

free of prejudicial error, adopt it as the decision of the Board itself.²

The unfair practice charge in Case No. LA-CO-39-S is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chairperson Hesse and Member Camilli joined in this Decision.

(c) Refuse or fail to meet and confer in good faith with a state agency employer of any of the employees of which it is the recognized employee organization.

²The full citation to the Collins case, cited by the regional attorney in his warning letter, is United Teachers of Los Angeles (Collins) (1982) PERB Decision No. 258.

PUBLIC EMPLOYMENT RELATIONS BOARD

Los Angeles Regional Office
3530 Wilshire Boulevard, Suite 650
Los Angeles, CA 90010-2334
(213) 736-3127



January 30, 1991

Robert Burks

RE: DISMISSAL AND REFUSAL TO ISSUE COMPLAINT, Unfair Practice
Charge No. LA-CO-39-S, Robert Burks v. California
Association of Highway Patrolmen

Dear Mr. Burks:

I indicated to you in my attached letter dated January 11, 1991, that the above-referenced charge did not state a prima facie case. You were advised that if there were any factual inaccuracies or additional facts that would correct the deficiencies explained in that letter, you should amend the charge accordingly. You were further advised that unless you amended the charge to state a prima facie case, or withdrew it prior to January 18, 1991, the charge would be dismissed. I later extended that deadline to January 25, 1991.

I have not received either a request for withdrawal or an amended charge. On January 28, 1991, I received from you a letter dated January 23, 1991, and sent by certified mail on January 24, 1991. The letter was not signed under penalty of perjury and was not accompanied by a proof of service. The letter states that there are some omissions in my January 11 letter, even though my letter quoted in full the allegations contained in your charge. Your letter states, in relevant part, (1) that sometime after May 8, 1990, you wrote another letter to the CAHP requesting assistance with another race discrimination complaint (which you do not describe), (2) that in late May or early June 1990 you wrote yet another letter to the CAHP requesting assistance with a retaliation complaint (which you do not describe), and also made a verbal request for assistance, but received no response, and (3) that at some point (perhaps in your letter of late May or early June 1990) you also requested that the CAHP negotiate to prevent acts of race discrimination.

Accepting these statements as true, it is still not apparent how the CAHP violated its duty of fair representation. The memorandum of understanding between the CAHP and the CHP, of which you sent me a copy, does not appear to make discrimination or retaliation subject to the grievance procedure, to which the duty of fair representation extends. The duty also extends to

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negotiations, but it does not appear that the CAHP did or could engage in negotiations during the six months prior to the filing of your charge (on October 5, 1990). From Article XVIII of the memorandum of understanding ("Duration"), it appears that the last negotiations were in 1988 and that the memorandum became subject to renegotiation only in the six months prior to June 30, 1991.

I am therefore dismissing the charge based on the facts and reasons contained in this letter and in my January 11 letter.

Right to Appeal

Pursuant to Public Employment Relations Board regulations, you may obtain a review of this dismissal of the charge by filing an appeal to the Board itself within twenty (20) calendar days after service of this dismissal. (California Code of Regulations, title 8, section 32635(a)). To be timely filed, the original and five copies of such appeal must be actually received by the Board itself before the close of business (5:00 p.m.) or sent by telegraph, certified or Express United States mail postmarked no later than the last date set for filing (California Administrative Code, title 8, section 32135). Code of Civil Procedure section 1013 shall apply. The Board's address is:

Public Employment Relations Board
1031 18th Street
Sacramento, CA 95814

If you file a timely appeal of the refusal to issue a complaint, any other party may file with the Board an original and five copies of a statement in opposition within twenty calendar days following the date of service of the appeal (California Code of Regulations, title 8, section 32635(b)).

Service

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding, and a "proof of service" must accompany each copy of a document served upon a party or filed with the Board itself. (See California Code of Regulations, title 8, section 32140 for the required contents and a sample form.) The document will be considered properly "served" when personally delivered or deposited in the first-class mail postage paid and properly addressed.

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Extension of Time

A request for an extension of time in which to file a document with the Board itself must be in writing and filed with the Board at the previously noted address. A request for an extension must be filed at least three calendar days before the expiration of the time required for filing the document. The request must indicate good cause for and, if known, the position of each other party regarding the extension, and shall be accompanied by proof of service of the request upon each party (California Code of Regulations, title 8, section 32132).

Final Date

If no appeal is filed within the specified time limits, the dismissal will become final when the time limits have expired.

Sincerely,

JOHN W. SPITTLER
General Counsel

By _____
Thomas J. Allen
Regional Attorney

Attachment

cc: John D. Markey

PUBLIC EMPLOYMENT RELATIONS BOARD



Los Angeles Regional Office
3530 Wilshire Boulevard, Suite 650
Los Angeles, CA 90010-2334
(213)736-3127



January 11, 1991

Robert Burks

RE: WARNING LETTER, Unfair Practice Charge No. LA-CO-39-S,
Robert Burks v. California Association of Highway Patrolmen

Dear Mr. Burks: _____

In the above-referenced charge, it is alleged that the California Association of Highway Patrolmen (CAHP) has failed and refused to assist you with race discrimination complaints against your employer, the California Highway Patrol (CHP). This conduct is alleged to violate Government Code sections 3519.5(a), (b) and (c) of the Ralph C. Dills Act (Dills Act).

The charge, filed October 5, 1990, alleges in full as follows:

The California Association of Highway Patrolmen referred to as the CAHP has been recognized by the State as the exclusive negotiating agent for all employees in the law enforcement unit #5. Members of the California Highway Patrolmen are members of unit #5.

