

Barbara L. Long (Long) because of her affiliation with a rival labor organization, and without regard to any established reasonable restrictions regarding membership in CAPT. We have reviewed the record in its entirety, including the ALJ's decision, the exceptions filed by CAPT, and Ms. Long's responses thereto. We find the ALJ's findings of fact to be free from prejudicial error, and therefore adopt them as our own. We also adopt the ALJ's conclusions of law insofar as they are consistent with the following discussion.

STATEMENT OF FACTS

Long was a chapter representative of the Communication Workers of America (CWA) from 1983 until the summer of 1985, when she became a CWA statewide grievance coordinator. While serving CWA as statewide grievance coordinator, Long was on union leave of absence from her position as a psychiatric technician, and the state was reimbursed her salary by CWA. Long returned to employment from her leave of absence on February 3, 1987. In March of 1985, CAPT filed a decertification petition, and was certified as the exclusive representative of the bargaining unit on December 31, 1986.

CAPT officials were aware of Long's active participation against the decertification of CWA. On two occasions prior to CAPT's certification on December 31, 1986, Long attempted to gain

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

membership to CAPT, and was denied. CAPT admits that Long was denied membership during this time period because of her affiliation with CWA, but denies that the further delay and denial of Long's application for membership had any illegal motive.²

After certification, CAPT began to process membership and dues authorization cards which it had received prior to certification. Although Long had submitted membership cards prior to certification, there was no evidence presented at the hearing that her application was processed after certification, and no dues were deducted from Long's February paycheck. On February 13, 1987, however, Mr. Dan Western (Western) sent a request to the State Controller in order to delete Long from the

²The ALJ found the Association's actions and motives prior to 1987 could not constitute a violation. Because Long's charge was filed on August 12, 1987, no conduct occurring prior to February 12, 1987, can be the basis of a complaint under Government Code section 3514.5, which reads in pertinent part:

.

(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; . . .

(See California State University (San Diego) (1989) PERB Decision No. 718-H, pp. 8-14.)

Therefore, events occurring prior to February 12, 1987, cannot form the basis of a complaint, but only because of the jurisdictional bar found in section 3514.5, and not because of the fact that they occurred prior to certification.

list of members for whom dues deductions would be taken.³ At this time, Long received no cards or letters regarding acceptance or denial of membership. Long at no time indicated a desire, either verbally or in writing, to withdraw membership from CAPT.⁴

Long's next attempt to join CAPT was at a CAPT chapter meeting on March 19, 1987, by handing her authorization card to Mr. Saccamano, the chapter president.⁵ Long's application was not processed at this time.

In May of 1987, Long spoke with Sylvia Kuchenmeister (Kuchenmeister), a CAPT chapter president whom she knew through CWA. Kuchenmeister suggested Long give her two signed authorization cards, which she would deliver to CAPT officials at CAPT meetings which she had set up in the near future. Kuchenmeister also told Long that comments were made by CAPT officials that Long would never become a member, and that her cards were repeatedly being "lost."⁶

Long's authorization card was submitted to the State

³Mr. Dan Western was the individual responsible for processing CAPT membership/dues deduction cards.

⁴There was a postcard sent to members of CAPT, who were known by CAPT to be CWA supporters, which indicated that they need only sign off on the postcard and return it to CAPT in order to withdraw from membership. Long did not return such a card.

⁵Testimony by Long evinced that she and Saccamano had been long-time rivals regarding union affairs.

⁶From the testimony produced at hearing, it appears that no dues deduction cards can be processed after the fifteenth of each month, and must be submitted on the fifteenth of the following month in order for the dues deduction to be taken on the month following that in which it was submitted.

Controller on May 15, 1987, although Long was never notified and had no knowledge that this had been done. Her card was then rejected by the Controller because the social security number was incorrect. An irregularity notice was sent to Western's office on May 26, 1987. Although the necessary corrections were made for the several other names on the irregularity notice, Long's name was crossed out,⁷ no corrections were made, and her card was therefore not processed.

CAPT received another membership card from Long dated July 10, 1987. On August 12, 1987, Long filed an unfair practice charge. Long's card was finally submitted to the Controller on August 15, 1987, and she became a member of CAPT.

DISCUSSION

CAPT excepts to the decision of the ALJ on three separate bases. Firstly, CAPT contends that, under the Dills Act, it could not process Long's membership application while she was on a union leave of absence because she was, therefore, not employed by the state. Secondly, CAPT contends that the application of Long was processed in a timely manner. Lastly, CAPT contends that Long suffered no adverse effect as a result of the actions or failure to act of CAPT.

As stated in footnote 2, supra, events occurring prior to February 12, 1987 are outside the jurisdictional time limit of the present complaint. All parties agree that Long ended her

⁷Mr. Western admitted that the name was crossed out by his pen, but was unable to give an explanation as to why.

leave of absence and returned to employment on February 3, 1987, so that during the relevant time period she was not on leave of absence. Further, there is no evidence that Long at any time separated from state service, and the state continued to pay her salary throughout, although it was reimbursed by CWA while Long was on leave. Therefore, we find no merit in this argument.

