STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA STATE EMPLOYEES ASSOCIATION, Charging Party, v. STATE OF CALIFORNIA (DEPARTMENT YOUTH AUTHORITY), Respondent.	)	Case No. SA-CE-1201-S PERB Decision No. 1403-S September 12, 2000

Appearances: Marcia Mooney, Senior Labor Relations Representative, for California State Employees Association; State of California (Department of Personnel Administration) by Wendi L. Ross, Labor Relations Counsel, for State of California (Department of Youth Authority).

Before Dyer, Amador and Baker, Members.

DECISION

AMADOR, Member: This case comes before the Public Employment Relations Board (Board) on appeal by the California State Employees Association (CSEA) to an administrative law judge's (ALJ) proposed decision (attached). The unfair practice charge alleged that the State of California (Department of Youth Authority) (CYA or State) violated section 3519(a) and (b) of the

Ralph C. Dills Act (Dills Act)[1] in various ways with regard to CYA employee Rosielyn Dyer-Browhaw.

After reviewing the entire record, including the unfair practice charge, the ALJ's proposed decision, CSEA's exceptions and the State's response, the Board hereby affirms the proposed decision as the decision of the Board itself.

ORDER

The unfair practice charge and complaint in Case No. SA-CE-1201-S are hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Dyer and Baker joined in this Decision.

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[1]The Dills Act is codified at Government Code section 3512 et seq. 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 to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter. For purposes of this subdivision, "employee" includes an applicant for employment or reemployment.
>
> (b) Deny to employee organizations rights guaranteed to them by this chapter.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA STATE EMPLOYEES ASSOCIATION, Charging Party, v. STATE OF CALIFORNIA (DEPARTMENT OF YOUTH AUTHORITY), Respondent.	)	Unfair Practice Case No. SA-CE-1201-S PROPOSED DECISION (4/6/2000)

Appearances: Marcia Mooney, Labor Relations Representative, for California State Employees Association; State of California (Department of Personnel Administration) by Wendi Ross, Labor Relations Counsel, for State of California (Department of Youth Authority).

Before Allen R. Link, Administrative Law Judge.

PROCEDURAL HISTORY

On January 7, 1999, the California State Employees Association (CSEA), filed an unfair practice charge with the Public Employment Relations Board (PERB or Board) against the State of California (Department of Youth Authority) (CYA). On March 8, 1999, PERB's Office of the General Counsel, after an investigation of the charge, issued a complaint against CYA alleging violations of the Ralph C. Dills Act (Dills Act), subdivisions (a) and (b) of section 3519.'

[1]The Dills Act is codified in the Government Code (commencing with section 3512 et seq). All section references, unless otherwise noted, are to the Government Code. Subdivisions (a) and (b) of section 3519 state that 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

On April 16, 1999, the respondent filed its answer to the complaint denying all material allegations and asserting affirmative defenses.

A formal hearing was held before the undersigned on July 14, August 9, September 13 and 21, and November 18, 1999. At the conclusion of the hearing, transcripts were prepared, briefs were filed and the case was submitted for a proposed decision on March 10, 2000.

INTRODUCTION

CSEA alleges that Rosielyn Dyer-Browhaw (Browhaw) was discriminated against by CYA when it (1) initiated an internal affairs investigation against her with insufficient justification, (2) failed to select her for promotion to a position of assistant principal, (3) denied her educational leave opportunities, (4) required her to receive permission from a co-worker to obtain classroom supplies, and (5) had insufficient justification to give her an annual review with low performance evaluation marks.

CYA insists that (1) there was sufficient evidence to justify the initiation of the subject investigation, (2) other candidates were better qualified for the assistant principal position(s), (3) there was sufficient justification for the

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> to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter. . . .
>
> (b) Deny to employee organizations rights guaranteed to them by this chapter.

educational leave denial, (4) the co-worker was the coordinator of the subject program and therefore was responsible for monitoring its financial expenditures, and (5) Browhaw's performance evaluation marks accurately reflected her performance.

FINDINGS OF FACT

Jurisdiction

The parties stipulated that the charging party is a recognized employee organization and the respondent is a state employer, within the meaning of the Dills Act.

Protected Activities and Employer Knowledge Thereof

During the time of the subject events, Browhaw was a teacher at the Northern California Youth Center (NCYC) in Stockton, California, a CYA facility. She was assigned to the Karl Holton School (KHS). From September 1994 to the present, she has been a CSEA job steward.

In 1994 CYA was attempting to implement a "Design for Living" (DFL) program at KHS. Browhaw openly and vocally opposed this program, which included religious overtones. She and other KHS teachers were plaintiffs in a lawsuit that challenged such implementation on the grounds that it violated the constitutional separation of church and state. Eventually, the court of appeal ruled in the plaintiff's favor. As a result, CYA deleted specific references to a deity in the DFL program. However, Browhaw believes the program continues to incorporate such references, but in a more subtle manner.

CYA managers, including Dorrine Davis (Davis), CYA's deputy director and superintendent of education, attended many of the court proceedings in this case and were, therefore, aware of Browhaw's participation.

Browhaw believes that discrimination against her greatly intensified after she was involved in this lawsuit. She also asserts that the other plaintiffs experienced similar discrimination.

On at least two separate occasions in 1996, Browhaw met with school administrators, including KHS Principal Sam Jones (Jones), on behalf of the teaching staff with regard to a specific issue. These meetings concerned the procedure by which security personnel were available to provide bathroom breaks for teaching personnel.

Throughout 1996 and 1997 Browhaw represented various fellow employees with regard to a series of other grievances. However, Jones states he does not recall Browhaw representing other employees in the filing of grievances "and coming through me." However, Manuel Ramon, Ed.D. (Dr. Ramon), KHS's vice principal in 1996 and 1997, admitted he was made aware of Browhaw's union status when he saw her name listed on one of CSEA's periodic listings of certified stewards.

On December 5, 1997, CSEA, on behalf of Browhaw, filed an unfair practice charge with PERB against CYA alleging discrimination against her for protected activities. The protected activities she alleged included both her participation

in the DFL lawsuit and eight separate instances of representation of other employees. The case was eventually settled.

