STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

TRIS COLMAN, Charging Party, v. CALIFORNIA CORRECTIONAL PEACE OFFICERS ASSOCIATION, Respondent.	)	Case No. S-CO-69-S PERB Decision No. 755-S July 25, 1989

Appearances: Steven Bassoff, Attorney, for Tris Colman; Carroll, Burdick & McDonough by Alison Berry, Attorney, for California Correctional Peace Officers Association.

Before Porter, Craib and Shank, Members.

DECISION

SHANK, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the California Correctional Peace Officers Association (CCPOA or Association) to the proposed decision (attached hereto) of a PERB administrative law judge (ALJ). Subsequent to this filing, CCPOA requested that its exception regarding PERB's jurisdiction over the instant dispute be withdrawn. The Board has considered the request and finds that such a withdrawal is in the best interest of the parties and is consistent with the Ralph C. Dills Act (Dills Act). The ALJ found that the Association acted unreasonably in suspending Tris Colman (Colman) from Association

membership in violation of section 3519.5(b) of the Dills Act[1] by: (1) finding him guilty, without pre-hearing notice, of harassing Ms. Lee Wilson at a chapter meeting on August 16, 1986; and (2) submitting to the CCPOA appeals board material which was not introduced at Colman's disciplinary hearing and which he had not seen before.

The Board, after review of the entire record, finds the ALJ's findings of fact to be free from prejudicial error and adopts them as its own. We are also in agreement with, and hereby adopt, the conclusions of law set forth in the ALJ's decision.

CCPOA excepts to the ALJ's exclusion of testimony, offered at the hearing, of the Association's intent behind the bylaws governing discipline of members. We find that the evidence was properly excluded since opinions of Association officers

[1]The Dills Act is codified at Government Code section 3512 et seq. Unless otherwise indicated, all statutory references are to the Government Code.

In relevant part, Government Code section 3519.5 provides as follows:

> It shall be unlawful for an employee organization to:
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> . . . . . .
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> (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.

concerning the procedure set forth in bylaws would be relevant only if ambiguity existed, which was not the case here.

CCPOA excepts to the ALJ's exclusion of the transcript of the disciplinary hearing and pre-hearing settlement conference. We find that the transcript was properly excluded since such evidence could not cure the two findings of unfairness.

CCPOA excepts to the ALJ's consideration of its appeals process since the General Counsel's complaint does not contain a reference to the appeal, and therefore, there was no notice that it would be a part of the decision. We find this exception to be meritless in that CCPOA must have been aware of its own procedure, which included the right of a member disciplined by the Association to appeal.

Finally, CCPOA excepts to the ALJ's determination that it failed to give Colman a fair hearing because it considered evidence of Colman's conduct at the August 16, 1986 chapter meeting held nearly two months after charges were filed. CCPOA's argument is that the chapter meeting was called by Colman for the purpose of censoring Ms. Wilson, so, even though it occurred after Wilson had filed charges, it was clearly related to the disciplinary proceeding. The ALJ correctly pointed out that the hearing panel's conclusion on the harassment charge was based upon evidence about the chapter meeting, which was unrelated to any other accusation against Colman. Colman was given no notice that he would be tried for his conduct at the chapter meeting. Basic fairness would require notice to Colman that such conduct

would be considered so that he could prepare a defense. Accordingly, we affirm the ALJ's conclusion that the Association failed to grant Colman a fair hearing.

ORDER

Based upon the foregoing findings of fact and conclusions of law, and the entire record of this case, the Board finds that the California Correctional Peace Officers Association (CCPOA) has violated section 3519.5(b) of the Ralph C. Dills Act. Pursuant to section 3514.5(c) of the Government Code, it is hereby ORDERED that the Association, its board of directors, and its representatives shall:

A. CEASE AND DESIST FROM:

Interfering with the protected right of Tris Colman to join and participate in the activities of an employee organization of his own choosing by unreasonably dismissing him from membership in the Association.

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

1. Retroactively nullify the hearing panel decision and order in the matter of Wilson v. Colman, restore life insurance benefits and retroactively rescind the suspension of Tris Colman from membership in the California Correctional Peace Officers Association. The hearing panel decision and order may not be reinstated unless Mr. Colman is afforded a new review of the decision by CCPOA State Board of Directors. In the event a new review is undertaken, the appellate board shall not consider any materials which were not introduced before the hearing panel.

The appellate board shall not consider the hearing panel's finding on Charge 10, harassment, unless a new hearing, upon proper notice, is granted to Mr. Colman regarding the August 16, 1986, chapter board meeting and a new finding is sustained against Mr. Colman.

2. Within thirty-five (35) days following the date this Decision is no longer subject to reconsideration, send by United States Mail copies of the Notice attached hereto as an Appendix to all members of the CCPOA chapter at the California Men's Colony, San Luis Obispo. The Notice must be signed by an authorized agent of the Association, indicating that the Association will comply with the terms of this Order.

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

Member Craib joined in this Decision.

Member Porter's concurrence begins on page 6.

Porter, Member, concurring: I concur that the California Correctional Peace Officers Association (CCPOA) violated the State Employee-Employer Relations Act. I cannot agree, however, with the holding based on the Public Employment Relations Board (PERB or Board) precedent that an interference violation under subdivision (b) of Government Code section 3519.5 does not require proof of unlawful motive.

Government Code section 3519.5 prescribes in pertinent part (emphasis added):

> It shall be unlawful for an employee organization to:
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> . . . . . .
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> (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.

In San Dieguito Unified School District (1977) EERB[1] Decision No. 22, the Board dealt with an identical statutory provision[2] contained in the Educational Employment Relations

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[1]Prior to January 1, 1978, PERB was known as the Educational Employment Relations Board (EERB).

[2]Government Code section 3543.5 provides in pertinent part:

> It shall be unlawful for a public school employer to:
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> (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 [EERA]. (Emphasis added.)

Act (EERA) making it unlawful for a public school employer to retaliate, discriminate, or interfere with employees "because of . . . ." The Board held that the "because of" proviso required proof of an unlawful motive to establish a violation. Thereafter, in Carlsbad Unified School District (1979) PERB Decision No. 89, the majority opined that, where there was interference with an employee's protected rights, a finding of an interference violation should not be conditioned on whether the employer had an unlawful motive in interfering. Thus, the Carlsbad Board held that it was not necessary to "read" the "because of" proviso as applying to interference violations, and overruled San Dieguito insofar as it held that proof of unlawful motive was required in interference cases. (Carlsbad, supra, p. 5.)

In Novato Unified School District (1982) PERB Decision No. 210, the Board reaffirmed the Carlsbad holding that proof of unlawful motive was not required to establish an interference violation, but clarified Carlsbad to set forth the so-called "Novato test" to identify the elements necessary to establish a reprisal or discrimination violation. The Novato elements are: (1) the employee's exercise of a protected right; (2) the employer's knowledge thereof; (3) an adverse or discriminatory action taken thereafter by the employer against the employee; and (4) proof (by direct and/or circumstantial evidence) that the employer took the adverse or discriminatory action "because of"

the employee's exercise of the protected right. (Novato, supra, pp. 5-14.)

Hence, Carlsbad and Novato hold that, while the "because of" proviso requires proof of such unlawful motive to establish a reprisal or discrimination violation, it is somehow not applicable to an interference violation under the same section. I respectfully disagree.

We deal with statutes which prescribe that it is unlawful for an entity (employer or employee organization):

> . . . to 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. (Gov. Code, secs. 3519.5, subd. (b) and 3543.5, subd. (a), emphasis added.)

