicating that he is aware of such comment and is provided with an opportunity to file a written response to any adverse comments placed in the personnel file.

Kalko and Ruger, he did not speak with any other employee about the July 18, 1992, incident prior to submitting his report to Milligan.

On August 4, 1992, Eaton submitted a written report to Milligan with a copy of the crime report prepared by Ruger, on or about August 3, 1992, attached. The crime report included supplementary reports by Kalko and the three seasonal lifeguards, Barnes, Graham, and Shaw. In his report, Eaton stated that he supported Kalko's and Ruger's resolution of the situation, i.e., citation and ejection of the suspects from the park, given the circumstances existing at the time. He did acknowledge, however, that certain procedures, including report timeliness, were not followed.

After receiving Eaton's report, Milligan directed Eaton to have Ruger rewrite the crime report to delete what Milligan regarded as "extraneous commentary." He also directed Eaton to issue corrective counseling memos to both Kalko and Ruger addressing the issues of private person's arrests and timeliness in the preparation of crime reports.

Eaton met with Kalko and Ruger on August 6, 1992, and issued corrective counseling memos to each of them. Both memos addressed the issues recommended by Milligan, setting forth the actions/DPR procedures to be followed in future law enforcement contacts involving "private person's arrests." Ruger's memo also addressed the timeliness of reports as required by existing District policy.

Kalko and Ruger each registered verbal objections to Eaton, and in writing over their signatures, to the contents of the memos.

After issuing the memos, Eaton sent copies to Milligan and placed the original copies in his personal "supervisor file." He did not forward copies to the DPR personnel department or anyone else.

After Milligan received copies of the memos from Eaton, he reported to Roggenbuck the actions that he had taken, through Eaton, with respect to the entire matter. Milligan and Roggenbuck insist that Roggenbuck did not know about the July 18 incident and its aftermath until Milligan reported it to him. Milligan also maintains that the copies of the August 6 counseling memos that he received from Eaton were retained in his office. He did not forward them to anyone until the current case arose, at which time they were given to the DPR management to prepare for its defense.

Milligan did not discuss the memos with Kramer. He did, however, tell Kramer that the July 18 incident had been looked into and resolved. According to Milligan and Roggenbuck, Roggenbuck had no role in the decision to issue the corrective memos to either Kalko or Ruger.

The 1992-93 Performance Appraisals

Subsequent to issuing the August 6 memos, Eaton prepared performance appraisals for both Ruger and Kalko. Ruger received his performance appraisal on September 18, 1992. The overall

appraisal rating was "satisfactory." The evaluation made no reference to the counseling memo issued on August 6. In fact, Eaton made the following general comments,

> Dave, your contributions to the unit operations sometimes goes unrecognized, but I appreciate the efforts. Keep up the good work.

Kalko received a performance appraisal on May 31, 1993. His overall appraisal rating was also "satisfactory." His evaluation also made no specific reference to the corrective August 6, 1992 memo. However, in the comments portion of the "Work Habits" factor, he was encouraged to "read DOM [Department Operating Manual] Chapter 6 Public Safety/Law Enforcement as a refresher." Eaton explained that this reference was based primarily on his observation of Kalko's performance in a defensive tactic training session where he noted that Kalko was unfamiliar with administrative procedures and the proper form to use in a drunk driver scenario. Eaton maintains that he would have made the same comment about Kalko's performance with respect to his work habits, notwithstanting his issuance of the corrective counseling memo in August 1992.

Relevant DPR Policies and Procedures

A. Crime Reports - Routing

The District has a policy regarding the preparation and routing of non-custody crime reports that has been in effect since October 24, 1986. This policy was issued to all peace officer personnel by Roggenbuck when he served as the District's

chief of visitor services. The policy defines a non-custody crime report as

> . . . any report written in which a crime occurred and no physical arrest was made. . . Misdemeanor citations fall into this category for routing purposes. . . .