Patsy Fine (Fine), KHS's assistant principal at that time,[2] stated that she was not aware of Browhaw's union stewardship until after she prepared her 1998 evaluation. Even then she was only aware that Browhaw had gone to a two-day CSEA training session. She was never aware of Browhaw's being involved in any representation issues. She does admit, however, that when she was working in CYA's Sacramento headquarters, prior to her KHS employment, she became aware of the DFL lawsuit.

Browhaw's Initial Contact with Jones at KHS

Prior to her employment with CYA, Browhaw was a correctional officer (CO) with the Department of Corrections (CDC). While in that job, she met Jones, who was a CDC teacher. He was later instrumental in her becoming a CYA teacher. When she came to KHS, Jones complained to her of the problems and interference that he believed was being directed toward the school by Harvey Martinez (Martinez), CSEA's chief NCYC job steward. Initially Browhaw aligned herself with Jones against CSEA, but eventually began to believe he was lying to her. Later, she switched her allegiance and became a CSEA steward. Once this occurred, she believed Jones considered her an enemy.

Educational Leave Denial

CYA teachers accrue a right to educational leave at a rate of eight hours per month. Many teachers are required to renew

[2]Fine became KHS's vice-principal on December 15, 1997.

their teaching credentials every five years. This leave permits them to do so, at least partially, on state time. Browhaw requested such leave for the 1997-98 fiscal year.

On May 23, 1997, Jones notified Browhaw as follows:

> No education leave will be approved for you this coming fiscal year. Thirteen (13) staff have requested this type leave. Some have never taken it. Some need it to maintain their credentials and some have only taken education leave once during the past twelve years.
>
> We only have a limited number of hours allotted [sic] to us for education leave. Most staff in the areas underlined will get some education leave. However, they may not get all the time they have requested.
>
> You may reapply for the 1998-99 fiscal year. However, there is no guaranteed approval. Education leave is not based on seniority. [Emphasis in original.]

Browhaw interpreted this memo as denying her educational leave for a two year period, even though it seems to deny such leave for only one year. To support her contention, she verbally referenced a second document. This other document was not introduced into evidence.[3]

Browhaw's 1996 Punitive Action

On February 27, 1996, D. Larry McGuire, Sr., acting superintendent of KHS, caused a notice of adverse action to be issued to Browhaw, temporarily reducing her salary by 5 percent

[3]A May 26, 1998, leave denial letter from Jones seems to suggest he would approve 100 hours of 1998-99 educational leave for Browhaw if she resubmitted her request for the lesser number of hours. In July 1998, Jones reminded her that she had not resubmitted her new request for the upcoming academic year.

for six pay periods, from April 1 through September 30, 1996. The action accused Browhaw of using KHS's facsimile (fax) machine to send a document to a local radio talk show host. The document, in a very scurrilous manner,[4] attempted to rebut various statements made by the radio host regarding the appropriateness of O.J. Simpson's "not guilty" verdict.

CYA's notice stated that Browhaw's letter was perceived as having come from KHS and CYA. It went on to state that the radio station management "questioned what kind of education department would allow an employee to use the facsimile machine to transmit this sort of hatred." It also accused her of causing distress to the talk show host.

Prior to the State Personnel Board (SPB) hearing on Browhaw's appeal, the parties settled the matter by stipulating that the penalty would be reduced to a 5 percent salary reduction for three instead of six months.

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[4]Browhaw's fax transmittal to Enid Goldstein, a radio host in Stockton, contained many comments along the following lines:

> a. Dear Enid, Goddess of Hatred
>
> b. Enid, congratulations! You have done more to revive hatred than anyone, since Hitler. Tell me, are you a reincarnated Hitler? . . . What a low life racist you are. I detest you, and the likes of you, . . .
>
> . . . . . .
>
> d. Now, listen, and listen well! The reason why you and the rest of the Jews/whites are upset, is because it takes more than your wishes and hatred to falsely convict an innocent man. [He] killed no one, if he did your mama did. . . .

Browhaw - Alarcon Communication re Alleged CYA Racism

On July 3, 1996, Browhaw received a response from Francisco Alarcon (Alarcon), the CYA director at that time, regarding a previous complaint from her about (1) her placement on an assistant principal promotion list, and (2) CYA's insistence that she repay the department for educational expenditures due to her failure to properly complete a contractual educational leave.[5]

In that complaint Browhaw states she suffered from racial discrimination on the part of her supervisors. In her written complaint she referenced either racism or her African-American heritage eight times. She made no references to either her union stewardship or any protected activities as the basis for her allegations of discrimination.

Browhaw's 1997 Punitive Action

On August 22, 1997, Gary F. Maurer (Maurer), superintendent of KHS at that time, caused a second notice of adverse action to be issued to Browhaw. This action, which suspended her for thirty days, accused Browhaw of leaving a training session in Sacramento 2 1/2 hours early on one day and 3 hours early on

[5]In the summer of 1995 Browhaw received paid educational leave. However, she did not complete her scheduled courses within the prescribed period of time. CYA determined she should reimburse the agency for costs it incurred in connection with her leave.

Browhaw states her failure to complete such courses was due to the death of her father. CYA's educational leave procedure states if "extenuating circumstances" exist, reimbursement is not necessary." Eventually, Browhaw got her money back but the process took an extended period of time, creating a financial burden on Browhaw.

another. She is also accused of verbally confronting the KHS teacher who informed management of her early departures. Browhaw is alleged to have told this teacher to "stay out of my business," "get out of my life," and "[y]ou'd better find somebody else to snitch on." Browhaw is also accused of calling her a "big fat bitch."

The adverse action included an allegation that Browhaw falsely denied leaving the sessions early. It also stated that Browhaw admitted to a CYA investigator that she did make the "big fat bitch" statement.

In a June 18, 1998, SPB settlement agreement, the suspension was reduced to a "letter of instruction" which was to be removed from her personnel file on March 1, 1999. A condition of this settlement is that Browhaw withdraw her December 1997 unfair practice charge.

Browhaw-Fernandez Communication re Alleged CYA Racism

On September 16, 1997, Browhaw wrote to Arturo C. Fernandez (Fernandez), who was CYA's assistant director in charge of its Equal Employment Opportunity Commission (EEOC) complaints. She complained that her prior racial discrimination complaints against four supervisors and administrators had gone unanswered. The letter contained thirteen references to racial bias as the reason for this discrimination. The letter contained no references to either her union stewardship or her protected activities.