One of the simplest and most fundamental canons of statutory construction is that a qualifying phrase must be applied to the antecedent words, phrases and clauses to which it relates. (Porto Rico Railway L. & P. Company v. Mor (1920) 253 U.S. 345, 348 [64 L.Ed. 944, 946]; Wholesale Tobacco Dealers v. National Candy and Tobacco Company (1938) 11 Cal.2d 634, 659-660; Addison v. Department of Motor Vehicles (1977) 69 Cal.App.3d 486, 496; Kelly v. State Personnel Board (1939) 31 Cal.App.2d 443, 448.) Moreover, a qualifying phrase must, at a minimum, be construed to refer and apply to the antecedent words, phrases and clauses immediately preceding it. (Krikorian v. Barry (1987) 196 Cal.App.3d 1211, 1218, hg. den.) Even in cases where an uncertainty or ambiguity exists in the statute, a qualifying

phrase must be construed as referring to the antecedent words, phrases and clauses immediately preceding it and not to more remote words, phrases or clauses. (Addison v. Department of Motor Vehicles, supra, 69 Cal.App.3d 486, 496; Board of Port Commissioners v. Williams (1937) 9 Cal.2d 381, 389; Kelly v. State Personnel Board, supra, 31 Cal.App.2d 443, 448.)

Clearly, subdivision (b) of Government Code section 3519.5 (as well as subd. (a) of Gov. Code, sec. 3545.5) may not be fragmented so as to separate the immediately preceding antecedent "or interfere with, restrain, or coerce employees" from its qualifying phrase "because of . . .," as the two phrases are inextricably tied. (People v. Superior Court (1969) 70 Cal.2d 123, 133; Krikorian v. Barry, supra, 196 Cal.App.3d 1211, 1218, hg. den.; Oliva v. Swoap (1976) 59 Cal.App.3d 130, 138, hg. den.) Furthermore, even apart from fundamental statutory construction rules, common sense dictates that we cannot simply leapfrog over the antecedent interference phrase immediately preceding the "because of" proviso and apply the "because of" proviso solely to the more "remote" reprisal and discrimination phrases.

Accordingly, I submit that proof of unlawful motive (e.g., that the employee organization interfered with, restrained or coerced the employee because of the employee's exercise of a protected right) is a required element of proof to establish

an interference violation under Government Code section 3519.5, subdivision (b).[3] Carlsbad and Novato should be overruled to the extent that they hold otherwise.

In the instance case, the record does not demonstrate that CCPOA acted with an unlawful intent in interfering with Colman's membership rights and, therefore, I cannot find a violation of Government Code section 3519.5, subdivision (b). The record, however, does clearly demonstrate that CCPOA failed to follow reasonable procedures in suspending Colman's membership status and, thus, unlawfully interfered with Colman's membership rights

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[3]The Carlsbad majority's concern was that the application of the "because of" proviso to interference violations could preclude an employee whose protected rights were interfered with from seeking redress unless intentional harm could be shown. This concern did not give the Board license to rewrite the statute. The Legislature has statutorily imposed an unlawful motive requirement for reprisal, discrimination, and interference violations under subdivision (b) of Government Code section 3519.5, and the Board must adhere thereto. Regarding the Carlsbad majority's concern, where an employee's protected rights are interfered with and where no unlawful motive exists, a respondent may, nevertheless, be charged with violating the statute specifically granting such rights to the employee. (Leek v. Washington Unified School District (1981) 124 Cal.App.3d 43, 48-53, hg. den.; Link v. Antioch Unified School District (1983) 142 Cal.App.3d 765, 768-769; Mt. Diablo Unified School District (1978) PERB Decision No. 68, pp. 11-13; and see San Jose Teachers Association v. Superior Court (Abernathy) (1985) 38 Cal.3d 839, 844, 861-863, fn. 14 on p. 861, vacated and remanded on other grounds (1986) 475 U.S. 1063, vacated on other grounds (1986) 42 Cal.3d 130.

The Carlsbad majority's concern perhaps stemmed from this agency's charging practice of attempting to channel and fit any and all alleged facts or violations into only those "unlawful" acts proscribed in just two relatively narrow sections of EERA. This Board is not so restricted in enforcing the acts which it administers. (Leek v. Washington Unified School District, supra, 124 Cal.App.3d 43, 48-49, hg. den.)

in violation of Government Code section 3515.[4] (Gov. Code, secs. 3515 and 3515.5; Union of American Physicians and Dentists (Stewart) (1985) PERB Decision No. 539-S, pp. 4-5; California Association of Psychiatric Technicians (Long) (1989) PERB Decision No. 745-S, pp. 8-9; California State Employees' Association (Fry) (1986) PERB Decision No. 604-S, p. 4; State of California (Department of Youth Authority) (1985) PERB Decision No. 535-S, p. 30.)

The record before us shows that when Colman filed his original charges with PERB, the thrust of his charges was twofold: (1) that respondent CCPOA had improperly suspended his membership through unreasonable disciplinary procedures; and (2) that respondent CCPOA was discriminating against him in violation of Government Code section 3519.5 in connection with the amount of dues and/or fair share fee being deducted from his paycheck during the suspension.

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[4]Government Code section 3515 provides in pertinent part:

> 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.

Respecting the aforesaid employee rights, Government Code section 3515.5 provides in relevant part:

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

Prior to the issuance of the complaint, the dues deduction matter was resolved. Colman's attorney filed a written request with the Board agent requesting that Colman's charges be amended "to eliminate those elements of the charge relating to Hudson violations [the fair share fee matter] and violations of 3515.6, 3519.5 and 3515.7(e) [emphasis added]." Colman's attorney's letter concluded:

> Mr. Colman is still most anxious to pursue the charge outlined in the first paragraph of his complaint concerning CCPOA's unreasonable denial of membership to him in violation of Government Code section 3515.5.

Thereafter, the Board agent issued a complaint which described the alleged unreasonable procedures used in suspending Colman's membership, and charged that such conduct "interferes in Charging Party's right to membership in a labor organization under Government Code section 3515." The complaint then stated: "This conduct violates Government Code section 3519.5(a) [emphasis added]."

At the beginning of his proposed decision, the administrative law judge (ALJ) pointed out that there was nothing in the complaint or the underlying charge suggesting a violation of section 3519.5(a). He therefore concluded that reference to that section was a typographical error, and he amended the complaint to allege a violation of section 3519.5(b). In the conclusion of his proposed decision, the ALJ found:

> By suspending Mr. Colman from membership on the basis of these actions [unreasonable disciplinary procedures], the Association interfered with his right to join and

> participate in the activities of an employee organization. This action was in violation of Dills Act section 3519.5(b).

For the reasons previously set forth, I cannot sustain a finding of a violation of subdivision (b) of section 3519.5. However, I do find that the record amply supports the determination that respondent CCPOA did unlawfully interfere with Colman's section 3515 rights and, thus, violated section 3515.

APPENDIX
NOTICE TO CHAPTER MEMBERS
DISTRIBUTED BY ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD
An Agency of the State of California

After a hearing in unfair practice Case No. S-CO-69-S, Tris Colman v. California Correctional Peace Officers Association in which all parties had the right to participate, it has been found that the California Correctional Peace Officers Association has violated section 3519.5(b) of the Ralph C. Dills Act. The Association violated the Act by suspending Tris Colman from membership in the Association upon a finding that was made without proper notice and an appellate process that denied a fair review of a hearing panel's decision.

As a result of this conduct, we have been ordered to mail copies of this Notice to all members of the Association chapter at the California Men's Colony, San Luis Obispo, and to abide by the following. We will:

A. CEASE AND DESIST FROM:

Interfering with the protected right of Tris Colman to join and participate in the activities of an employee organization of his own choosing by unreasonably dismissing him from membership in the Association.