Although CAPT excepts to the ALJ's finding that the application was not processed in a timely manner, the issue which the ALJ addressed was whether or not the Association had an unlawful discriminatory motive in its actions regarding Long's attempts to become a CAPT member. CAPT contends once again that because Long was not an employee under the Dills Act, CAPT could not accept her as a member until after her return from leave on February 3, 1987. Regardless of whether Long was an employee while on leave (see Discussion, supra). Long clearly was no longer on leave on February 13, 1987, when Western sent the deletion request to the Controller, or in March when she submitted a further application, or when her name was deleted from a list of applicants in May or June; therefore, that argument is inapposite.

CAPT further argues that the record did not produce evidence sufficient to justify a finding that CAPT had an unlawful motive in its delay or denial of the processing of Long's application for membership. On February 13, 1987, Western sent a written deletion request to the Controller, although CAPT was unable to produce any evidence upon which Western could have relied in

doing so. Long then submitted three more cards in an attempt to join CAPT; one card finally reached the Controller on May 15, 1987, but was rejected on May 26, 1987. Western's office then failed to investigate or make corrections to Long's card so that it could be processed, and, in fact, crossed Long's name off the list entirely. There was no evidence explaining the above actions of CAPT with regard to Long, nor was there any showing that others similarly situated have been treated in a like manner. Accordingly, and based upon a full review of the transcript, we find that the ALJ's findings of unlawful motive are amply supported by the evidence.

CAPT also excepts to the ALJ's determination on the ground that the only evidence relied upon to support a finding that Long was adversely affected occurred prior to CAPT's certification on December 31, 1986, and that Long otherwise suffered no adverse impact. The ALJ does state at page 15 of her proposed decision that Long was denied the option of competing for union office and that she was denied an equal voice in the formulation of bargaining proposals and strategy. The only record evidence of such activities relates to their occurrence in 1986, which is indeed pre-certification. That fact is, however, irrelevant to the issue at hand; the operative time period is six months prior to the filing of the charge with PERB.

Nonetheless, we find that CAPT unlawfully discriminated against Long regarding her right to join CAPT. In Novato Unified School District (1982) PERB Decision No. 210, the Board found

that a prima facie charge of discrimination/retaliation was shown by the finding of a nexus between an employee's exercise of a right protected by statute and the employer's adverse action against the employee. Section 3519.5(b) of the Dills Act, supra, makes it illegal for a union to discriminate against employees because of their exercise of rights guaranteed by the statute. Section 3515 of the Dills Act grants to state employees the 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.⁸

In the present case, CAPT's response to Long's attempts to

⁸Section 3515 of the Dills Act provides in pertinent part that:

. . . state employees shall have the 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. . . .

It is noted that section 3515.5 of the Dills Act, which provides in pertinent part:

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

allows an employee organization to create and implement reasonable restrictions upon the employee's right under section 3515. Had CAPT done so, our focus in this case would be whether the restriction(s) were reasonable as applied. Because no evidence of restrictions were offered into the record, and because the Act itself does not otherwise qualify the right given to employees under 3515, supra, the employee's right to join the employee association is unqualified.

join the union constituted adverse action against Long in that it prevented her from becoming a member of said union. As stated above, we affirm the ALJ's finding of unlawful motive on the part of CAPT in taking said adverse action against Long. Thus, the nexus required by Novato has clearly been established herein. The harm to Long's rights necessarily and directly flowed from the union's actions in refusing to process her application, thereby denying her union membership. We find that such harm to Long, that is, being deliberately deprived of her statutorily guaranteed right, is indeed one type of harm which falls within the scope of the Novato standard of "adverse action."

We therefore affirm the ALJ's finding of a violation of section 3519.5(b) of the Dills Act.

ORDER

Based upon all of the above, we AFFIRM the proposed order of the ALJ. Pursuant to that order and section 3514.5(c) of the Dills Act, it is hereby ORDERED that California Association of Psychiatric Technicians, its executive board and its representatives shall:

A. CEASE AND DESIST FROM:

1. Unlawfully denying Barbara L. Long her statutory right to join CAPT because of the exercise of her rights guaranteed under the Ralph C. Dills Act.

2. Denying or attempting to deny membership to Barbara L. Long without regard to any established reasonable restrictions on who may join CAPT.

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

1. Within thirty-five (35) days following the date this Decision is no longer subject to reconsideration, sign and post copies of the attached Notice marked "Appendix" in conspicuous places where notices to employees are customarily placed, at its business office, at each of its job sites and at all other work locations where members of State of California Unit #18 work, for thirty (30) consecutive workdays. Copies of this Notice, after being duly signed by an authorized agent of CAPT, shall be posted within ten (10) workdays from service of the final decision in this matter. Reasonable steps shall be taken to insure that the Notice is not reduced in size, altered, defaced or covered by any other materials.

2. Upon issuance of a final decision, make written notification of the actions taken to comply with these Orders to the Sacramento Regional Director of the Public Employment Relations Board in accordance with his instructions, and serve concurrently on the charging party.

Member Porter joined in this Decision.

Chairperson Hesse's concurrence begins on page 11.

Hesse, Chairperson, concurring: I concur that the California Association of Psychiatric Technicians (CAPT or Association) unlawfully discriminated against Barbara L. Long (Long) by denying or attempting to deny her membership in the Association. I write separately because I would limit the Public Employment Relations Board (PERB or Board) holding to the facts in this case. I respectfully decline to establish on the facts of this case that the denial of the right to join an employee organization is harm per se.