The procedure requires, among other things, that all necessary reports be written and submitted to the supervisor within 48 hours of the occurrence of an incident. If any employee has days off in excess of the 48 hours, the written report is required by the end of the shift.

B. Private Person's Arrest Procedures

DPR Department Operating Manual (DOM), Chapter 6, section 0642, sets forth the policies and procedures pertaining to a private person's arrest. A private person's arrest is authorized by California Penal Code section 837.

DPR's enforcement policy requires that a peace officer advise a private person desiring to make a lawful arrest for a public offense not committed in the officer's presence, that the person may either (a) make a physical arrest, or (b) cause a crime report to be completed. If a private person arrests another and requests that a peace officer receive the arrested person, the officer must do so. When accepting a private person's arrest and issuing a citation, the peace officer must have the arresting party (1) verbally inform the person arrested of the nature of the charges and the statutory authority to make the arrest; (2) complete the appropriate DPR form; and (3) sign the citation in the appropriate space.

In the case of the July 18 incident, the seasonal lifeguards were regarded as "private persons" by the DPR because they do not have peace officer status.[9] Since the lifeguards complained about the brandishing of weapons, an action not committed in the presence of either Kalko or Ruger, when the citations were issued to the suspects, the lifeguards should have been required to sign the citations as the arresting parties, with Kalko and Ruger also signing the citations as the officers receiving the arrested persons. Copies of the citations issued to the suspects and the necessary written reports should have been prepared and submitted to Eaton within 48 hours of the incident.

After reviewing Eaton's report regarding Kalko's and Ruger's handling of the July 18 incident, Milligan decided that corrective counseling was appropriate to advise Kalko and Ruger of the appropriate procedures to follow in making a private person's arrest and submitting timely reports.

Milligan insists that corrective counseling is not a disciplinary action, but an attempt to help an employee improve performance by avoiding similar behavior that could lead to discipline in the future.

C. Retention Schedule for Documented Employer Actions

The DPR has a retention schedule for maintaining documented employer actions. A corrective counseling memo is considered an

[9]See California Penal Code section 837,

informal action by the employer. It can be retained for one year or until incorporated in the annual performance appraisal.[10]

There is no evidence that the August 6, 1992, corrective counseling memos issued to Kalko and Ruger were ever placed in either employee's personnel files maintained at the District's office in San Clemente or the DPR's headquarters in Sacramento.

ISSUES

Did the DPR issue counseling memos to Kalko and Ruger in retaliation for their having participated in protected activities?

CONCLUSIONS OF LAW

Section 3515 gives State employees the protected right 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. Employees also have the right to participate in other employment-related activities on their own behalf. Section 3519(a) makes it unlawful for a State employer to

> . . . impose reprisals on employees, . . . discriminate against employees, or otherwise interfere with, restrain, or coerce employees because of their exercise of rights . . . .

The complaint in this case alleges that the State took adverse action against Kalko and Ruger because they engaged in

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[10]The DPR's supervisor's guide to employee discipline, which was prepared by the Office of Personnel Administration (DPA), and is dated February 1, 1991, does not refer to documented corrective interviews/counseling as formal adverse action by an employer.

protected activities. In order to prevail on these allegations, the Charging Parties must establish proof of each element of a discrimination violation.

To prove discrimination, the Charging Parties must first demonstrate that they engaged in protected conduct. Then they must show that the employer knew of this protected activity when it took adverse action against them. The adverse action cannot be speculative, but must constitute actual harm. (Palo Verde Unified School District (1988) PERB Decision No. 689 (Palo Verde); Newark Unified School District (1991) PERB Decision No. 864 (Newark).)

Once protected conduct, employer knowledge, actual or imputed (Moreland Elementary school District (1982) PERB Decision No. 227), and adverse action are established, the Charging Parties must make a prima facie showing of unlawful motivation. (Novato Unified School District (1982) PERB Decision No. 210 (Novato).) Unlawful motivation is the "nexus" in the establishment of a prima facie violation. A nexus or connection must be demonstrated between the employer's conduct and the employee's exercise of statutory rights. The Novato test was made applicable to the Dills Act by State of California (Department of Developmental Services)(Monsoor) (1982) PERB Decision No. 228-S.