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

1. Retroactively nullify the hearing panel decision and order in the matter of Wilson v. Colman, restore life insurance benefits and retroactively rescind the suspension of Tris Colman from membership in the California Correctional Peace Officers Association. The hearing panel decision and order may not be reinstated unless Mr. Colman is afforded a new review of the decision by CCPOA State Board of Directors. In the event a new review is undertaken, the appellate board shall not consider any materials which were not introduced before the hearing panel. The appellate board shall not consider the hearing panel's finding on Charge 10, harassment, unless a new hearing, upon proper notice, is granted to Mr. Colman regarding the August 16, 1986, chapter board meeting and a new finding is sustained against Mr. Colman.

Date:

CALIFORNIA CORRECTIONAL
PEACE OFFICERS ASSOCIATION

By_____
Authorized Agent

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

TRIS COLMAN, Charging Party, v. CALIFORNIA CORRECTIONAL PEACE OFFICERS ASSOCIATION, Respondent.	)	Unfair Practice Case No. S-CO-69-S PROPOSED DECISION (12/28/87)

Appearances: Steven Bassoff, Attorney, for Tris Colman; Neyhart, Anderson, Nussbaum, Reilly & Freitas by Elaine B. Finegold for the California Correctional Peace Officers Association.

Before Ronald E. Blubaugh, Administrative Law Judge.

PROCEDURAL HISTORY

A former union officer contends here that he was suspended from union membership after a hearing marked by procedural irregularities. In particular, he alleges, the union's pre-hearing notice of allegations was fatally non-specific and the union's review of his conduct went beyond the pre-hearing allegations. The union responds that the dispute is an entirely internal affair of the union and is not subject to external review. Alternatively, the union responds that its pre-hearing notice was procedurally adequate but that if it was not, the error was cured by actual notice given to its former officer in various written and spoken communications.

The charge which commenced this action was filed on April 10, 1987, by Tris Colman against the California Correctional Peace Officers Association (Association or CCPOA). A portion of the charge was withdrawn on June 16, 1987, and on the same day a complaint was issued by the general counsel of the Public Employment Relations Board (PERB or Board). The complaint alleges that the Association violated section 3519.5(a)[1] of the Ralph C. Dills Act[2] by 1) failing to provide the charging party with a statement of charges containing specific alleged offenses, including locations and circumstances, and 2) failing to limit its review of allegations to those matters in the statement of charges.

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[1]In relevant part, Government Code section 3519.5 provides as follows:

> It shall be unlawful for an employee organization to:
>
> (a) Cause or attempt to cause the state to violate section 3519.
>
> (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.

There is nothing in the complaint or the underlying charge even suggesting a violation of section 3519.5(a). I conclude that the reference to this section in the complaint is a typographical error and hereby amend the complaint to allege a violation of section 3519.5(b)

[2]The Ralph C. Dills Act (Dills Act) (formerly known as the State Employer-Employee Relations Act) is found at Government Code section 3512 et seq. Unless otherwise indicated, all statutory references are to the Government Code.

The Association filed an answer on June 30, 1987, denying that it had violated the Dills Act and arguing affirmatively that PERB had no jurisdiction over internal union matters. A hearing was held in Sacramento on September 21, 1987. With the filing of post-hearing briefs, the matter was submitted for decision on December 11, 1987.

FINDINGS OF FACT

The Respondent, California Correctional Peace Officers Association, is an employee organization under the Dills Act. At all times relevant the Association has been the exclusive representative of State of California Bargaining Unit no. 6, Corrections.

Mr. Colman has been a correctional officer since August of 1982. He joined the Association shortly after he was employed by the State. During the relevant period, Mr. Colman worked at the California Men's Colony in San Luis Obispo, a prison operated by the State Department of Corrections. At the time of the events at issue, Mr. Colman was the president of the Association's chapter at the California Men's Colony. On May 11, 1987, Mr. Colman was promoted to sergeant, a position outside the bargaining unit represented by the Association. As a moonlight job, Mr. Colman has worked for several years as a real estate salesman for the Century 21 office in Santa Maria.

The events at issue grew out of a dispute that developed between Mr. Colman and the chapter secretary-treasurer, Lee Wilson. Ms. Wilson was appointed secretary-treasurer on

February 25, 1986. The secretary-treasurer takes the minutes at chapter meetings, keeps chapter records, pays bills and provides financial statements at meetings. The person holding the post is expected to be knowledgable about chapter business.

At the time she was appointed secretary-treasurer, Ms. Wilson requested that the chapter books be brought up to date, audited and turned over to her. On March 25, 1986, Ms. Wilson was given several boxes of chapter records, not including checkbooks and financial statements. At Ms. Wilson's request the chapter agreed to transfer its checking account from a bank in San Luis Obispo to one in Morro Bay. Despite the chapter's approval for the switch, Mr. Colman concluded that the account should be maintained at a more central location and he resisted the transfer.

Following a disagreement with Mr. Colman about his continued failure to turn over the books, Ms. Wilson on June 19, 1986, wrote a letter of complaint to Bob Morgan, the Association's state finance committee chairman. In her letter, Ms. Wilson said she wanted "to rectify the existing problem of our chapter funds," specifically, the checking account and the benevolent fund. The benevolent fund was a special account established to assist members in times of ill fortune. Among its various uses was as a source of personal loans for members. In her letter, Ms. Wilson asked that "the guidelines for chapter funds be restored and adhered to" and, after the

appropriate corrections were made, that she be given control of the chapter books. Ms. Wilson sent copies of her letter to the chapter officers.

The next day, June 20, 1986, Mr. Colman wrote a letter of reprimand to Ms. Wilson. In the letter, Mr. Colman accused Ms. Wilson of "deliberate and malicious" conduct toward him. He wrote that she had created conflicts among the Association leadership and had become a threat to his credibility and that of the Association. "Please consider this to be a formal notice that I am very concerned regarding your conduct, attitude, and actions towards the other members of this Board of Directors and myself in particular," Mr. Colman wrote. He stated that if Ms. Wilson continued along her "present path" he would remove her from the chapter board and from her position as chief job steward for a portion of the prison.

Ms. Wilson responded on July 20, 1986, by filing charges against Mr. Colman under the Association's constitution or "Standard Operating Procedure" (SOP), as it officially is known. The SOP sets out 13 grounds for the discipline of a member. In her statement of charges, Ms. Wilson cited two grounds from Chapter 13 of the SOP:

> 2H) Using the name or assets (including mailing lists) or goodwill of CCPOA or any chapter in an unauthorized manner;
>
> 2I) Deliberately interfering with any official of CCPOA or any chapter official in the discharge of his or her lawful duties.

Ms. Wilson's statement of charges against Mr. Colman are set out in the form of a letter to Association Secretary Larry Corby. The letter describes a series of incidents in a rambling discourse. Ms. Wilson did not divide her letter into discrete factual allegations and in most instances did not recite the specifics of the alleged acts of misconduct. The failure to recite specific details was inconsistent with the Association SOP requirement that:

> Charges shall be in writing and shall be signed by the member or members bringing the charge. The charges shall be specific, citing in detail the nature, the date, and the circumstances of the alleged offense, where the violation of a section shall be cited, along with the specific act or omission which constitutes the alleged violation.

Ms. Wilson's letter was not revised or rewritten into a formal accusation by CCPOA staff or officers. At the time of this dispute, CCPOA staff attorneys took a strict, hands-off approach to charges filed by one Association member against another.