Long stated, in support of the claim that section 3519.5 of the Ralph C. Dills Act (Dills Act or Act) had been violated:

I was a former CWA officer and know that no psychiatric technician was ever denied membership on the basis of previous affiliation with another employee organization. I feel that I have been discriminated against both under SEERA and the existing MOU between the State of California and CAPT.

The complaint issued on CAPT's failure to process Long's three applications for membership between March 19 and July 1987, because of her activities as a shop steward between 1983 and 1986 in the Communication Workers of America (CWA), prior to the date CAPT decertified CWA. The case was litigated as a discrimination case.

The administrative law judge (ALJ) held that Dills Act section 3515 gave Long the statutory right to participate in CWA activities when it fought the CAPT decertification drive, as well as the independent statutory right to join CAPT. However, the statutory right to join may be qualified by reasonable

restrictions established by employee organizations under Dills Act section 3515.5. The ALJ relied upon California School Employees Association (Parisot) (1983) PERB Decision Nos. 280, 280a and Union of American Physicians and Dentists (Stewart) (1985) PERB Decision No. 539 as authority for the proposition that the Board will make a determination whether an employee organization exceeded its authority to deny employees membership in the organization to dismiss or discipline its members.¹ CAPT did not rely upon any established reasonable restrictions governing who can join the Association.

The PERB test for resolving charges of discrimination and retaliation was set out in Novato Unified School District (1982) PERB Decision No. 210, and was adopted for the Act in State of California (Dept. of Developmental Services) (Monsoor) (1982) PERB Decision No. 228-S. The Board has previously held that the analytical standard that is applied to cases involving employer misconduct is appropriate in cases involving employee

¹California School Employees Association (Parisot) and Union of American Physicians and Dentists (Stewart) hold that the employee's statutory right to form, join, and participate in employee organization activities may be qualified by reasonable restrictions established by an employee organization. The decisions do not hold that denial of membership or dismissal of individuals from membership is a per se violation of the statute. Both decisions suggest the application of the balancing test in Carlsbad Unified School District (1985) PERB Decision No. 529. The Parisot Board found that the showing of substantial impact on employees' relationship with the employer, as specified by Los Angeles Community College District (Kimmitt) (1979) PERB Decision No. 106, is not controlling since PERB has jurisdictional authority to determine if an employee organization has exceeded its authority under the reasonable restrictions provisions.

organization misconduct. (State of California (Dept. of Developmental Services) (1983) PERB Decision No. 344-S.)

Under Novato, supra, and State of California (Dept. of Developmental Services (Monsoor), supra, the charging party must make a showing that the employee organization's action against the employee was motivated by the employee's participation in protected conduct. A prima facie case is established upon a showing that the employee organization's acts resulted in harm to the employee's rights. The organization's knowledge of the protected conduct together with indicia of unlawful intent support an inference of unlawful motive. Among the indicia are: (1) timing of the organization's conduct in relation to the employee's protected activity; (2) the organization's disparate treatment of employees engaged in such activity; (3) the organization's departure from established procedures and standards; and (4) the organization's inconsistent or contradictory justification for its actions.

After the charging party has made a prima facie showing sufficient to support the inference of an unlawful motive, the burden shifts to the employee organization to prove its action would have been the same despite the protected activity, or that it had a legitimate operational purpose.

The ALJ applied the Novato test to the facts of this case. It is undisputed that Long engaged in protected activity and CAPT had knowledge of the activity. Indeed, CAPT stipulated that prior to its certification as the exclusive bargaining

representative, prior to December 31, 1986, Long was denied CAPT membership because of her activities with CWA. As evidence of the harm befallen Long due to CAPT's actions, the ALJ cites CAPT's denial of Long's right to compete for Association office and deprivation to Long of an equal voice in the formulation of bargaining proposals and strategy.

Inference of unlawful motive is made by the ALJ's conclusion that CAPT treated Long disparately by either not processing her membership card along with other employees' cards in January 1987, or, conversely, disparate treatment was shown by CAPT's unsupported justification of deleting Long from the membership rolls in February. The various processing irregularities, Long's unimpeached testimony, and CAPT's inability to produce records or reasonable restrictions regarding who may join the Association as support for its conduct, resulted in the ALJ's conclusion that CAPT denied Long membership because of her prior affiliation with CWA. Although Long stipulated that she has always been a supporter of CWA and has been continuously active in an attempt to bring back CWA to reform the exclusive representative, CAPT, the ALJ concluded that the omission of any reasonable restrictions or policy was fatal to CAPT's defense of the complaint.

On appeal, CAPT makes three arguments: (1) CAPT was not required to process Long's membership card in January 1987, because Long was on a leave of absence as a paid staff member of CWA and, therefore, was not employed by the state; (2)

considering the State Controller processing schedule, the dates on which Long submitted applications, and the subsequent dates on which CAPT submitted Long's applications for dues deduction, there was only a one-month delay in processing Long's membership application, which does not support a finding of discrimination; and (3) Long did not meet the burden of showing that she was adversely affected by CAPT's actions, and, in any event, the evidence relied upon by the ALJ for adverse affect or harm to the employee is timebarred.²

Concerning the first exception, I find, in the facts before the Board, no obligation on CAPT's part to process Long's application prior to January 1987. Nor do I read into the proposed decision that proof of CAPT's processing of Long's application in January was a necessary part of the Association's defense to the complaint. Since the complaint covers conduct which occurred between February 12 and August 12, 1897, I conclude that Long's status as a state employee in January 1987 and CAPT's corresponding duty to process her application are irrelevant. The exception is without merit.