PERB has adopted a test for determining unlawful motive which is consistent with other California and federal precedents. Pursuant to this case law, the trier of fact is required to weigh

both direct and circumstantial evidence to determine whether the employer's action would, or would not, have been taken against an employee but for the employee's exercise of protected rights. (Novato; McPherson v. PERB (1987) 189 Cal.App.3d 293 [234 Cal.Rptr. 428]; Martori Brothers Distributors v. Agricultural Labor Relations Board (1981) 29 Cal.3d 721 [175 Cal.Rptr. 626] (ALRB); Wright Line, Inc. (1980) 251 NLRB 1083 [105 LRRM 1169] enfd, in relevant part (1st Cir. 1981) 662 F.2d 899 [108 LRRM 2513].)

Proving the existence of unlawful motivation, which is required to link the employer's knowledge to the harm sustained by the employee, can be difficult.

Since direct proof of unlawful motivation is rarely presented, animus may be established by circumstantial evidence and inferred from the record as a whole. (California State University, Fresno (1990) PERB Decision No. 845-H.) PERB has found indicia of unlawful motivation in the following conduct: (1) words reflecting retaliatory intent (Santa Clara Unified School District (1979) PERB Decision No. 104); (2) the timing of the employer's actions in relation to the employee's participation in the protected activity (North Sacramento School District (1982) PERB Decision No. 264); (3) failure to adhere to regularly followed or accepted procedures (Novato; Woodland Joint Unified School District (1987) PERB Decision No. 628); (4) disparate treatment of employees engaged in similar activity (State of California (Department of Transportation) (1984) PERB

Decision No. 459-S); (5) shifting or inconsistent justifications for the employer's actions (Pleasant Valley School District (1988) PERB Decision No. 708); (6) cursory or inadequate investigation (State of California (Department of Parks and Recreation) (1983) PERB Decision No. 328-S); or (7) imposition of unusually harsh discipline against an employee with an otherwise clean employment record (Baldwin Park Unified School District (1982) PERB Decision No. 221).

Once the charging party has made a prima facie showing sufficient to support an inference of unlawful motivation, the burden shifts to the respondent to produce evidence that the action would have occurred irrespective of the protected conduct. (ALRB. at p. 730.)

The Charging Parties here have established their protected activity and their employer's knowledge of such conduct. Even though both Eaton and Milligan maintain they were unaware of Kalko's various past grievances, Roggenbuck, their District manager, had personal knowledge of these activities. Considering the closeness of the working relationship between Roggenbuck, Milligan and Eaton, it is difficult to believe that Eaton and Milligan were totally ignorant of the Charging Parties' activities. Notwithstanding these supervisors' lack of knowledge, the DPR does not dispute that these elements of a discrimination charge have been satisfied.

Kalko and Ruger must also demonstrate that the DPR's action adversely impacted them. In determining whether an adverse action is established, in Newark, the Board explained that

> The test which must be satisfied is not whether the employee found the employer's action to be adverse, but whether a reasonable person under the same circumstances would consider the action to have an adverse impact on the employee's employment. [Emphasis added; fn. omitted.]

This is an objective test. It does not rely on the subjective reaction of the employee.

Applying this test to the evidence, it is concluded that the Charging Parties have not shown how the issuance of the corrective memos caused harm or had "impact on their employment." They speculated that the counseling memos had the potential for adverse employment consequences. This fear was based on their belief that the memos would be placed in their personnel files and remain there for possibly three years. However, there is no proof that the memos are, or ever have been, in their personnel files. Nor is there any evidence that they resulted in harm to their employment status such as being used to support a negative performance appraisal. (Palo Verde; State of California (Department of Parks and Recreation), supra, PERB Decision No. 1031-S.)