After reviewing the charges, state Association officers hired a private investigator to look into the accusations and prepare a report. Mr. Colman was questioned at length by the investigator who went substantially beyond the accusations in the Wilson letter in his questioning. The investigator made no findings of wrongdoing or illegal activity by Mr. Colman.

Two efforts at settlement were made by Association officers. The second effort, on September 18, 1986, followed

the completion of the investigator's report. Both Mr. Colman and Ms. Wilson were permitted to go through the report, one at a time, with the investigator and offer corrections. Thereafter, the parties reached a tentative agreement to try to resolve the dispute informally. However, after two weeks Ms. Wilson rejected the informal process and asked for a full hearing of her complaint.

The hearing on the charges against Mr. Colman was set for November 14, 1986. When Mr. Colman learned that the chairman of his hearing panel was to be an Association officer named John Baird he requested CCPOA President Don Novey to assign someone else. Mr. Colman justified his request to remove Baird because he was running against Baird for the position of statewide executive vice president. "I believe that it would be unfair to be judged by someone whom I would hope to unseat from office a few days later," Mr. Colman wrote. The request was denied by Mr. Novey and Mr. Baird served as chairperson.

The hearing commenced on the scheduled date, but at 2:00 p.m. instead of the scheduled 9:00 a.m. At the start of the hearing Mr. Colman asked Mr. Baird what charges the committee would be dealing with. Mr. Baird showed him a copy of Ms. Wilson's letter of July 20 and said that was all. Because of the late start, the hearing continued into the evening. At 8:00 p.m., Mr. Colman's representative, Douglas Young, asked for a continuance because of his personal health problems. Mr. Young was a diabetic who recently had

recovered from heart surgery. The request for a continuance was denied and Mr. Young left. Mr. Colman represented himself throughout the remaining two hours of the hearing.

During the hearing, Chairman Baird permitted the introduction of evidence regarding an August 16, 1986, chapter board meeting conducted by Mr. Colman. This meeting occurred nearly a month after the statement of charges was filed by Ms. Wilson. Mr. Baird testified he permitted evidence about the August 16 chapter meeting as "a collaboration to an ongoing practice in regard to her allegation of harassment."

The hearing concluded about 10:00 p.m. After 30 minutes of deliberation, the committee members reconvened and advised Mr. Colman that the charges against him had been sustained and that he was suspended immediately. The written decision was issued one month later.

Although Ms. Wilson did not divide her letter of accusation against Mr. Colman into specific charges, the Association hearing committee made such a breakdown in its written decision. This breakdown will be followed here. The allegations of Ms. Wilson and the findings of the hearing panel may be summarized as follows:

Charge 1 - Letter of instruction. Ms. Wilson alleged that Mr. Colman's June 20, 1986, letter of instruction interfered with her ability to carry out her duties as chief job steward. Moreover, she continued, the letter was shown to other members

and elected officials of the chapter. By this action, Ms. Wilson complained, Mr. Colman had discredited her "reputation and integrity." This conduct was alleged to have been in violation of SOP Chapter 13, subsection 2(I).

The hearing panel found a violation on this charge. The panel wrote that "by raising the issue with the Chapter Board, this letter was elevated to the level of a personal attack against Ms. Wilson, and could be construed to be disciplinary. Mr. Colman, as a Chapter President, had no authority in and of himself to write a Letter of Reprimand. . . . Additionally, . . . this letter [was] a disciplinary action in retaliation for her expressing her concerns regarding the Chapter finances to a State officer . . . ."

Charge 2 - Chapter Benevolent Fund. Ms. Wilson charged that Mr. Colman had used chapter resources for the development of the benevolent fund. Further, she wrote, "(i)t is my understanding [that] this fund is illegal." This conduct was alleged to have been in violation of SOP Chapter 13, subsection 2(H).

The hearing panel found a violation on this charge. The panel held that neither the chapter nor Mr. Colman had secured a legal opinion in favor of the fund prior to initiating it. The panel found that Mr. Colman improperly used $50 in chapter monies for a City of San Luis Obispo license prior to a fund raiser for the benevolent fund. This expenditure, the panel

held, jeopardized CCPOA's non-profit tax status and should have been made only after approval by Association legal authorities. The panel further found that Mr. Colman refused to follow instructions from the CCPOA general counsel to cease all operation of the benevolent fund. In addition, the panel concluded, Mr. Colman inappropriately made personal loans out of the benevolent fund. The panel held that in addition to being improperly made, the personal loans were improperly documented.

Charge 3 - Chapter Books. Reciting a conversation with Mr. Colman, Ms. Wilson quoted him as saying he "had no intention of turning [the books] over to me, and that if I didn't like the way he was doing things, I could resign." She charged that Mr. Colman's refusal to audit and turn over the books deliberately interfered with her ability to discharge the duties of secretary-treasurer, in violation of SOP Chapter 13, subsection 2(I).

The hearing panel found a violation on this charge. The panel concluded that the chapter books were never turned over to Ms. Wilson despite the explicit instruction of a statewide vice president. The panel held that the refusal to turn over the books was a deliberate interference with a chapter officer in the discharge of her duties.

Charge 4 - Chapter Newsletters. Ms. Wilson alleged that Mr. Colman "has printed Chapter [n]ewsletters without the approval of the local Chapter [b]oard, nor having the

newsletter reviewed by the Sacramento Office." This conduct was alleged to have been in violation of SOP chapter 13, subsection 2(H).

The hearing panel concluded that Mr. Colman had secured approval by telephone for chapter newsletters issued prior to July 20, 1986, the date of Ms. Wilson's statement of charges. However, the panel held that Mr. Colman had not secured prior approval for the September, 1986 chapter newsletter. A message from Mr. Colman in the September newsletter refers generally to "allegations of wrong doing from one of our own [b]oard [m]embers." It also refers to "tempers and tensions" running high. It makes no specific reference to Ms. Wilson or to her accusations. The hearing panel held that reference to the Wilson charges violated specific instructions given to Mr. Colman by the CCOPA legal staff. In addition, the panel concluded, by "printing said newsletter, Mr. Colman was only stoking the fire of harassment towards Lee Wilson."

Charge 5 - Collection of Loans. Ms. Wilson charged that "[o]n two occasions Mr. Colman has asked me to collect funds from members who were loaned money." This conduct was alleged to have been in violation of SOP Chapter 13, subsection 2(H).

The hearing panel found no violation on this charge.

Charge 6 - Chief Job Steward Removal. Ms. Wilson charged that "[r]ecently, Mr. Colman informed me indirectly that he was replacing me as Chief Job Steward of the West Facility." She

described the removal from the post as "nothing more than retaliation for my letter to R. Morgan." There was no allegation regarding which SOP section was violated by this action.

The hearing panel found no violation on this charge.

Charge 7 - Campaign Manager. Ms. Wilson charged that "[w]hen I refused to be Mr. Colman's campaign manager at the upcoming convention he became upset. He also ordered me to start collecting funds for campaign contributions for his campaign at the convention. I refused to carry out this 'order.'" There was no allegation regarding which SOP section was violated by this action.

The hearing panel found no violation on this charge.

Charge 8 - Century 21. Ms. Wilson wrote that Mr. Colman had used chapter meetings "to further his real estate ventures." She attached a copy of Mr. Colman's real estate promotional materials. There was no allegation regarding which SOP section was cited by this conduct.