Regarding the second exception, I find that the ALJ's findings of indicia of unlawful motive are supported by the record. CAPT failed to establish that it had a legitimate

²The ALJ admitted testimony in the hearing relating to conduct and activities which occurred prior to February 12, 1987, more than six months prior to the filing of the charge. However, CAPT's actions prior to February 1987 cannot form the basis of the complaint. (California State University, San Diego (1989) PERB Decision No. 718.)

operational justification for its actions. Though CAPT asserted that employee organizations have the right to restrict membership, the record is devoid of evidence of the existence of any CAPT restrictions or the application of such restrictions as provided for in Dills Act section 3515.5.

In the last exception, CAPT contends Long failed to show any harm as a result of CAPT's actions. CAPT is correct. Under the Novato analysis, charging party must show the harm that has affected the employee because it is the employee's activity that is afforded protection in discrimination and retaliation cases.

However, I find that the Novato test for employer misconduct (i.e., discrimination and retaliation) does not always neatly fit with employee organization misconduct, because Novato fails to recognize that an employee organization's actions may not result in any actual adverse affect to the employee. Therefore, I turn to the application of the discrimination and interference test set forth in Carlsbad Unified School District (1979) PERB Decision No. 89. In Carlsbad, the Board held that where an employer's act causes potential harm or some slight harm to protected rights, the unfair practice charge against the employer will be resolved through a balancing of the employer's operational needs against the degree of harm to employee rights. The inference of unlawful motive is not required and only a potential or tendency of harm to protected rights needs to be shown.

It is well established that employees must be permitted to form, join, and participate in the activities of employee organizations, free from coercion or interference. However, employee organizations have inherent interests which coexist with the employees' statutory rights. In Parisot, supra, PERB Decision Nos. 280, 280a, the Board recognized that, although employees have the right to engage in decertification activity, an act by an employee organization member which threatens the existence of the organization is sufficient to justify a self-protective response by the organization. The statute provides that, when the competing interests of the employee organization and the employees it represents must be weighed, the rights of the employees to join the organization may only be abridged by reasonable restrictions for membership established by the employee organization.

Application of the criteria set forth in Carlsbad, supra, leads me to the conclusion that CAPT discriminated against and interfered with Long's statutory right to join the Association. Although CAPT may have an interest in restricting the membership of the organization, there is no evidence that CAPT established reasonable restrictions. Absent reasonable restrictions, Long's statutory rights outweigh the harm, if any, to the Association's rights.

APPENDIX



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

After a hearing in Unfair Practice Case No. LA-CO-31-S, Barbara L. Long v. California Association of Psychiatric Technicians (CAPT) in which all parties had the right to participate, it has been found that the respondent violated Government Code section 3519.5(b) by unlawfully denying Barbara L. Long her statutory right to joint CAPT because of her prior affiliation with a rival organization and denying or attempting to deny membership to her without regard to any established reasonable restrictions regarding who may join CAPT.

As a result of this conduct, we have been ordered to post this NOTICE and will abide by the following. We will:

A. CEASE AND DESIST FROM:

1. Unlawfully denying to Barbara L. Long her statutory right to join CAPT because of the exercise of her rights guaranteed under the Act.

2. Denying or attempting to deny membership to Barbara L. Long without regard to any established reasonable restrictions on who may join CAPT.

Dated:

CALIFORNIA ASSOCIATION OF
PSYCHIATRIC TECHNICIANS

By _____
Authorized Representative

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

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD



BARBARA L. LONG,)
)
 Charging Party,) Unfair Practice
) Case No. LA-CO-31-S
)
 v.) PROPOSED DECISION
) (7/20/88)
)
 CALIFORNIA ASSOCIATION OF)
 PSYCHIATRIC TECHNICIANS,)
)
 Respondent.)
 _____)

Appearances: John Dugan for Barbara L. Long; Ken March, Consultant, for California Association of Psychiatric Technicians.

Before Barbara E. Miller, Administrative Law Judge.

I. STATEMENT OF THE CASE

Barbara L. Long (hereinafter Charging Party or Long) is a licensed psychiatric technician employed by the State of California. The California Association of Psychiatric Technicians (hereinafter Respondent or CAPT) is the exclusive representative of the State of California's bargaining unit #18 which includes Long's position. CAPT obtained its status as exclusive representative by defeating the Communications Workers of America, AFL-CIO, (hereinafter CWA) in a prolonged decertification battle which began even before the filing of a decertification petition on March 3, 1985, and concluded with the certification of CAPT on December 31, 1986. Prior to the decertification of CWA, Long was one of its active supporters and she held local or statewide offices from 1982-86.

This proposed decision has been appealed to the Board itself and may not be cited as precedent unless the decision and its rationale have been adopted by the Board.

On August 12, 1987, Long filed an unfair practice charge against CAPT alleging it had repeatedly rejected her membership applications because of her prior affiliation with CWA when it was the exclusive representative of Unit #18. On October 27, 1987, the General Counsel of the Public Employment Relations Board (hereinafter PERB or Board) issued a Complaint which alleged that CAPT's denial of membership to Long violated section 3519.5(b) of the Ralph C. Dills Act (hereinafter Act or Dills Act)¹

The Respondent filed an Answer denying all the material allegations in the Complaint². After an informal settlement conference did not result in resolution of the dispute, a formal hearing was conducted on February 9, 1988. On June 21, 1988, after the Respondent and then the Charging Party elected not to file post-hearing briefs, the case was submitted for proposed decision.