In light of the conclusion that the Charging Paries failed to prove that they were adversely impacted by the employer's action, the Novato analysis may properly end.

However, even assuming, arguendo, that the issuance of the memos constituted a negative impact on their employment, there is insufficient direct or circumstantial evidence from which an inference of unlawful motivation may be drawn.

From the Charging Parties' perspective, there is direct evidence of unlawful motivation in the form of words reflecting retaliatory intent allegedly made by Roggenbuck and Kramer. There is also circumstantial evidence from which an inference of unlawful motivation may be drawn, namely, timing, disparate treatment accorded to them, and departure from established procedures and standards.

1. Direct Evidence of Animus

As direct evidence of the employer's animosity toward Kalko because of his grievance activity, Kalko and Ruger both testified about comments allegedly made by Roggenbuck about Kalko.

According to Kalko, SPR Mike Ash (Ash) told him that while waiting to speak with Roggenbuck in March or April 1991, he overheard Roggenbuck tell someone on the telephone, "Kalko will screw up and I'll be waiting for him." Ash did not know to whom Roggenbuck was speaking, but this comment was made after the rescission of Kalko's proposed adverse action in November 1990. Although Kalko testified that Ash prepared a declaration regarding these comments, he did not present the document or any other evidentiary support for this claim.

Kalko and Ruger also testified that shortly after Kalko's 1990 "gun belt" grievance and his allegations about management's

failure to deal with the misconduct of some lifeguards, Eaton told them that Roggenbuck, in the presence of Kramer, said to Eaton, " . . . Heads are going to roll and it won't be the lifeguards . . . ." According to them, Eaton allegedly implied that Roggenbuck was specifically referring to Kalko. In this same meeting, Kramer is reported to have stated that "Kalko is trying to ruin my program."

These statements, if true, could show some evidence of animus towards Kalko's exercise of his statutory rights. However, absent credible proof of the comments and the context in which they were made, it is difficult to infer that they prove employer hostility toward Kalko because of his participation in protected activities.

2. Indirect Evidence of Animus

a. Timing of the Counseling Memos

Kalko and Ruger argue that the timing of the counseling memos support an inference that they were motivated by animosity toward them because of their protected activities.

Both Charging Parties believe that pre-existing hostility harbored against them by Kramer and Roggenbuck provided the impetus for the counseling memos in August 1992. They point out that Kramer initiated the complaints about the July 18 incident which, it is argued, provided a suitable opportunity for retaliation against them for earlier protected conduct.

However, when all the evidence is examined, the timing of the counseling memos does not support the Charging Parties'

position for several reasons. First, Kalko acknowledged that DPR management attempted to take corrective action in response to his January 1992 breach of confidentiality grievance. Kelso-Shelton's January 27, 1992, memo to all CCSP staff was intended as a positive response to the issue presented in that grievance, even though Kalko regarded it as insufficient.

Secondly, although Kramer initiated the inquiry about the Charging Parties' performance during the July 18 law enforcement contact, there is no evidence that either he or Roggenbuck played a role in the decision to issue the counseling memos. Indeed, Roggenbuck did not know about the July 18 incident or the counseling memos until informed, after the fact, by Milligan.

Finally, neither Milligan nor Eaton are accused of harboring animus toward Kalko or Ruger for any reason. Both deny knowing about the Charging Parties' grievance activity, even though Kalko and Ruger describe it as common knowledge at CCSP. The timing of the decision about the corrective counseling memos appears related to nothing more than the supervisor's judgment about the appropriateness of Kalko's and Ruger's performance on a specific occasion.

It is thus concluded that the timing of the circumstances surrounding the issuance of memos does not support an inference of unlawful motive on the part of the employer.

b. Disparate Treatment

Kalko and Ruger maintain that the August 1992 counseling memos provide strong evidence of their subjection to disparate

treatment. This claim is based on their contention that District management has failed to discipline lifeguards and other employees for similar or worse conduct, whereas they were unfairly disciplined even though taking appropriate action under the circumstances. At the heart of this allegation is the Charging Parties' view that the counseling memos were an unjustified criticism of their judgment regarding the handling of the July 18 incident.