The hearing panel found a violation on this charge. The panel found that despite the rejection of a Century 21 relocation program by CCPOA's statewide board, Mr. Colman continued to distribute Century 21 literature which implied a CCPOA endorsement. The panel found that even though Mr. Colman did not make any money on the program, "it was wrong of him to continue to distribute the packet in light of the State Board

[m]eeting." The panel found that the material distributed by Mr. Colman "gives the appearance of an exclusive business relationship between Century 21 and CCPOA." The hearing panel described Mr. Colman's action as "very poor judgment."

Charge 9 - Hernandez Letter. Ms. Wilson's July 20, 1986, statement of charges makes no reference to a "Hernandez Letter." However, the hearing panel considered whether Mr. Colman had acted improperly in distributing materials from a financial planner who addressed a chapter meeting. The hearing panel found no violation on this matter.

Chapter 10 - Harassment. Ms. Wilson's July 20, 1986, letter contains no accusation of harassment. Indeed, the word "harassment" is not used in the letter. Nevertheless, the hearing panel concluded that "the sole purpose" of an August 16, 1986, chapter meeting was "to attack, discredit, and adjudicate the charges prior to an official hearing by the [h]earing committee." The panel concluded that there was no authority under CCPOA bylaws or SOP for such an action. The panel concluded further that the "censoring of Ms. Wilson in a public document constitutes an inappropriate exercise of discipline by a Chapter Board." The hearing panel said Mr. Colman, as an interested party, acted inappropriately by voting on the censure resolution.

Under the Association SOP, either party may appeal the decision of a hearing committee to the State Board of Directors

within 30 days. Appeals must be in writing and are to be accompanied by a copy of the original charge and the decision which is being appealed. The State Board of Directors is to review "the two documents" at its next meeting following the appeal.

Mr. Colman promptly availed himself of the appeal procedure. After submitting the appropriate documents, Mr. Colman called the hearing panel chairman, Mr. Baird, to find out what documents the panel would be submitting to the appeal body. Mr. Baird told him there would be nothing submitted other than the decision of the hearing panel.

The appeal was heard at a meeting of the State Board of Directors in January. Mr. Colman attended the meeting and observed members of the board of directors carrying a book approximately 3 1/2 inches thick that was entitled "Wilson v. Colman, 1986." Mr. Colman requested and was given a copy of the document. In addition to the original charge and the decision of the hearing panel, the book contained a copy of the hearing transcript, a copy of the settlement conference transcript, a copy of the Century 21 relocation packet, eight items of correspondence relating to the case, and a declaration by CCPOA General Counsel Gerrit Jan Buddingh. Mr. Colman's appeal was denied by the board of directors.

The Association presented evidence intended to show that Mr. Colman received actual notice of the allegations considered

by the hearing panel regardless of any technical deficiencies in the Wilson charges. Mr. Buddingh testified that he had several conversations with Mr. Colman in July of 1986 about problems with the benevolent fund. In a letter of July 28, 1986, Mr. Buddingh set out in considerable detail the tax problems which might grow out of the continued operation of the benevolent fund. In the letter, Mr. Buddingh essentially directed Mr. Colman to disband the fund, give the money to a recognized charity and mail him a receipt for the gift.

Mr. Buddingh also testified that he had three or four conversations with Mr. Colman in July of 1986 regarding his involvement with Century 21. He said he warned Mr. Colman that CCPOA as a statewide organization was going to take over the chapter's books because the chapter office was being used to conduct Century 21 business. On another occasion, Mr. Buddingh told Mr. Colman that his involvement with Century 21 gave the appearance that he was using his chapter office for personal gain.

At the time he was suspended, Mr. Colman was running for reelection as chapter president. A count of the ballots after Mr. Colman's suspension showed that he had received a majority of the votes. However, his suspension from membership made him ineligible to serve as president despite the ballot count. Mr. Colman's one-year suspension from membership commenced on November 14, 1986.

While he was chapter president, Mr. Colman worked on the second watch at the prison and enjoyed Saturdays and Sundays off. This was in accord with a contractual provision between the State and CCPOA which provided that the chief job steward at each institution could select the shift and days off that he/she preferred. Mr. Colman's work shift and days off remained unchanged after his suspension until sometime in April of 1987 when he was placed on vacation relief. On May 11, 1987, when he was promoted to sergeant, Mr. Colman was assigned to the graveyard shift. At the time of the hearing, Mr. Colman was off work on Mondays and Tuesdays.

Sergeants are supervisors and are excluded from the negotiating unit represented by CCPOA. The contract therefore does not pertain to them.

LEGAL ISSUES

1) Does PERB have jurisdiction over allegations of misconduct in the operation of a union's internal disciplinary procedures?

2) If so, did the Association's discipline of Mr. Colman interfere with his protected right to engage in the activities of an employee organization?

CONCLUSIONS OF LAW

Jurisdiction

State employees have the right under the Dills Act to "form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee

relations."[3] It is an unfair practice under section 3519.5(b) for an employee organization "to interfere with, restrain, or coerce employees because of their exercise of" protected rights.[4]

In an unfair practice case involving an allegation of interference, a violation will be found where the respondent's acts interfere or tend to interfere with the exercise of protected rights and the respondent is unable to justify its actions by proving operational necessity. Carlsbad Unified School District (1979) PERB Decision No. 89.[5] See also, Novato Unified School District (1982) PERB Decision No. 210, Sacramento City Unified School District (1982) PERB Decision No. 214 and Sacramento City Unified School District (1985) PERB Decision No. 492.

At issue here is the protected right of Mr. Colman to join and participate in the activities of an employee organization for the purpose of representation. An employee organization's unreasonable interference with an employee's right to be an organization member is a denial of protected rights. Union of

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[3]Section 3515.

[4]Text at footnote no. 1, supra.

[5]The Board's test for interference cases was developed in the context of an employer's unfair practice. However, the wording of the relevant sections for interference is identical as to both employers and employee organizations. For this reason, the PERB uses the same analytical method in analyzing cases involving unions as it does for cases involving employers. State of California (Department of Developmental Services) (1983) PERB Decision No. 344-S. This case also adopted the Carlsbad rule for cases decided under the Dills Act.

American Physicians and Dentists (Stewart) (1985) PERB Decision No. 539-S. The question here, therefore, is whether the Association's suspension of Mr. Colman was unreasonable and thus an interference.

CCPOA does not reject this approach but would limit the Board's inquiry solely to those cases which "have a substantial impact on the relationship of employees to their employer," citing Service Employees International Union, Local 99 (Kimmett) (1979) PERB Decision No. 106. The Association reads Kimmett and a later case, California School Employees Association (Parisot) (1983) PERB Decision No. 280, as absolutely precluding PERB review in the present matter.[6]

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[6]The Association relies in particular on the following language from Parisot:

> . . . [In Kimmett] we stated that we will not interfere in matters concerning the relationship of members to their union unless they have had a substantial impact on the relationship of the employees to their employer. This does not require a demonstrable impact on the employees wages, hours or terms and conditions of employment. The relationship of employees to their employer can be manifested through and conditioned by the selection or rejection of a bargaining representative.

However, the Association fails to quote the very next sentence from the Board's decision in Parisot:

> In Kimmett, we did not intend to abdicate our jurisdictional power to determine whether an employee organization has exceeded its authority under subsection 3543.1(a) to dismiss or otherwise discipline its members.

After Parisot, the Association argues, an employee challenging union discipline must demonstrate either that the discipline was motivated by conduct designed to thwart the right to select a bargaining representative or that the discipline was in retaliation for protected activities. Only after these requirements are met, the Association reasons, will the PERB conduct an inquiry into whether the disciplinary proceedings were "reasonable."