¹The Ralph C. Dills Act is codified at Government Code section 3512 et seq. Unless otherwise indicated, all statutory references are to the Government Code. Section 3519.5 provides, in relevant part, as follows:

It shall be unlawful for an employee organization to:

.

(b) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.

²The Respondent's "Answer" was actually filed on or about September 16, 1987, before issuance of the Complaint, apparently in the mistaken belief that the Complaint had already been issued.

II. FINDINGS OF FACT

A. Background

Long has been employed by the State of California for more than 10 years, working as a licensed psychiatric technician at Sonoma State Hospital and then at Camarillo State Hospital. In 1982 she was the CWA steward at Camarillo. She was CWA's chapter representative from 1983 until the summer of 1985, at which time she became the statewide grievance coordinator. While serving CWA in that capacity, Long was on a leave of absence from her position as a psychiatric technician; CWA reimbursed the State for her salary and fringe benefits.

In March 1985, CAPT filed its decertification petition. The election results were ultimately certified on December 31, 1986. During that time, there is no dispute that CAPT officials knew of Long's active role in support of CWA. Long vigorously participated in the election campaign and she was a CWA witness in the evidentiary hearing on CWA's objections to the election and its unfair practice charge concerning conduct allegedly impacting upon the election.³ Long described her relationship with the CAPT leadership and its consultants, Dan Western and Ken March, as hostile and she

³The formal hearing on the objections to the election (S-OB-104-S) and the unfair practice charge (S-CE-261-S) began on February 24, 1986, and concluded on April 18, 1986. Exceptions were filed to the Administrative Law Judge's Proposed Decision dated October 1, 1986, and the Decision of the Board itself was issued on December 30, 1986. (PERB Decision No. 601-S)

stated the hostility did not emanate from one side only but was reciprocal. Her testimony was not controverted.

In 1986, while the decertification disputes were still active and while Long was a paid CWA statewide staff representative, she attempted on at least two separate occasions to join CAPT. On June 3, 1986, Long sent, by certified mail, a membership/dues authorization card and a check to CAPT's mailing address in Sacramento. Dan Western testified that he checked the postal box mailing address once every week or ten days. For reasons unknown, he failed to claim Long's letter although the U.S. Postal Service delivered notices of its existence on June 7, 12, and 22. The card and check were subsequently returned to Long "unclaimed."

Thereafter, on August 19, 1986, Long submitted her membership/dues authorization card, along with the cards of many other CWA supporters, to Linda Pinkerton, a CAPT representative at Lanterman State Hospital. During a subsequent CAPT meeting at Camarillo, several of those cards were burned by CAPT officials. As for the remainder, CAPT President Jay Salter indicated they would not be accepted.

Long testified that she anticipated CAPT would be certified as the exclusive representative. Accordingly, she and other CWA activists and members wanted to join so they could have a voice in the direction of CAPT policies. Long particularly wanted to join so she could run against Ed Saccamano, the

incumbent chapter president of CAPT at Camarillo.

Long was initially denied membership in CAPT because of her affiliation with CWA, a fact admitted by the CAPT representative at the formal hearing when he stated:

I so stipulate that the first two times that she [Long] submitted membership cards in the organization that they were not processed on the basis of the activity that she was involved in with CWA.

CAPT was certified on December 31, 1986. After that date CAPT denies that Long's past affiliation with CWA had any impact on her CAPT status. It is Long's post-certification membership status-in CAPT which is the subject of this proceeding.

B. Processing Long's Membership Card

Prior to the date of certification, CAPT had received several hundred membership/dues authorization cards. Western was responsible for logging in the cards, including those submitted by CWA activists, and sending the list of names to the controller after the date of CAPT's certification. That was when CAPT was entitled to receive dues through payroll deductions. If a name was submitted to the controller before the 15th of one month, dues would be deducted from the check

⁴Long testified that she and Saccamano were old rivals. He had been working for the California State Employees Association when CWA was certified as the exclusive representative.

issued the 15th of the following month. Anything sent to the controller before the 15th of January, for example, would result in a dues deduction by the 15th of February. If the controller got the information after January 15, dues would not be deducted until March.

Western thinks Long's name was submitted to the controller before January 15, 1987. CAPT did have Long's authorization card dated August 1986, but Western failed to produce the records which would support the conclusion that her name was submitted to the controller. Moreover, no dues were deducted from Long's February paycheck. Nevertheless, on February 13, 1987, Western sent a notice to the controller directing that Long be deleted from the rolls of CAPT's dues paying members.

Western testified that CAPT believed that many of the CWA supporters did not really want to be members of CAPT. Accordingly, those individuals were sent postcards with the following message:

Your application for membership in CAPT has been processed as of the date of our certification, December 30, 1986.

We thank you for your interest in CAPT. We hope you will enjoy all the many benefits of our Association.

However, if for some reason we have mistakenly processed your application and you wish to withdraw from CAPT membership, please address a withdrawal request to the address on the reverse side of this card.

Western testified that Long's name must have been deleted as a

result of a response to the above-quoted postcard. He failed, however, to produce evidence that the postcard was mailed to Long, or that she filed a response asking to withdraw from CAPT. During the formal hearing, Western was able to produce cards from other employees which indicated they wanted to withdraw. No explanation was provided for Western's inability to locate the alleged correspondence from Long.