In this document she accused Davis of continuing

> to destroy people, such as myself, by ruining our career chances. She manipulates, controls, and designs the manner in which staff within CYA Education will be promoted or harassed. Well qualified African Americans, such as myself, are passed over, and often times set-up to deal with slander as a means of padding personnel files of otherwise perfect candidates. . . .

Browhaw's 1997 Negative Performance Appraisal

In late 1997 Browhaw received a performance appraisal prepared by Dr. Ramon.[6] This appraisal covered seven phases of her job. The "above standard," "standard," and "needs improvement" categories were not marked, but rather her evaluation was set forth in narrative form. She was rated as "standard" in five categories. The document also stated that she "needed improvement" in the categories of (1) "relationships with people, and (2) "analyzing situations and materials." The general comments section stated:

> As you are aware, there have been a few times that relationships have been strained between other faculty and yourself. You are encouraged to make a concerted effort to work with all faculty and administrators. I will be available for support or assistance if you so desire.

Browhaw-Brown Work Improvement Discussion (WID)

On March 4, 1998, Browhaw met with Jones, Fine and Robert Brown (Brown), CYA's headquarters-based assistant deputy

[6]Shortly after preparing this appraisal, but before presenting it to Browhaw, Dr. Ramon was transferred to Sacramento. Therefore, the document was signed by Jones instead of Ramon.

Dr. Ramon, at some time in the past, was under CYA investigation based on unknown complaints made by Browhaw.

director, Education Services Branch. At this meeting Brown conducted a WID with Browhaw.

On March 6, 1998, Browhaw was given a written memorialization of the WID with Brown. The document alleged that she called another teacher a "bitch" and made the following comment about the same teacher, "[she] sure did, her monkey looking self." The document accused Browhaw of making such comment in a voice loud enough to be heard by the subject teacher in an adjoining hallway. Both incidents were alleged to have occurred in October of 1997. She was also accused of protesting so loudly at the meeting with Brown her voice could be heard outside the "closed office door." Browhaw denied both allegations. In her written rebuttal to the WID memo, she made two references to race and none to her union activities.

March 5, 1998, Verbal Counseling Session

In a March 5, 1998, meeting, Browhaw received a counseling memorandum from Fine and Jones.[7] This memorandum concerned an allegation that Browhaw was speaking too loudly in the hallway while engaged in a discussion with Brown on March 4. They accused her of using staff names in loud public discussions with other staff. It insisted such behavior

> creates disruptions in the workplace, interferes with work activities, causes divisions among the faculty, or can be interpreted as intimidating or threatening to other staff members. . . .

[7]This counseling session and its concomitant written memorialization relate to the same subject set forth in Brown's March WID memorandum.

Brown wrote a rebuttal to this counseling memorandum. In it she denied speaking too loudly. She attributed the entire incident to another teacher, who, after overhearing her talking to two other teachers, told her (Browhaw) to "shut up!" The teacher then, according to Browhaw, went into Jones' office and complained about Browhaw's statements. She attributed the "counseling" she received to CYA racism when she included the following statement in her rebuttal:

> When Proposition 209 ended affirmative action some people saw it as permission to get rid of African Americans. Within this agency, many have been fired. Everything that we do is magnified a thousand times, as in the case of your memorandum. I verified this with my witnesses.

She also stated, in this rebuttal, that while in this meeting she felt she was in the presence of her enemies. When testifying about this meeting, Browhaw listed these enemies as Brown, Jones and Fine, "but not solely them." Later she included "the people who run the Youth Authority" in this list. This reference was defined to include Alarcon and Davis.

Jones' Complaint to Brown About Browhaw

On March 11, 1998, Jones sent a letter to Brown, complaining about Browhaw's "exhibiting unprofessional behavior." He insisted that her "behavior, loud talking, accusations against you, me, my assistant Patsy Fine and other staff could be heard throughout the education center onto the football field." He continued:

> Numerous staff have asked me why do I continue to put up with her continuous

> unprofessional behavior and I am at a lost [sic] for not being able to give them a reason. It is as [if] we (Superintendent's Office included) are being held "hostage" with no one addressing this issue.
>
> . . . . . .
>
> Rosielyn's behavior is affecting a lot of staff including non-educators. Also, students are seriously being affected in her classroom by her negative behavior. Most students don't want to be in her classes and we have a hard time keeping them there. Rosielyn continuously berates and belittles her students on a daily basis. I gave my assistant last Friday off because I could see her frustrations because of this very issue. Also, Rosielyn has recently stated in writing that my assistant since her arrival has further put her job at risk. Yes, this is frustrating me too and I see no end to her continuous harassment. Also, I do not believe a mediator can resolve any of this because it has gone on too long with no resolve. It is now a crisis.
>
> Again, I am requesting an immediate transfer for Rosielyn Browhaw to another high school. If this does not happen, I foresee serious repercussions against the Youth Authority from many affected staff, including non-education staff and students. [Emphasis in original.]

Vice-Principal Promotion Test

Browhaw was informed, in a document dated April 2, 1998, that she was placed in the seventh rank on the "Supervisor of Academic Instruction Correction Facility" (vice-principal) test. This same document informed her that the appointment method, when

filling vacancies, would only "give consideration to individuals in the highest three ranks."[8]

Confrontation at a Spring 1998 Meeting

On April 23, 1998, Browhaw wrote Fine complaining about a recent staff meeting in which she believed she was negatively referenced by a speaker.[9]

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[8]Eight years earlier, in 1990, shortly after her CYA employment began and before she became a CSEA job steward, she took this same test and placed in either the second or third rank. This was prior to her having obtained an administrative credential.

[9]Browhaw wrote, in pertinent part:

> During the meeting yesterday, I was very much offended by several comments, and some I consider to be racials [sic] slurs. There is a subtle message being given that minorities should model white behavior.
>
> My first complaint has to do with the manner in which Manny Borges reacted to a comment made by me. He told staff that they should speak softly, and at a low level when testing students. He said that facial expression should be pleasant. After he'd finished, I suggested that staff should be themselves. Borges retorted with: "I"m not going to argue with you..." Why was my statement considered "argument?"
>
> There are few staff other than myself who speak loudly, and none are white. On several occasions P. Fine has made the same comment regarding my voice. It was obvious that Borges had been prompted by F i n e . . . .