A showing of unlawful motivation is appropriate for discrimination or retaliation cases, Novato Unified School District, supra, PERB Decision No. 210. But the facts alleged by Mr. Colman do not raise an issue of discrimination. Rather, they set out an issue of interference. Proof of unlawful motivation is unnecessary to demonstrate interference with protected activities. Regents of the University of California (1983) PERB Decision No. 305-H.

Nor is the Association convincing in its contention that PERB review of union discipline is precluded except where the discipline has a substantial impact on the employee's relationship with the employer. The PERB review of union disciplinary procedures is rooted in Section 3515.5 of the Dills Act. In relevant part, that section provides that:

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

As Parisot makes clear, PERB finds in this language "jurisdictional power to determine whether an employee organization has exceeded its authority . . . to dismiss or otherwise discipline its members." Indeed, the Board in Parisot phrased the issue as whether the union was "obligated to have reasonable provisions covering its disciplinary actions and, if so, did it act accordingly."

A fair reading of Parisot and Stewart makes it evident that the PERB does not believe itself restricted in the review of union discipline to only those situations which substantially impact the employer-employee relationship. The Kimmett limitation on review, which the Respondent cites, is rooted in the duty of fair representation questions presented there. Neither Parisot nor the present case involves the duty of fair representation.

It is doubtlessly true that the PERB will review some union disciplinary matters that the National Labor Relations Board (NLRB) would bypass. The NLRB's reservations are rooted in textual requirements. Section 8(b) (1) (A) of the National Labor Relations Act expressly provides that the prohibition against union interference with protected rights,

> . . . shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein . . .

This wording affords greater deference to union disciplinary procedures than does the Dills Act. The Dills Act requirement

that an employee organization's restrictions be "reasonable" suggests a level of administrative review not intended under the federal law. Plainly, if an employee organization is precluded from making unreasonable restrictions on membership, an individual member must be able to test the reasonableness of union discipline. In Parisot, the PERB concluded that it would resolve such disputes.

Interference

The complaint sets out two grounds for a finding of interference against the Association: 1) that the Association failed to provide the charging party with a statement of charges containing specific alleged offenses, including locations and circumstances, and 2) that the Association failed to limit its review of allegations to those matters in the statement of charges.

In Parisot the PERB directed the issuance of a complaint on allegations that a union suspended a member on charges that were "unreasonably vague and ambiguous." In addition, the Board noted, the case presented allegations that the union,

> . . . did not specify the sections of the [union] constitution which had been violated or the dates, times, places, and witnesses involved in each of the charged offenses . . .

Such allegations, the Board concluded, properly raised questions about the reasonableness of the procedures followed by the union and whether the accusations against the charging party "were unreasonably vague and ambiguous."

The Association hearing panel made findings on ten accusations against Mr. Colman. It dismissed four of the accusations and the Charging Party makes no contention here regarding them. As to the remaining six findings, Mr. Colman argues that the Association violated its own rules on specificity of charges. Mr. Colman argues that the veracity of the General Counsel's complaint against the Association can be demonstrated by simply comparing the charges contained in the Wilson letter of July 20 to the hearing panel report of December 11.

It is self-evident that the Wilson letter of July 20, 1986, did not adhere to the Association's own rules on specificity for charges against members. It did not cite "in detail the nature, the date, and the circumstances of the alleged offense(s)." In several instances, it did not cite "the specific act or omission which constitutes the alleged violation."

Even if this be so, the Association replies, a technical violation of the organization's rules is insufficient to sustain the unfair practice charge. The Association argues that it must be given wide latitude in its disciplinary procedures and that "technical legal niceties" are not required in a union disciplinary procedure. The Association argues that there is no requirement that the findings of the hearing panel precisely track the language of the charge. All that is required, the Association contends, is that the findings

against Mr. Colman be "related to" the issues raised in the Wilson letter.

Because of textual differences between the Dills Act and the National Labor Relations Act, federal cases are not helpful in evaluating the level of procedural fairness required in union disciplinary proceedings. However, as noted by both parties, California law is instructive. California courts review dismissals from private organizations under the common law requirement of "fair procedure." See generally Ezekial v. Winkley (1977) 20 Cal.3d 267 [142 Cal.Rptr. 418] for a discussion of the rule as applied both to exclusions and expulsions from organization membership.

In cases involving unions, the courts interfere in an expulsion only where the organization has not followed its own rules, or rudimentary rights of defense have not been granted. Cason v. Glass Bottle Blowers Assn. (1951) 37 Cal.2d 134. In general, the courts apply the "fundamental principle of justice that no man may be condemned or prejudiced in his rights without an opportunity to make his defense." Id. at 37 Cal.2d 143. However, "the refined and technical practices which have developed in the courts cannot be imposed upon the deliberations of workingmen and the form of the procedure is ordinarily immaterial if the accused is accorded a fair trial." Id.

What the courts do require is that the union's procedure grant the accused "substantial justice." The elements of a

fair trial "will be imposed even though the rules of the union fail to provide therefor." Id. This includes "the right to notice of the charges, to confront and cross-examine the accusers and refute the evidence." Id. at 37 Cal.2d 144. The judicial requirements are thus consistent with the PERB holding in Parisot that a union may not suspend a member on pre-hearing charges that are "unreasonably vague and ambiguous."

As the California cases make clear, the Association therefore is correct that "technical legal niceties" are not required in a union's disciplinary process. But the union must give pre-hearing notice that is more than just "related to" the findings which ultimately are reached by a hearing panel. At minimum, the accusation must be sufficiently clear to enable the accused union member to prepare a defense. Anything less would be "unreasonably vague and ambiguous." It is against these standards that Ms. Wilson's July 20, 1986, letter must be measured. A charge-by-charge analysis reveals the following:

Charge 1 - Letter of Instruction. The charge gave Mr. Colman reasonable notice that because of his letter of June 20, 1986, he was accused of interfering with a chapter official, Ms. Wilson, in the discharge of her duties. The hearing panel sustained the charge on the grounds that the letter was disciplinary and retaliatory and that Mr. Colman had no authority to issue a letter of reprimand to another chapter officer. Although the hearing panel did not make a specific finding using the word "interference," it can reasonably be

inferred that in the panel's view a disciplinary, retaliatory letter that was outside the authority of its author constituted an interference with Ms. Wilson in the discharge of her duties.

Mr. Colman argues that the hearing panel's conclusion must be rejected because of the failure of the panel to make a finding that the letter interfered in some specific way with Ms. Wilson's ability to perform her duties. Mr. Colman complains that the hearing panel did not "find one specific instance" where Ms. Wilson was hampered in the performance of her duties.

By making this argument, the Charging Party invites the administrative law judge to review the merits of the panel's conclusion, i.e., whether the conduct of Mr. Colman was sufficient under the Association's constitution to justify the panel's conclusion. Administrative agencies and courts must give great deference to a union's interpretation of what conduct is sufficient to violate a union's own bylaws. Kahn v. Hotel and Rest. Employees & Bartenders, Etc. (1977) 469 F.Supp. 14 [101 LRRM 2516], affd. 597 F.2d 1317 [101 LRRM 2521].[7]

It is not for an outside entity to decide whether a disciplinary, retaliatory letter that was outside the authority of its author is sufficient to constitute interference with a chapter officer under CCPOA bylaws. That is a matter for the Association's own internal judgment. The issue before me is

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[7]For a similar holding on a related issue see NLRB v. Boeing Co. (1973) 412 U.S. 67 [83 LRRM 2183].

whether Mr. Colman was given sufficient notice that he stood accused of interfering with a chapter officer in the performance of her duties by his authorship of the June 20 letter. I conclude that the notice was sufficient.