Since no money was being deducted from her paycheck, Long again attempted to join CAPT on March 19, 1987. At that time she attended a CAPT meeting at Camarillo and handed her card to the chapter president, Saccamano. Long had read CAPT literature which indicated that membership cards could be given to any CAPT official. There is no evidence, however, that CAPT made any attempt to process the card Long handed to Saccamano.

Long did not know that March 19 was too late a date for processing an April dues deduction. Thus, when no dues were withheld from her April paycheck, she made another attempt to join CAPT. Long testified that she spoke with Sylvia Kuchenmeister, the CAPT chapter president at Metropolitan State Hospital.

Kuchenmeister had also been active in CWA but, unlike Long, she had been admitted to CAPT. Kuchenmeister advised Long, "It was sort of a running joke within the CAPT executive board that [Long] would never be admitted as a member of CAPT." Kuchenmeister told Long to send her two or more membership

cards dated to correspond with dates Kuchenmeister would be meeting with members of the CAPT executive board. Long did send the cards sometime early in May 1987. When dues were not withheld from Long's paycheck in either June or July, Long again contacted Kuchenmeister who reported she had presented a card to Western who jokingly stated: "Shall I lose this one too."⁵

Long had no way of knowing that her name was submitted to the controller on May 15, 1987 after her name was taken from one of the cards submitted by Kuchenmeister. Her name, however, was among 15 rejected by the controller because the social security number was incorrect. Western or his secretary had allegedly mistaken a 4 for a 9. If it was a mistake, I conclude it was not unreasonable in light of the way the number 4 was written on the card.

The "Irregularity Notice" from the controller's office was dated May 26, 1987. Western testified that his office regularly took action to correct errors but that it was a difficult task because the controller's office never provided

⁵Even if the statements attributed to CAPT officials are considered hearsay rather than evidence of the state of mind of CAPT officials, they could be considered in this proceeding. Hearsay is admissible in PERB proceedings and may be considered when, as here, it is not the only basis for a finding. In addition, the statements would be admissible over objection in a civil proceeding as either party admissions or authorized admissions since Kuchenmeister, as a CAPT chapter president, was presumptively authorized to speak for the Respondent CAPT.

information as to why a name had been rejected and Western had to figure it out. The record does not support his testimony. The May 26 notice from the controller's office listed ten possible specific reasons for rejecting a dues authorization for the named employees. The only reason checked was number 7 which stated: "Please verify SSN"

Western testified that the list from the controller's office was given to a clerical employee in his office to make the necessary corrections, although he could not be precise as to what methodology that employee was instructed to or did use. The original of the list produced at the formal hearing showed a corrected social security number or an indication of "OK" in black ink by each person's name on the list except Barbara Long's. There was also a red ink and a black ink check mark by each name except Barbara Long's. In addition, by each name, except Barbara Long's, a blue ink pen was used to write in the amount of the monthly dues deduction. A blue ink pen was also used to cross out Barbara Long's name. Western admitted the blue ink notations on the list were his but he had no recollection of crossing out her name and no adequate explanation as to why she received different treatment from others on the list.⁶

⁶At one point Western testified that he thought the correct information regarding Long was already in the computer at the controller's office and, accordingly, it was not

Records produced at the hearing showed that CAPT received another membership/dues authorization card from Long dated July 10, 1987. CAPT records also show that her name was not submitted to the controller until August 15, 1987, however, at which time she finally became a member.

III. ISSUES

- A. Can PERB properly assert jurisdiction in a case concerning the denial of union membership?
- B. Was Long denied membership pursuant to reasonable restrictions established by CAPT?
- C. Did CAPT unlawfully discriminate or retaliate against Long because of her prior affiliation with CWA?

IV. CONCLUSIONS OF LAW

A. Jurisdiction

It is well settled that, as a rule, the PERB will not insert itself into disputes between unions and their members, or their prospective members, that are "strictly internal." Service Employees International Union, Local 99 (Kimmett) (1979) PERB Decision No. 106. That general proposition, however, must be harmonized with the statutory language at issue herein. Some of the rights of state employees are set

necessary to get correct information for resubmission to the controller. What Western meant by that testimony is unclear; there was no reference to or explanation of when or how Long's name and correct social security number were allegedly transmitted to the controller. Accordingly, it will be given no weight herein.

forth in section 3515 which provides, in relevant part, as follows:

Except as otherwise provided by the Legislature, state employees shall have the 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. State employees also shall have the right to refuse to join or participate in the activities of employee organizations. . . .

Pursuant to the above-quoted section, Long had the right to participate in the activities of CWA when it challenged CAPT's decertification drive. Long also had the statutory right to join CAPT. That right may be abridged, however, by virtue of section 3515.5 which provides, in relevant part, as follows:

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

When PERB was called upon to interpret virtually identical language to that quoted above in the Educational Employment Relations Act,⁷ it determined that it was appropriate for PERB to question the propriety of a union's imposition of discipline on a member because of his participation in a decertification campaign. Noting that Kimmett, supra, did not preclude such an inquiry, the Board stated:

There [in Kimmett] we stated that we will not

⁷The Educational Employment Relations Act is codified at Government Code section 3540 et seq.

interfere in matters concerning the relationship of members to their union unless they have had a substantial impact on the relationship of the employees to their employer. This does not require a demonstrable impact on the employees wages, hours or terms and conditions of employment. The relationship of employees to their employer can be manifested through and conditioned by the selection or rejection of a bargaining representative. In Kimmett, we did not intend to abdicate our jurisdictional power to determine whether an employee organization has exceeded its authority under section 3543.1(a) to dismiss or otherwise discipline its members. California School Employees Association and its Shasta Chapter #381 (Parisot) (1983) PERB Decision No. 280 at p. 11.