Fine responded, in pertinent part, as follows:

> It is unfortunate that you chose to be offended by the instruction Mr. Borges was directed to give to staff regarding proper administration of the STAR test. . . .Mr. Borges was instructed to try [to] emphasize the need for the examiners and procters [sic]

Fine insists that any negativity towards Browhaw was precipitated by her comments to the speaker that were "very challenging and confrontational."

In her electronic mail (e-mail) memorandum, Browhaw attributed the speaker's negative reference(s) to racism. She cited six instances of problems with racism, cultural diversity and tolerance, racial treatment of wards, and "white priders." There were no references to union activity.

CYA Internal Affairs Unit (IAU) Investigation

In late 1997 or early 1998, shortly after Fine assumed her duties at KHS, a ward came to her with a written complaint regarding activities he alleged occurred in Browhaw's classroom. Fine believed that if these allegations were true they constituted unprofessional behavior on Browhaw's part. The ward insisted that there were other wards who would substantiate his allegations. She decided to conduct her own investigation. She called six wards, one at a time, out of class. These wards constituted an ethnic cross section of the classroom population. The six all said the alleged behavior had not occurred. She

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> to be positive in their approach to administering the examination, . . . No individual teachers, racial groups, or other "minorities" were mentioned or singled out as particular examples . . . .
>
> Your comment to Mr. Borges was confrontational and challenged the training point that he had just made. You put him in a position to either argue the point with you or to choose to drop it. He indicated that he was not going to argue the point with you.

discussed the matter with Jones, who gave her permission to talk to Davis and handle it as she saw fit. She spoke to Davis who told her to take whatever action she felt was appropriate. Fine dropped the matter.

In early March 1998, Fine stated a number of wards came to her and filed both written and verbal grievances against Browhaw. She also stated that at the same time a number of wards asked to be transferred out of her class.[10] According to Fine, their transfer requests were vague and supported by a variety of excuses. Fine called Davis again and was told to (1) reduce the verbal grievances to writing, (2) include a request for an Internal Affairs investigation,[11] and (3) submit the documentation to her (Davis). On March 13, 1998, Fine submitted the requested materials. Her "investigation" consisted of little more than talking to the five wards that accused Browhaw of

[10]Ward D, when interviewed by Lt. Sandra Wright (Lt. Wright), one of the IAU investigators, stated he filled out a form to be removed from Browhaw's classroom because it was too hard. He made an appointment with Fine because he was told he needed her authorization to get out of Browhaw's class. He told Fine he was not getting any help from Browhaw, although he admitted to Lt. Wright that Browhaw gives the wards assignments and expects them to "put a little effort into figuring it out before they receive help."

[11]CYA has two types of investigations. One, for potentially less serious offenses, is conducted by one-site personnel. The other type for potentially more serious offenses is conducted by trained investigators from CYA's headquarters IAU. Fine's request did not specify which type of investigation was to be conducted.

improper behavior.[12] There was no record of Fine discussing the matter with (1) Browhaw's two classroom aides, (2) the volunteer grandmother, or (3) Browhaw, herself, prior to requesting a formal investigation. In her investigation request, Fine stated:

> On five separate occasions with student [sic] assigned to her classroom Rosielyn Dyer-Browhaw made statement [sic] to or about students that were of a sexual harassment nature or were unprofessional. These students state she often uses the words "fuck" and "bitch" in class.

On April 28, 1998, Browhaw was notified by CYA's Internal Affairs Unit[13] that she was under investigation for allegedly being "discourteous in your treatment of wards assigned to your classroom between January 1998 through April 27, 1998." The subsequent investigation report listed five separate instances in which Browhaw was alleged to have made inappropriate comments to wards. Fine conducted the preliminary interview on three of these allegations.[14]

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[12]Fine testified that she received written ward grievances; she also stated that she was told by Davis to reduce all oral grievances to writing and submit them as a part of her investigation request. However, no ward-written complaints were entered into evidence, nor were any such written grievances supplied by CYA to the charging party in response to a subpoena duces tecum.

Sgt. Mark Langensepien (Sgt. Langensepien), the second IAU investigator, did not recall any ward grievances being attached to Fine's investigation request.

[13]Lt. Wright and Sgt. Langensepien were assigned to conduct the investigation.

[14]Browhaw stated that a ward spoke to her prior to her being told of this investigation. He said that the day before when she had been absent, Fine called various wards out of the classroom to ask them if Browhaw was making inappropriate comments in the

Lt. Wright asked Fine to obtain written statements from Browhaw's two aides. When Fine asked for such statements, they declined. One said he did not want to get involved. The other said, "no, I will answer questions if I'm interrogated."

As a part of the Internal Affairs investigation Browhaw's two aides and the grandmother volunteer were interviewed. They all stated that she was stricter and/or more structured than other teachers. None of them ever heard Browhaw use inappropriate language in the classroom, nor did they hear her raise her voice other than to a level necessary to maintain control.

The volunteer stated that she knew three of the five wards that accused Browhaw of misconduct. All three have been sent out of the classroom at one time or another for not following instructions. She stated that when they were sent out "they began to curse and get upset at Browhaw." She stated the ward allegations were all untrue. She has worked in Browhaw's classroom since 1990.

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classroom. The ward told Browhaw that some of the wards that did not like her were making up negative incidents. Fine asked them to reduce these incidents to writing and submit them to her. Browhaw learned that her teaching assistants were also interviewed by Fine, who told them not to tell her (Browhaw) about the interviews. Neither the wards nor the teaching assistants were called to testify at the formal hearing in this case.

Sgt. Langensepien states his recollection was that the incidents that were the subject of the investigation were brought to Fine's attention by wards.

In addition to the five complaining wards and the three classroom employees, seventeen wards and six staff members, including Browhaw,[15] were interviewed. The only allegations of misconduct came from the five wards. There was no corroboration of their allegations from any of the other twenty-six interviewees.

On September 28, 1998, Browhaw was notified that the allegations that were the basis for the investigation were not sustained; therefore, the case was closed.

Browhaw's E-Mail Complaints to Fine

On May 9, 1998, Browhaw exchanged a series of e-mail messages with Fine. In her comments Browhaw outlined a series of negative allegations about Fine's supervisorial actions. She listed three allegations of Fine's racially discriminating against her and only one reference to her own "union duties."