Charge 2 - Chapter Benevolent Fund. The charge gave Mr. Colman reasonable notice that he was accused, in the development of the chapter benevolent fund, of using chapter resources in an unauthorized manner. He also was given notice of an accusation that the fund was illegal.

The hearing panel sustained the charge. It found that Mr. Colman had used $50 of chapter money in connection with a fund raiser for the benevolent fund. The panel found that the expenditure and the way the fund had been used was in violation of Internal Revenue Service rules for non-profit organizations and jeopardized CCPOA's status as such an organization. The panel further found that Mr. Colman had been told by Association lawyers that the fund was illegal and had disobeyed instructions to close it. The panel found these actions to constitute an unauthorized use of CCPOA assets.

Although Ms. Wilson's July 20 statement of charges did not specify how the fund was illegal, this deficiency was cured in a letter eight days later from CCPOA chief counsel, Gerrit Jan Buddingh. In the July 28 letter, Mr. Buddingh explained in detail the legal problems the fund presented to CCPOA's status as a non-profit organization. Upon receipt of the letter, Mr. Colman was on notice about the problems CCPOA

perceived with the benevolent fund and what the organization expected him to do about them. Mr. Colman thus had ample opportunity to prepare a defense for the hearing panel. For this reason, I conclude that Mr. Colman was not denied a fair hearing on the accusation about the benevolent fund.

Charge 3 - Chapter Books. The charge gave Mr. Colman reasonable notice that he was accused of refusing to turn over the chapter books to Ms. Wilson, thereby deliberately interfering with her ability to discharge the duties of secretary-treasurer. The hearing panel sustained the charge, holding that Mr. Colman in fact never did turn over the books to Ms. Wilson. The panel held that the refusal to turn over the books was a deliberate interference.

The Charging Party again urges the administrative law judge to examine the underlying merits of the dispute, i.e., whether the evidence presented before the union's hearing panel was sufficient for the panel to sustain Ms. Wilson's accusation. The Charging Party argues that the hearing panel failed to explain how the failure of Mr. Colman to turn over the books interfered with Ms. Wilson in the performance of her duties.

What evidence is sufficient to demonstrate interference with an officer in the performance of her chapter duties is not a matter for the PERB to second guess. It involves the union's interpretation of its own bylaws. I decline the invitation to become immersed in this internal matter and conclude that the

Wilson letter of July 20, 1986, provided sufficient notice of the accusation which was sustained against Mr. Colman.

Charge 4 - Chapter Newsletters. The Wilson letter gave Mr. Colman reasonable notice that he was accused of printing chapter newsletters without approval of the chapter board or the Sacramento office, thereby using the name, assets or goodwill of CCPOA in an unauthorized manner. The hearing panel sustained the charge on the ground that in one instance Mr. Colman had printed a chapter newsletter containing material he had been specifically told not to include by CCPOA attorneys. The newsletter at issue was published in September of 1986, approximately two months after Ms. Wilson filed her statement of charges. The hearing panel concluded that by printing the newsletter, Mr. Colman was "only stoking the fire of harassment towards Lee Wilson."

Mr. Colman argues that a finding based on events which occurred two months after the statement of charges is a clear violation of CCPOA's rules on notice. The Association responds that the publication of the September 1986 newsletter was sufficiently related to the underlying charge to justify its consideration at the hearing. In advancing this argument, the Association contends that the hearing panel's consideration of the September newsletter was no different than PERB's consideration of unalleged violations in unfair practice hearings.

PERB cases permit the introduction of evidence about post-complaint conduct where the conduct is related to the subject matter of the complaint and is part of the same course of action. A violation may then be found on the post-complaint conduct if the matter was fully litigated at the hearing. Mt. Diablo Unified School District (1984) PERB Decision Nos. 373b and 373c. The requirements that the post-complaint conduct be related to the subject matter of the complaint and be part of the same course of action negate the problem of inadequate notice. A respondent is not caught unaware when confronted at a hearing with evidence about a continuation of the same course of action as that set out in a pre-hearing notice.

The policy reasons behind the PERB rules permitting evidence about post-complaint conduct are valid in other contexts. There is no reason why a union disciplinary hearing should be held to a higher standard of notice than PERB itself requires. Mr. Colman went before the hearing panel knowing that he was accused of issuing chapter newsletters that had not been approved by the chapter board or the Association's Sacramento office. Evidence about the September 1986 newsletter was related to the subject matter of the charge and was part of the same course of action. For these reasons, I believe that the Wilson letter of July 20, 1986, provided sufficient notice of the accusation which was sustained against Mr. Colman.

The hearing committee found no wrong-doing by Mr. Colman on Charges 5, 6 and 7 and they are not at issue here.

Charge 8---Century 21. The Wilson letter gave Mr. Colman reasonable notice that he was accused of using chapter meetings to further his real estate ventures. The hearing panel sustained the charge finding that Mr. Colman had distributed literature which implied the existence of a business relationship between CCPOA and Century 21.

Mr. Colman argues that he was given no notice that he had been accused of improperly distributing literature. The accusation concerned conduct at chapter meetings, not distribution of literature. The Association responds that Ms. Wilson had attached, as an illustration to her charge, a copy of a Century 21 real estate packet distributed by Mr. Colman. In light of the attachment, CCPOA argues, Mr. Colman's complaint is baseless.

The attachment of the Century 21 literature to the July 20 letter was obviously intended to be an example of the contested conduct. Mr. Colman was clearly placed on notice that he would be called upon to defend the literature attached to Ms. Wilson's letter. I conclude that Mr. Colman received reasonable notice of the accusation sustained against him.

The hearing committee found no wrong-doing by Mr. Colman on Charge 9 and it is not at issue here.

Charge 10--Harassment. Ms. Wilson's letter of July 20, 1986, contains no accusation of harassment. She does not even use the word harassment in the letter. Nevertheless, the hearing committee found that the sole purpose of an August 16, 1986, chapter meeting was to attack and discredit

Ms. Wilson. The committee concluded that the meeting was held outside the authority of CCPOA bylaws and was an inappropriate exercise of discipline.

The panel's conclusion on the harassment charge is based upon evidence about an August 16, 1986, chapter meeting. The meeting was conducted nearly two months after Mrs. Wilson's July 20 letter. The meeting was a new incident, not part of a continuous course of conduct and unrelated to any other accusation against Mr. Colman. Plainly, Mr. Colman was given no notice that he would be tried for conduct at an August 16, 1986, chapter board meeting. In the absence of pre-hearing notice, his right to defend himself on this accusation was severely limited. On this accusation, I find the Association failed to grant Mr. Colman a fair hearing.

In addition to the allegations that he failed to receive proper notice of accusations he was tried on, Mr. Colman raises two other allegations in his brief. He asserts that the Association denied his right to representation when it refused to grant a continuance of the hearing and when it sent documents not introduced at the hearing to the appeal committee. Both actions, Mr. Colman maintains, constitute violations of Association bylaws.

The disputed continuance was denied when Mr. Colman's representative at the hearing was unable to go forward after 8 p.m. because of health problems. Mr. Colman argues that the denial of the continuance had the effect of denying him the

right to representation at the hearing. The Respondent replies that Mr. Colman has not shown any bylaw requiring the granting of a continuance at hearing. Moreover, the Respondent continues, Mr. Colman has presented no evidence that he was in any way prejudiced by the refusal to grant a continuance.