See also, Union of American Physicians and Dentists (Stewart) (1985) PERB Decision No. 539-S, a case arising under section 3519.5(b), where the Board held that an appropriate subject of inquiry was whether a union's dues schedule discriminated against certain members for an impermissible reason.

Based upon the authorities cited above, it is concluded that whether Barbara L. Long was denied membership in CAPT because she exercised rights guaranteed by the Dills Act is not "a strictly internal" dispute between Long and CAPT; it is a proper subject of inquiry for PERB.

B. Reasonable Restrictions on Membership

As noted above, section 3515.5 grants employee organizations the right to "establish reasonable restrictions regarding who may join." In its Answer and several times during the formal hearing, CAPT urged the undersigned to

recognize and not infringe upon its statutory right to restrict membership. Nevertheless, notwithstanding numerous suggestions from the undersigned that CAPT put in evidence its constitution and bylaws or any other internal rules setting forth restrictions on membership, CAPT failed to do so. Moreover, no testimony was proffered regarding the existence of reasonable restrictions regarding membership or the application of any such rules in Long's case.

Accordingly, whether or not one might conclude that a regulation restricting Long's membership would not be unreasonable, CAPT must establish the regulation or restriction, not PERB. Thus, having failed to produce any evidence on this issue, the defense afforded by section 3515.5 is not available to CAPT in this proceeding. Without that defense, CAPT's actions must be analyzed pursuant to the standards ordinarily applicable in discrimination cases.

C. Discrimination and Retaliation

In an unfair practice case involving an allegation of discrimination, a violation will be found if the Charging Party makes a showing sufficient to raise an inference that protected activity was a motivating factor in the Respondent's decision to take an adverse action and the Respondent is unable to demonstrate that the adverse action would have been instituted

in any event. State of California (Department of Developmental Services). (1982) PERB Decision No. 228-S; Novato Unified School District (1982) PERB Decision No. 210. Although the above-cited cases establish the PERB's test for discrimination cases in the context of an employer's unfair practice, language in the employer section of the Dills Act is identical to the language applicable to employee organizations. Accordingly, in State of California (Department of Developmental Services) (1983) PERB Decision No. 344-S, the Board held that the method of analysis used in cases involving allegations of employer misconduct arising under section 3519(a) was appropriate in cases arising under section 3519.5(b).

In order to establish a prima facie violation of section 3519.5(b) the Charging Party must establish that she participated in protected activity, the Respondent had knowledge of such participation, the Respondent took action adverse to her interests, and there was an unlawful motivation for the Respondent's action such that the Respondent would not have acted but for the protected activity. The inference of unlawful motivation may be created by a variety of factors, including, but not limited to, the timing of the Respondent's action, disparate treatment of the employee, departure from established procedures and standards, inconsistent or contradictory justifications or explanations for the action, or

the proffering of exaggerated or vague and ambiguous reasons for the action.

In the instant dispute, there is no question that CAPT officials, including March, Western, and Salter, all had knowledge of Long's protected activity. Long held a statewide staff position with CWA and, in that capacity, she attended meetings also attended by CAPT officials, she presented membership cards to CAPT officials, and she had enough contact with CAPT officials to be able to characterize their relationship as hostile. Moreover, Long was an active participant in the election campaign that resulted in CWA's decertification. CAPT officials were present when Long was a witness for CWA at the hearing on the objections to the election and the companion unfair practice charge.

There is also no dispute that by virtue of not being a member of CAPT, Long was adversely affected. She was denied the option of competing for local or statewide union office and she was deprived of an equal voice in the formulation of bargaining proposals and strategy. The record does not disclose if Long was also deprived of any insurance or other benefits incident to membership in CAPT.

The record unquestionably supports an inference that CAPT's denial of membership to Long was unlawfully motivated. From the outset, Long's membership application was not afforded the

same treatment as membership applications received from other employees. There is no basis for concluding her name was submitted to the controller in January 1987 along with the names of all other employees who submitted cards prior to the date of certification. CAPT was either unable to or failed to produce a list of names submitted to the controller. In addition, had Long's name been submitted, membership dues would have been withheld from her February paycheck. They were not.⁸

In the event Long's name was submitted to the controller after January 15, CAPT then took steps to prevent her from becoming a member. Without any legal justification or basis for doing so, CAPT notified the controller that Long should be deleted from the membership rolls. CAPT retained deletion requests from other employees and no reasonable explanation was proffered as to why, if a deletion request from Long existed, it could no longer be located.

There were other irregularities in the processing of Long's membership applications which were not sufficiently explained during the course of the formal hearing. For example, Long

⁸Although the failure to submit Long's name to the controller in January 1987 occurred more than six months prior to the filing of the unfair practice charge, quite reasonably, Long did not know her name had been withheld until sometime after February 15, 1987, when she received her second February paycheck. Accordingly, the charge that her application was not properly processed in January is timely.

testified that she handed a membership application to Ed Saccamano, the chapter president at Camarillo State Hospital. Long also testified that CAPT literature indicated that membership cards could be given to any CAPT official. Nevertheless, Long's March 19, 1987 application was never processed and Saccamano was not called to testify to refute Long's assertions that she handed him a card.