Browhaw's Request for IASA Supplies from Fellow Teacher

In January 1998 Browhaw was assigned to KHS' Instructing America's Students Act (IASA) program.[16] On June 2, 1998, she complained to Fine about, among other things, a fellow KHS teacher, Nancy Powell-Haniey's (Hanley), being given the position of coordinator of this program. In this written complaint she made four references to racism as being the cause of her not

[15]Browhaw was interviewed on July 13, 1998.

[16]The IASA is a federally funded, compensatory education, skills enhancement program that involves computer instruction, teaching assistants, and both pre- and post-program testing.

being given this position. There were no references to her union activities.

One of Hanley's coordinating responsibilities was the monitoring of the program's budget, which included expenditure-related recommendations. Each year, prior to being assigned to the IASA program, Browhaw would order equipment and supplies for her classroom. She had direct access to Jones to discuss her needs and to lobby him regarding any initial disapprovals. After receiving her IASA assignment she had to submit her requests to Hanley, thereby losing her direct access to Jones.

Browhaw was in a unique situation. She was the only full-time IASA teacher. The other teachers assigned to the program had "transition" classrooms, which meant they would teach regular core classes with a small number of IASA students. Therefore, she was the only teacher completely under Hanley's budgetary supervision.

On November 30, 1998, Browhaw received a memorandum from Hanley explaining that approximately one-half of her requested classroom materials were disapproved by Jones. Browhaw believes that Hanley either denied or effectively recommended denial of her requests.

Hanley states that, in her role as IASA coordinator, she does not have the authority to approve or disapprove any teacher requests. She states her involvement in requisitioning supplies is limited to holding meetings to inform the IASA staff of the amount of available money and monitoring their supply requests.

This monitoring process consists of reading, initialling and forwarding them to Jones.

However, Jones testified that Hanley may recommend approval or disapproval of IASA teacher requisitions, although the final decision is made by either him or Fine.

In addition to the coordinator selection and budgetary supervision issues, Browhaw had a number of conflicts with the manner in which the IASA program was being implemented. One such conflict was the procedure under which wards were released from the program. Previously, a ward's exit was based exclusively on his score on a program-wide test. Under the new procedure, these scores were only one criterion to be examined in any exit decision. Browhaw initially refused to participate in the collaborative process necessary to make exiting decisions and continued to effect exits based on the test score.

In general, Fine and Hanley were upset with Browhaw's reluctance to follow IASA guidelines, as interpreted by CYA's educational administration.

Letter to Editor of the Stockton Record

On June 9, 1998, Browhaw wrote a "letter to the editor" of the Stockton Record in which she accused the CYA of failing to properly investigate her charges of racism. In it she made three references to racism and none to union activity.

Lucero/Fontenot Lawsuit Against Browhaw and CYA

On July 11, 1998, Denise Lucero (Lucero) and Brenda Fontenot (Fontenot), two KHS teachers, filed suit in San Joaquin County

against Browhaw and CYA. The suit alleged that Browhaw created a hostile atmosphere at KHS for the two plaintiffs. Browhaw was alleged to have discriminated against Lucero, who is white, because of her race; and Fontenot, who is not white, because of her racial attitude. Browhaw was alleged to have said to Fontenot, "you think you're white."

The plaintiffs' suit stated that CYA failed to take reasonable steps to stop Browhaw's alleged actions against them. There were no references to Browhaw's union stewardship, protected activities, or any other union-related matters in the subject complaint.

Browhaw was deposed on August 10, 1999, in connection with this case. In that deposition reference was made to her testimony in the subject unfair practice case. When asked to describe the gravamen of the charge in this case, she stated

> It had a lot to do with the fact that the Youth Authority did not protect me from Lucero and Fontenot and in fact, I believe that some of the administrators had a lot to do with where we are today. And I think that they did that as reprisal for a racial discrimination case I filed as well as my duties with the California State Employee Association.

Browhaw's 1998 Negative Performance Appraisal

In late November 1998, Browhaw was given a performance appraisal by Fine which graded her as (1) above standard in the category of "work habits," (2) standard in five other categories, and (3) "needs improvement" in two categories: (a) relationships

with people, and (b) analyzing situations and materials. The following sentence was inserted in "General Comments:"

> The work that you do to help students learn and improve their basic skills in reading writing, and math is appreciated.

Under the "Relationships with People" category, the following sentences were included:

> You have made derogatory comments in writing about school administration and other staff. In the long run, these behaviors are counter-productive for all concerned.

When asked why she included the first sentence, Fine said:

> There were numerous documented writings -- Workers' Comp claims and rebuttals and things like that -- and comments were very derogatory.

Browhaw's 1999 EEOC Charges

On January 5, 1999, Browhaw wrote to the EEOC office in Fresno complaining of "[b]latant acts of racial discrimination" by KHS and CYA. She began her letter by complaining that the Fresno EEOC office had sided with her opponents with regard to the seven charges she previously had filed. She then requested that her six new charges be sent to EEOC's Oakland or San Francisco office due to Fresno's past negative decisions. The six new charges allege that she improperly suffered the following adverse personnel actions: (1) a negative December 28, 1998, performance appraisal, (2) a temporary teaching subject matter change, (3) receipt of a low rating on the assistant principal test, (4) receipt of a March 6, 1998, WID from Brown, (5) failure to receive upwardly mobile assignments at KHS, and (6) a

requirement that she submit her requests for teaching materials to IASA coordinator Hanley, rather than to the principal.

She attributed all of these charges to racism against her because of her African-American ethnicity. There was no mention, of any sort, in this letter of her union status or activities.

Interrelationship of Racism and Dills Act Protected Activities

In response to questions from her representative during the hearing in this case, Browhaw discussed the interrelationship of racism and Dills Act protected activities as reasons for the alleged discrimination against her, as follows:

> Q. Okay. And isn't it true that it's your contention that the Department of Youth Authority has taken these actions not simply based on your status as a union steward, but also in retaliation for racial discrimination or that they're discriminating on the basis of race?
>
> A. I think they both equally played a role; however, I think my union steward and the people that I associated with as a union steward outweighed the other factor.
>
> Q. Outweighed the other factor being?
>
> A. The racial discrimination was compounded by my activities as a union steward. And because of the people that I associated with who were also union stewards compounded a problem that exaggerated my problems with the racial discrimination.
>
> Q. So to clarify, both the fact that -- you believe the Department retaliated or discriminated against you based on your union status as well as the fact that the Department retaliated or reprised against you based on your race, both played a role in these actions?
>
> A. It's been my observation and my experience that the California Department of

> Youth Authority discriminates against African-Americans. And that's a statement that is confirmed by a report that was done by the State Personnel Board, Adverse Action Board.