Aside from the bare allegations of "disparate treatment," no evidence was offered of instances where other SPR's were accorded more favorable treatment by either Eaton or Milligan under circumstances similar to that of the Charging Parties. Nor was any showing made to demonstrate what similarities, if any, exist between the law enforcement responsibilities of SPRs and lifeguards. Although Kalko and Ruger claim that most lifeguard misconduct was ignored for years by District management, they admit that they have no personal knowledge about disciplinary measures that may have been taken against other CCSP employees as a result of their self-described "watch dog" activities.

In explaining his decision, Milligan testified, that after receiving Eaton's report of Kalko's and Ruger's handling of the July 18 incident, he concluded that the Charging Parties had a performance problem in the areas described earlier. He decided that corrective counseling with documentation was appropriate to make the employees aware of the problems and how to improve future performance to avoid possible discipline.

According to Milligan, he has issued or directed the issuance of counseling memos to other subordinate employees. None of these, however, concerned performance in connection with following the DPR private person's arrest procedures.

Given the absence of any adverse consequences associated with the counseling memos, and the absence of evidence that District supervisors or management have treated similarly situated employees more favorably, it is concluded that there is no support for an inference of unlawful motive based on disparate treatment by the employer.

c. Departure from Established Procedures and Standards

Most of the conflict related to this factor focuses on whether DPR conducted an "investigation" of the events surrounding the July 18 incident. Kalko and Ruger contend that when Eaton commenced questioning them on July 20, and 25, 1992, he was initiating a formal investigation that fell within the requirements of POBAR because it could have led to punitive action. (See fn. 8, p. 11.) As such, he should have advised them of their POBAR rights, including the right to representation.

Eaton denies that his informal discussions with Kalko and Ruger amounted to an investigation within the meaning of POBAR or that they were held with the intent of imposing discipline on either employee.

There is no evidence to refute Eaton's assertion that his conversations with Kalko and Ruger were no more than normal

supervisory contacts regarding a complaint about their performance.[11] In this regard, PERB is not charged under the Dills Act with determining whether the employer's reason(s) for pursuing the matter in the manner chosen was appropriate. PERB is concerned with such reasons only to the extent that they are pretextual, i.e., do the reasons support an inference that the employer's true motivation for its action was the employee's protected activities. The mere fact that an employee participates in protected activity does not, however, immunize the employee from routine employment decisions, no matter how much the employee may disagree with an employer's decision.

There is no basis in this case for concluding that the employer ignored established procedures and standards nor can unlawful motivation be inferred from the employer's actions in this regard. (ALRB.)

d. Summary

After a thorough review of the evidence, as analyzed under the Novato standard, it is concluded that Kalko and Ruger have not proven a prima facie case of discrimination or retaliation regarding the DPR's issuance of corrective memos to them in August 1992. Failure of proof dictates a conclusion that the DPR has not violated section 3519(a).

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[11]As an aside, it is noted that section 3303 does not apply to the "interrogation of a public safety officer in the normal course of duty. . . by . . . a supervisor. . ."

CONCLUSION

For all the reasons set forth above, the complaint and its underlying charge must be dismissed.

PROPOSED ORDER

Upon the foregoing findings of fact, conclusions of law and the entire record in this case, it is ordered that the complaint and the underlying unfair practice charge are hereby DISMISSED.

Pursuant to California Code of Regulations, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the Board itself at the headquarters office in Sacramento within 20 days of service of this Decision. In accordance with PERB Regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. (See Cal. Code of Regs., tit. 8, sec. 323 00.) 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 . . ." (See Cal. Code of Regs., tit. 8, sec. 32135; Code 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. (See Cal. Code of Regs., tit. 8, secs. 32300, 32305 and 32140.)

W. JEAN THOMAS
Administrative Law Judge