The bylaw cited by Mr. Colman provides that the accused shall have the right to representation "by any nonmember of the bar, member or officer of CCPOA." Mr. Colman's argument is that denial of the request for a continuance was inherently unreasonable in light of the health problems of Mr. Colman's chosen representative. Thus, when the representative decided he must leave, by Mr. Colman's rationale, it was the Association which denied him representation. But there is nothing inherently unreasonable about the 8 p.m. denial of a continuance in a hearing which was in its closing stages. The need for a continuance is seen only in light of the serious health problems of Mr. Colman's representative. Yet these were problems which must have been known to Mr. Colman at the time he picked the representative. The burden of the representative's health problems cannot be made by Mr. Colman to be entirely that of the Association.

In addition, as the Association argues, Mr. Colman has made no showing that his defense was prejudiced by the denial of a continuance. It is true that Mr. Colman's representative left at that point. However, it must be recalled that this was a

hearing conducted by nonlawyers who were co-unionists with Mr. Colman. In these circumstances, one cannot automatically infer prejudice because of the departure of Mr. Colman's nonlawyer representative. No violation can be found on this point.

Finally, Mr. Colman argues that the Association violated its own bylaws and denied his rights by submitting to the appeal board documents not introduced before the hearing panel. Mr. Colman argues that he was given no advance notice of this action and was able to secure a copy of the information only on the day of his appeal. By that time, he contends, it was too late for him to offer any response. The Association responds that submission of the additional material did not violate Association bylaws and that Mr. Colman has made no showing that he was prejudiced by the documents.

There is no allegation in the complaint about the appeals process. However the contention meets the tests of Mt. Diablo Unified School District, supra, PERB Decisions 373b and 373c as an unalleged violation. The manner in which the Association conducted the appeal proceeding was related to the subject matter of the complaint, was part of the same course of action and was fully litigated.

It seems self-evident that the placement before the appeals board of evidence not made part of the record at a hearing is a denial of fairness. In effect, the accusor is given the opportunity to strengthen its case before the appellate body

while the accused is not permitted to respond. This action could have a definite effect on the decision of the appellate body. It is concluded, therefore, that basic principles of fairness were breached in the appellate review of the finding against Mr. Colman.

Summary

A union interferes with an employee's protected rights when it unreasonably excludes the employee from union membership. I find here that the Association acted unreasonably in its suspension of Mr. Colman by two acts: 1) finding him guilty without pre-hearing notice of harassing Ms. Wilson at a chapter meeting on August 16, 1986; 2) submitting to the Association appeals board materials which were not introduced at Mr. Colman's disciplinary hearing and which he had not seen before.

By suspending Mr. Colman from membership on the basis of these actions, the Association interfered with his right to join and participate in the activities of an employee organization. This action was in violation of Dills Act section 3519.5(b).[8]

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[8]As a final line of defense, the Association argues that Mr. Colman waived any argument he may have had about improper notice by participating in the hearing. Mr. Colman replies that at the start of the hearing he was assured that he was defending himself only against the allegations in Ms. Wilson's letter of July 20, 1986. It was not until after Mr. Colman received the written decision from the committee that he discovered that findings were made on other matters. I reject the waiver defense for the reasons set out by Mr. Colman.

REMEDY

For a remedy, Mr. Colman asks that the PERB direct the Association to rescind the suspension, to reinstate Mr. Colman to his position as chapter president, to restore his insurance benefits and to reimburse him for his legal fees and all costs incurred.

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.

Although most of the findings of the Association hearing panel are left undisturbed by this proposed decision, it is not possible to know whether the suspension would have been upheld had Mr. Colman received a fair appellate review. For that reason, I conclude that the hearing panel decision must be nullified and the suspension must be retroactively rescinded. The decision justifying the suspension is not to be reinstated unless Mr. Colman is afforded a new review of his case by the Association's State Board of Directors. In the event a new review is undertaken, the appellate board shall not consider any materials which were not introduced before the hearing panel. The appellate board shall not consider the hearing panel's finding on Charge 10, harassment, unless a new hearing, upon proper notice, is granted to Mr. Colman regarding the August 16, 1986, chapter board meeting and a new finding is sustained against Mr. Colman. In addition, Mr. Colman is

to be made whole for any losses incurred as a result of his suspension from the Association insurance program.

It is further appropriate that the Association be directed to send copies by United States Mail of a notice incorporating terms of the order to all members of the CCPOA chapter at the California Men's Colony, San Luis Obispo. The mailing of a notice to chapter members will provide notice that the Association has acted in an unlawful manner, is being required to cease-and-desist from this activity, and will comply with the order. It effectuates the purposes of the Dills Act that employees be informed of the resolution of the controversy and the Association's readiness to comply with the ordered remedy. Placerville Union School District (1978) PERB Decision No. 69.

There are two reasons why it is not appropriate that the Association be directed to reinstate Mr. Colman as chapter president. First, many of the findings against Mr. Colman are left intact by this proposed decision. Upon proper review, the Association Board of Directors may conclude that the findings left in effect were sufficient to justify the suspension of Mr. Colman from the Association. Second, subsequent to the events at issue Mr. Colman has been promoted to a supervisor by the State of California and no longer is a member of the bargaining unit represented by CCPOA. Chapter members should not be required by the action of an outside entity to have a supervisor as chapter president. The change of Mr. Colman's status is of such significance that only chapter members, if

Mr. Colman chooses to run in some subsequent election, should decide whether to restore him to the position of chapter president.

It is likewise inappropriate that Mr. Colman be awarded attorney's fees. In Modesto City Schools and High School District (1985) PERB Decision No. 518, the PERB held that attorney's fees should not be awarded "unless there is a showing that the respondent's conduct has been repetitive and that its defenses are without arguable merit." It cannot be said that the Association's defenses are without arguable merit. The Association has been sustained in many of its arguments.

PROPOSED ORDER

Based upon the foregoing findings of fact and conclusions of law, and the entire record of this case, it is found that the California Correctional Peace Officers Association (CCPOA) has violated section 3519.5(b) of the Dills Act. Pursuant to section 3514.5(c) of the Government Code, it hereby is ORDERED that the Association, its board of directors and its representatives shall:

1. CEASE AND DESIST FROM:

Interfering with the protected right of Tris Colman to join and participate in the activities of an employee organization of his own choosing by unreasonably dismissing him from membership in the Association.

2. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE RALPH C. DILLS ACT:

A. Within ten (10) workdays of service of a final decision in this matter, retroactively nullify the hearing panel decision and order in the matter of Wilson v. Colman and retroactively rescind the suspension of Tris Colman from membership in the California Correctional Peace Officers Association. The hearing panel decision and order may not be reinstated unless Mr. Colman is afforded a new review of the decision by the Association's State Board of Directors. In the event a new review is undertaken, the appellate board shall not consider any materials which were not introduced before the hearing panel. The appellate board shall not consider the hearing panel's finding on Charge 10, harassment, unless a new hearing, upon proper notice, is granted to Mr. Colman regarding the August 16, 1986, chapter board meeting and a new finding is sustained against Mr. Colman.

B. Within thirty (30) workdays of service of a final decision in this matter, make Tris Colman whole for any losses incurred as a result of his suspension from Association insurance programs.

C. Within ten (10) workdays of service of a final decision in this matter, send by United States Mail copies of the Notice attached hereto as an Appendix to all members of the CCPOA chapter at the California Men's Colony, San Luis Obispo. The Notice must be signed by an authorized agent of the Association, indicating that the Association will comply with the terms of this Order.

D. Upon issuance of a final decision, make written notification of the actions taken to comply with the Order to the Sacramento Regional Director of the Public Employment Relations Board in accord with the director's 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: December 28, 1987

Ronald E. Blubaugh

RONALD E. BLUBAUGH
Administrative Law Judge