RULING ON MOTION FOR PARTIAL DISMISSAL

As set forth, supra, in the Introduction (p. 2), the complaint alleges five instances of CYA discrimination against Browhaw. At the end of the charging party's case-in-chief, respondent moved for dismissal of three of these allegations. This motion was submitted in writing and is hereby made a part of the record, as if fully set forth herein.

The motion was granted with regard to two of the allegations, i.e., that CYA discriminated against Browhaw when it (1) failed to select her for promotion to assistant principal, and (2) denied her educational leave opportunities. The motion was granted pursuant to section 3514.5(a)(I),[17] which prohibits the issuance of a complaint based on events occurring more than six months prior to the filing of the charge. The justification for the granting of such motions will be described, with greater specificity, below.

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[17]Section 3514.5, in pertinent part, states:

> (a) Any employee, employee organization, or employer shall have the right to file an unfair practice charge, except that the board shall not do either of the following: (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;

ISSUES

1. Were any of the allegations set forth in this unfair practice charge barred by the provisions of section 3514.5(a)(1)?

2. Did CYA discriminate against Browhaw due to her protected activities, thereby violating subdivision (a) or (b) of section 3519?

CONCLUSIONS OF LAW

ISSUE NO. 1. Were any of the allegations set forth in this unfair practice charge barred by the provisions of section 3514.5(a)(1)?

The statute of limitations begins to run on the date charging party obtains actual or constructive knowledge of the subject conduct. (Fairfield-Suisun Unified School District (1985) PERB Decision No. 547; The Regents of the University of California (1990) PERB Decision No. 826-H; Regents of the University of California (1993) PERB Decision No. 1002-H; Regents of the University of California (1993) PERB Decision No. 1023-H.)

Even actual knowledge must "clearly inform" the charging party of the alleged unlawful act. (See Victor Valley Union High School District (1986) PERB Decision No. 565.)

The charge in this case was filed on January 7, 1999. The primary question with regard to the allegations dismissed during the hearing becomes, "[H]ow soon before January 7, 1999 was Browhaw "clearly informed" that (1) she was not to be selected as a vice-principal, and (2) her request for educational leave was denied. If she had actual or constructive notice of either circumstance prior to July 8, 1998, six months before the charge

was filed, it would be barred by the provisions of section 3514.5(a) (1).

Vice-principal Test

The evidence is quite clear that she learned on April 2, 1998, or shortly thereafter, that she was placed in the seventh rank on her vice-principal test. As this ranking effectively caused her not to be considered for any newly opened positions, it was on this date that she became clearly informed of her failure to be selected for the position. As April 2, 1998, is well before July 8, 1998, the charge was properly dismissed.

Educational Leave

With regard to the educational leave issue the complaint states that she was denied educational leave "during her tenure" at KHS. The evidence adduced at the hearing centered on the denial for the 1997-98 school year.

It is clear that she was informed of Jones' denial of her request for 1997-98 educational leave by a letter dated May 23, 1997. As this date is well before July 8, 1998, the charge with regard to her request for 1997-98 was also properly dismissed.

The record also shows that her initial request for educational leave for the 1998-99 school year was denied on May 26, 1998. The denial was conditional, however, and included a suggestion that a request for a lesser amount would be granted. There was no record of her having resubmitted a request for a lesser amount. However, as she was given this 1998-99 denial on May 26, 1998, she was clearly informed of such action prior to

July 8, 1998. Therefore, this charge was also properly dismissed.

Initiation of Investigation

Respondent contends that the complaint allegation regarding the "initiation" of an investigation against Browhaw is also barred by section 3514.5(a)(1). It cites Browhaw's admission she heard of the investigation through wards and classroom aides and eventually was notified of the pendency of the investigation by an April 28, 1998, memorandum from Lt. Wright. Respondent insists that, at least as of that date, Browhaw was informed of the charges against her and the section 3514.5(a)(1) limiting period began to run.

Respondent's contention is not supported by the evidence. The memorandum from Lt. Wright merely states Browhaw is to be investigated for possible adverse action. It goes on to allege she was

> . . . discourteous in your treatment of wards assigned to your classroom between January 1998 through April 27, 1998.

This memorandum does not "clearly inform" her of her allegedly improper conduct. Absent specifics Browhaw does not know what improprieties CYA is alleging. Therefore, she is unable to develop a defense to the charges against her or have sufficient information to support an unfair practice charge alleging that the initiation of the investigation was due to her protected activities.

Respondent cannot, on the one hand, fail to notify an employee of the details of the charges against him/her; and then cite the employee's receipt of rumors and incomplete memos as support for a contention that the employee was "clearly informed" of such charges. It was only when she actually met with the IAU investigators that she became aware of the specific charges against her. This meeting occurred on July 13, 1998. It was at this time that the time limit set forth in section 3514.5(a)(1) • began to run.

Respondent's motion for dismissal of the part of the charge that concerns the initiation of an investigation against her is hereby denied.

Permission from Co-Worker for Supplies

Respondent also claims that the charge that she was required to obtain permission from a co-worker to obtain classroom supplies is barred by section 3514.5 (a) (1) . It bases this argument exclusively on a letter it claims Browhaw wrote to CYA Director Alarcon on August 11, 1998. In this letter there is a list of circumstances that Browhaw believes show she was being discriminated against by CYA administrators. The letter includes the following statement next to a January 1998 date:

> . . . Required to work under a less qualified teacher. Refused a budget, the ability to give grades to students, choose my own equipment, and supplies. Refused access to administrators . . . . [Emphasis added.]

Respondent cites the January 1998 date next to this statement in support of its contention that Browhaw knew at that

time she was required to "obtain permission from a co-worker to obtain classroom supplies."

There are two problems with this contention. First, although Browhaw originally admitted writing the letter, she later recanted, admitting only that she wrote a letter "similar to this." She cites the facts that (1) the letter bore no signature, (2) had different kinds of typing on it, and (3) various papers were taken out of her drawer at school.