The irregularities in the processing of Long's membership applications through the March 19 event described above are sufficient, without more, to raise an inference of unlawful motivation. CAPT's handling of the matter after that date is just further evidence of motivation.

Although there is no basis for discrediting the Respondent's evidence that Long's name was submitted to the controller on May 15, 1987, the Respondent's explanation of what happened after the name was rejected by the controller is simply unacceptable. Almost three months went by before Long's name was resubmitted to the controller. The social security numbers of other employees who appeared on the controller's lists with Long were verified or corrected. There was no verification or correction of Long's social security number and Western admits he crossed her name off the list. But he couldn't explain why.

Finally, there is evidence which supports the conclusion that the leadership of CAPT deliberately frustrated Long's

attempts to become a member. Kuchenmeister was an officer of CAPT when she told Long that "it was sort of a running joke within the CAPT Executive Board that [Long] would never be admitted as a member of CAPT" and that Western had joked about "losing" yet another of Long's membership cards.

Since the Charging Party met her burden of proof, the burden shifted to the Respondent to establish that it would have treated Long's membership applications in the same way even had she not engaged in protected activity. The Respondent failed to meet that burden. CAPT failed to present any cohesive explanation for its conduct in denying Long membership or in failing to process her applications. When CAPT did attempt to explain some of its actions, Western was uncertain as to what occurred and he could not produce records to support or clarify his vague recollections. Although the record reflects that the Respondent moved its office in May 1987, and although the undersigned concluded that the office was not well organized and it was poorly staffed, CAPT failed to introduce any evidence that any other applicant received treatment comparable to that given Long.⁹

⁹Based upon an independent review of the sparse records reluctantly produced by CAPT during and after the hearing, I note that, in addition to Long, other names on the controller's "Irregularity Notice" of May were on the list submitted to the Controller on August 15, 1987. Without more, however, it is impossible to conclude what circumstances led to that singular similarity.

Based upon the entire record in this proceeding, it must be concluded that the California Association of Psychiatric Technicians denied membership to Barbara Long because of her prior affiliation with CWA and that, in denying her membership, it was not relying upon any established reasonable restrictions governing who may join. Such conduct discriminated and retaliated against Long in violation of section 3519.5(b).

V. REMEDY

The PERB in section 3514.5(c) is given:

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

In the instant case, even though Barbara Long has now been admitted to membership in CAPT, it is appropriate to order the Respondent to cease and desist from its unlawful action of excluding her from membership without reference to or regard for any established reasonable restrictions on membership. In addition, it is appropriate that CAPT be required to post a notice incorporating the terms of this order at all locations throughout the state where CAPT notices are customarily placed. The notice should be subscribed by an authorized agent of CAPT, indicating that it will comply with the terms thereof. The notice shall not be reduced in size,

defaced, altered or covered by any other material. Posting such a notice will provide employees with notice that CAPT has acted in an unlawful manner and is being required to cease and desist from this activity. It effectuates the purposes of the Dills Act that employees be informed of the resolution of the controversy and will announce CAPT's readiness to comply with the ordered remedy. See Placerville Union School District (1978) PERB Decision No. 69. In Pandol and Sons v. Agricultural Labor Relations Board. (1979) 98 Cal.App.3d 580, 587 the California District Court of Appeals approved a similar posting requirement. NLRB v. Express Publishing Co. (1941) 312 U.S. 426 [8 LRRM 415].

VI. PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, and pursuant to section 3514.5(c) of the Ralph C. Dills Act, it is hereby ORDERED that the California Association of Psychiatric Technicians (CAPT), its executive board and its representatives shall:

A. CEASE AND DESIST FROM:

(1) Unlawfully denying Barbara L. Long her statutory right to join CAPT because of her affiliation with a rival organization.

(2) Denying or attempting to deny membership to Barbara L. Long without regard to any established reasonable restrictions on who may join CAPT.

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

(1) Sign and post copies of the attached Notice marked "Appendix" in conspicuous places where notices to employees are customarily placed at its business office, at each of its job sites and at all other work locations where members of State of California Unit #18 work for thirty (30) consecutive workdays. Copies of this Notice, after being duly signed by an authorized agent of CAPT, shall be posted within ten (10) workdays from service of the final decision in this matter. Reasonable steps shall be taken to insure that the Notice is not reduced in size, altered, defaced or covered by any other materials.

(2) Upon issuance of a final decision, make written notification of the actions taken to comply with these Orders to the Sacramento Regional Director of the Public Employment Relations Board in accordance with his instructions.

Pursuant to California Administrative Code, title 8, part III, 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 California Administrative Code, title 8, part III, section 32300. A document is considered "filed" when actually received before the close of business (5:00 p.m.) on the last day set for filing, ". . . or when sent by telegraph or certified or Express United States mail, postmarked not later than the last day set for filing . . ." See California Administrative Code, title 8, part III, section 32135. Code of Civil Procedure section 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 California Administrative Code, title 8, part III, sections 32300, 32305 and 32140.

Dated: July 20, 1988

Barbara E. Miller
Administrative Law Judge