Second, even if it were proven that Browhaw wrote the letter, the reference to January 1998 next to the subject statement is insufficient to support a finding that she is barred by section 3514.5(a)(1) from pursuing her charge.

Therefore, respondent's motion for dismissal of the part of the complaint that concerns a requirement she obtain supplies from a co-worker is hereby denied.

ISSUE NO. 2. Did CYA discriminate against Browhaw due to her protected activities, thereby violating subdivision (a) or (b) of section 3519?

Applicable Test

The Board, in Carlsbad Unified School District (1979) PERB Decision No. 89 (Carlsbad), set forth the following test for alleged violations of subdivision (a) of section 3543.5:

> 1. A single test shall be applicable in all instances in which violations of section 3543.5(a) are alleged;
>
> 2. Where the charging party establishes that the employer's conduct tends to or does result in some harm to employee rights granted under the EERA, a prima facie case shall be deemed to exist;

> 3. Where the harm to the employees' rights is slight, and the employer offers justification based on operational necessity, the competing interest of the employer and rights of the employees will be balanced and the charge resolved accordingly;
>
> 4. Where the harm is inherently destructive of employee rights, the employer's conduct will be excused only on proof that it was occasioned by circumstances beyond the employer's control and that no alternative course of action was available;
>
> 5. Irrespective of the foregoing, a charge will be sustained where it is shown that the employer would not have engaged in the complained-of conduct but for an unlawful motivation, purpose or intent. [Emphasis added.]

In Novato Unified School District (1982) PERB Decision No. 210 (Novato), the Board clarified the Carlsbad test for retaliation or discrimination in light of the National Labor Relations Board decision in Wright Line, Inc. (1980) 251 NLRB 1083 [105 LRRM 1169] enforced in part (1st Cir. 1981) 662 F.2d 899 [108 LRRM 2513]. In Novato, the Board made it clear that unlawful motivation must be proven in order to find a violation. In addition, a nexus or connection must be demonstrated between the employer's conduct and the exercise of a protected right resulting in harm or potential harm to that right.

In order to establish a prima facie case, the charging party must first prove that the subject employee engaged in protected activity.[18] Next, it must establish that the employer had

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[18]Section 3515 grants state employees:

> . . . the right to form, join, and participate in the activities of employee

knowledge of such protected activity. Last, it must prove that the subject adverse action(s) were taken in whole or in part, as a result of such protected activity.

Existence of an Adverse Action

Respondent contends that (1) the mere initiation of an investigation, (2) a requirement that budgetary requests be reviewed by a fellow employee, and (3) a performance appraisal that does not include a majority of substandard ratings, do not constitute "adverse actions" or "harm to employee rights" under the Dills Act.

PERB, in Newark Unified School District (1991) PERB Decision No. 864, interpreting Palo Verde Unified School District (1988) PERB Decision No. 689 (Palo Verde), stated, in pertinent part:

> Furthermore, Palo Verde necessitates an objective finding of adverse action; thus, as stated above, the question is not whether Bookout personally found the transfer undesirable, but whether a reasonable person under the same circumstances would consider the transfer to have an adverse impact on the employee's employment. [Emphasis in original.]

Initiation of Investigation

Certainly, any teacher being investigated for allegedly being "discourteous in your treatment" of assigned students, would reasonably consider such action as having an adverse impact on his/her employment.

> organizations of their own choosing for the purpose of representation on all matters of employer-employee relations. . . .

Permission from Co-worker for Supplies

Likewise, any teacher required to obtain permission from a peer for the requisition of her classroom supplies would reasonably consider such action to be demeaning and have an adverse impact on his/her employment.

In this case the fellow teacher was elevated to a coordinator position and it was this elevation that granted the peer such responsibility. These circumstances may have an impact on the ultimate decision of whether there was unlawful motivation, but not on whether such action was adverse to the employee.

Adverse Performance Report

Respondent cites a provision of the parties' memorandum of understanding (MOU) that only permits a grievance to be filed against a performance report when such report contains a majority of substandard ratings. However, the Palo Verde standard is not controlled by the provisions of the parties' MOU. Certainly, a reasonable person would consider a performance report that included substandard ratings for "relationships with people" and "analyzing situations and materials" to have an adverse impact on his/her employment.

Summary

Therefore, the respondent's contention that each of the complaint allegations failed to constitute "adverse action" within the provisions of the Dills Act is rejected.

Proof of Unlawful Motivation

Proving the existence of unlawful motivation can be a difficult burden. The Board acknowledged this when it stated the following in Carlsbad:

> Proof Of Unlawful Intent Where Offered Or Required
>
> Unlawful motivation, purpose or intent is essentially a state of mind, a subjective condition generally known only to the charged party. Direct and affirmative proof is not always available or possible. However, following generally accepted legal principles the presence of such unlawful motivation, purpose or intent may be established by inference from the entire record. [Fn. omitted.]

In addition, the Board, in Novato, set forth examples of the types of circumstances to be examined in a determination of whether union animus is present and a motivating factor in the employer's action(s). These circumstances are (1) proximity of time between participation in the protected activity and the adverse action, (2) disparate treatment of the affected employee(s), (3) inconsistent explanations of the employer's action(s), (4) departure from established procedures or standards, and (5) inadequate investigation(s). (See also Baldwin Park Unified School District (1982) PERB Decision No. 221 (Baldwin Park).)

Protected Activity and Management's Knowledge Thereof

The evidence is clear that Browhaw engaged in protected activities and that the decision makers, Jones, Fine and Davis were aware of such activity. Her CSEA steward status was known

to both Jones and Davis as was her participation in the DFL lawsuit.[19] Although Fine insists that she was unaware of Browhaw's stewardship until after the November 1998 performance evaluation, she was aware of the DFL lawsuit prior to her arrival at KHS. She undoubtedly became aware of Browhaw's participation in that suit shortly after her arrival at KHS.

Respondent correctly points out that the quantum of Browhaw's representational activity was not supported by empirical evidence, but rather by her statements alone. However, her filing of an unfair practice charge in December 1997 and her appeals from various negative personnel actions constitute sufficient evidence to support a finding she engaged in protected activity.

Nexus Between such Activity and Adverse Personnel Actions

Timing

The record is replete with charges and counter charges between these parties from early 1996 through 1998. The evidence sets forth a chronology of Browhaw's protected activities intertwined with a corresponding chronology of negative CYA personnel actions.

Some examples of this chronological interrelationship are:

[19]There is a question of whether or not Browhaw's participation in the DFL lawsuit would qualify as protected activity under the Dills Act. However, due to Browhaw's other actions on behalf of CSEA, this issue need not be resolved.

(1) In 1994-5 Browhaw actively engages in the lawsuit against CYA with regard to the DFL program. In February 1996 she receives an adverse action;

(2) Throughout 1996-97 Browhaw represents employees on various issues. In May 1997 Jones denies Browhaw's request for educational leave;

(3) On December 5, 1997, Browhaw files an unfair practice charge against CYA. In December 1997 Browhaw receives a negative performance report; and

(4) In April 1998 Browhaw complains about disrespect shown her by Manny Borges; in May she complains about Fine's supervisorial actions; and in June she complains about not receiving the IASA coordinator position. In late November Browhaw (a) receives a negative performance report, and (b) is told one-half of her requested materials were rejected by Jones.

All of these circumstances lend support to an inference of unlawful motivation. However, PERB has made it clear that timing alone is insufficient to create an inference of a nexus between protected activity and negative personnel actions. (Moreland Elementary School District (1982) PERB Decision No. 227; Charter Oak Unified School District (1984) PERB Decision No. 404.)

Disparate Treatment

Unlawful motivation may also be inferred from disparate treatment of the employee. Charging party contends that CYA's decision to conduct a level two investigation, with the use of

IAU investigators, rather than a lesser level investigation with the use of NCYC or in-house investigators, was disparate treatment of Browhaw.

Charging Party's contention is without merit. There was no evidence that either Fine or Davis requested a level two investigation. The choice of the investigatory level was made by the IAU. Given Browhaw's litigious background, prior adverse actions, and multiple complaints to various high level CYA administrators, it is reasonable that the IAU would want to assure itself that the investigation was conducted by trained professionals, rather than the local part-time investigators. The choice of a level two investigation of Fine's allegation does not support an inference of unlawful motivation.

Inadequate Investigation

An inadequate investigation can also provide evidence of unlawful motivation. (See Baldwin Park.) A case can be made that Fine's investigation of the ward allegations prior to her request for an IAU investigation was inadequate. She did not speak to the classroom aides, the volunteer grandmother or Browhaw, herself, before requesting an investigation. Nor was there any evidence that she examined the wards' disciplinary history in Browhaw's classroom.

In addition, she referenced the existence of written complaints in her initial discussions with Davis, and was directed to reduce all verbal ward complaints to writing. And yet, even though a subpoena duces tecum for such documentation

was served on the CYA, no such writings were produced. These circumstances raise questions of Fine's ability to conduct a competent preliminary investigation. As the more formal investigation learned, the charges of the five wards were not substantiated by any of the other twenty-six witnesses interviewed.

The inadequacies of Fine's investigation, prior to her initiating the IAU investigation, support, to some extent, an inference of unlawful motivation.

There is no credible evidence with regard to any (1) inconsistent explanations of the employer's action or (2) departure(s) from established procedures or standards.

Summary of "Novato" and "Baldwin Park" Circumstances

With regard to the (1) peer review of supply requisitions and (2) the negative rankings in her 1998 performance appraisal, it is determined there is insufficient evidence to support an inference of unlawful motivation and these charges shall be dismissed.

With regard to the allegation of improperly initiating an investigation of Browhaw, there was some evidence supporting an inference of unlawful motivation. However, the harm to Browhaw was slight and the respondent insists that a charge of discourtesy towards wards, especially one that includes allegations of improper use of sexual language, was serious enough to justify a formal investigation.

Under these circumstances the competing interests of the employer and the rights of the employee will be balanced and the charge resolved accordingly.

In any attempt to balance the rights of the parties, it must be pointed out that Fine, Jones and Davis were faced with an employee who has had numerous conflicts with others in the past.[20] It is not unreasonable for them to be concerned that this predilection for conflict would carry over to her classroom demeanor.

Although, the record clearly shows numerous incidents in which Browhaw was in conflict with her supervisors, there was little, if any, evidence that such conflicts were the result of her protected activities. There is no doubt that the overwhelming weight of the evidence dictates the charge be resolved in favor of the employer.

Summary

After an examination of the foregoing, it is determined that there is insufficient evidence to support a charge that Browhaw's adverse personnel actions were the result of her protected activities.

PROPOSED ORDER

Based on the foregoing findings of fact, conclusions of law and the entire record in this case, it is found that the State of

[20]Her own contemporaneous writings show that she believed her conflicts with others were ' the result of their racial discrimination. However, in her testimony she states she believes her protected activities are equally to blame for her problems. The evidence does not support this testimony.

California (Department of Youth Authority) did not violate the Ralph C. Dills Act, Government Code section 3519(a) or (b), when it (1) initiated an internal affairs investigation against her, (2) failed to select her for promotion to vice-principal, (3) denied her educational leave opportunities, (4) required her to obtain classroom supplies through the Instructing America's Students Act coordinator, or (5) gave her an annual review with two low rankings. It is ORDERED that all aspects of the charge and complaint in Case No. SA-CE-1201-S, California State Employees Association v. State of California (Department of Youth Authority), 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 within twenty days of service of this Proposed Decision. The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95814-4174

FAX: (916) 327-7960

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. 32300.)

A document is considered "filed" when actually received before the close of business (5 p.m.) on the last day set for filing or when mailed by certified or Express United States mail,

as shown on the postal receipt or postmark, or delivered to a common carrier promising overnight delivery, as shown on the carrier's receipt, not later than the last day set for filing. (See Cal. Code of Regs., tit. 8, sec. 32135(a); see also Cal. Code Regs., tit. 8, sec. 32130.)

A document is also considered "filed" when received by facsimile transmission before the close of business on the last day for filing, together with a Facsimile Transmission Cover sheet which meets the requirements of Cal. Code Regs., tit. 8, sec. 32135(d), provided the filing party also places the original together with the required number of copies and proof of service in the U.S. mail. (Cal. Code Regs., tit. 8, secs. 32135(b), (c) and (d); see also Cal. Code Regs., tit. 8, secs. 32090 and 32130.)

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, 32140 and 32135(c).)

Allen R. Link
Administrative Law Judge