The CAHP has the responsibility for representing its members before the State regarding wages, hours and other terms and conditions of employment.

The CAHP has not negotiated with the California Highway Patrol to solve the problems of Black employees being disciplined or fired more often than Whites. The CAHP has not worked to assure all employees fair treatment and fair opportunity for promotions.

The CAHP has not negotiated and worked out an agreement with the California Highway Patrol to secure the rights of Blacks to have a good favorable working atmosphere free from intimidation, harassment and discriminatory practices.

The CAHP has not conducted unbiased [sic], independent investigations of race discrimination complaints against the California Highway Patrol.

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The CAHP has not provided competent qualified representative to assist Blacks with race discrimination complaints.

The CAHP has provided competent representatives in other disputes and employment matters.

I have requested that the CAHP assist me with the race discrimination complaints since the discriminatory acts started.

I am still being subjected to acts of race discrimination. I am still distressed from the results of past discrimination acts and the CAHP refuses to assist me with my race discrimination complaints against the California Highway Patrol.

I believe [sic] the CAHP refused to assist me with my complaint because of my race and the complaint is about race discrimination.

I have asked you to provide me with information concerning specific instances within the six-month Dills Act statute of limitations (beginning April 5, 1990) when the CAHP failed or refused to assist you with matters within its duty of fair representation. You provided me with a copy of the memorandum of understanding between the CAHP and the CHP. That memorandum does not appear to contain any provision to prohibit or remedy race discrimination. The memorandum states that it was entered into on July 1, 1988.

You also provided me with copies of some correspondence between you and the CAHP. On November 1, 1987, you asked the CAHP to file a petition for rehearing in a case before the State Personnel Board. The CAHP informs me that it did file a petition for rehearing, but the petition was denied on January 6, 1988.

The CAHP also informs me that on January 4, 1990, the federal Equal Employment Opportunity Commission (EEOC) issued to you a "right to sue" letter on a charge of race discrimination and retaliation you had filed, although the EEOC concluded that the evidence obtained during its investigation did not establish a violation. You requested assistance from the CAHP, which, on March 15, 1990, requested that you provide specific details and documents. On March 18, 1990, you provided such information to CAHP. You requested a written response from the CAHP by March 30, 1990, and a full written explanation if your request was denied. On April 24, 1990, the CAHP responded as follows:

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The Board of Directors of the California Association of Highway Patrolmen considered your request for assistance at their meeting of April 19-21, 1990. After reviewing the material which you provided, including the determination of the U.S. Equal Employment Opportunity Commission and the background material which you provided concerning your EEOC complaint, the Board of Directors concluded that there was an insufficient basis presented to provide you with CAHP legal assistance. Accordingly, your request has been denied.

Much of the information which you provided concerned incidents which were the subject of an adverse action against you in 1987. The adverse action taken against you by the CHP was appealed to the State Personnel Board and a hearing was held before Judge Byron Berry. As a result of that hearing, Judge Berry found against you and was unwilling to conclude that you were the victim of race discrimination. The State Personnel Board supported his findings.

Thereafter, you pursued your remedies before the U.S. Equal Employment Opportunity Commission. You alleged that the CHP had engaged in a systematic practice of violating Title VII of the United States Code. In his letter to you of January 4, 1990, Michael Dougherty of the U.S. Equal Employment Opportunity Commission set forth the Commission's conclusion "...that the evidence obtained during the investigation does not establish a violation of the statute." He previously advised you that you would be obliged to preserve your rights to file a private action in Federal District Court by filing such an action within the appropriate time limit, since the Board of Directors was not scheduled to meet until after the expiration of that limit.

Legal assistance from the Association is discretionary, according to CAHP Bylaws. Legal assistance "may" be provided in certain cases. The Board of Directors has considered the material which you provided, has discussed the case with Legal Counsel and has considered the likelihood that a successful suit can be brought on your behalf after two separate entities which have had the opportunity to review your charges have chosen not to accept them as valid. There is no reason to believe that a Federal District Court would reach a different decision with regard to your claims.

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The approval of legal assistance in any case involves the allocation of limited CAHP assets. Legal assistance is primarily used for officers who face disciplinary action. It was made available to you at no expense when you faced disciplinary action. Your contention with regard to the State Personnel Board being essentially a rubber stamp for management is not supported by the evidence. The CAHP consistently persuades the State Personnel Board to revoke or modify disciplinary actions taken against CHP officers, particularly in serious cases involving large penalties or dismissal. Your statement that the Department "...will violate the law and it's own policies because the Department knows that almost every case presented [to the Board will be decided] in favor of the Department by Administrative Law Judges regardless of the circumstances in evidence." is simply not accurate.

You do, of course, have the right to pursue this matter on your own time and at your own expense. That is your choice. The Board of Directors did as you requested. It thoroughly reviewed the case which you presented and considered carefully all of the issues raised. The Board concluded that your case could not succeed in Federal District Court since it has not succeeded before two separate and distinct independent quasi-judicial bodies.

On May 8, 1990, you wrote again to the CAHP, asking CAHP to provide you with an attorney or with funds to pay for one. You stated an intention to file a lawsuit in court in the next 30 to 60 days. You also stated in part as follows:

I am not asking the Board of Directors to form an opinion or attempt to conclude whether my case could or could not succeed in court.

I am not asking the Board of Directors to review my request. I am asking that the Board of Directors specifically honor my request.

If the Board of Directors forms an opinion or come to the conclusion that my case will not succeed in Court the Board of Directors will be denying me due process.

You have not informed me whether or how the CAHP responded to this last request.

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Based on the facts stated above, the charge does not state a prima facie violation of the Dills Act within the jurisdiction of the Public Employment Relations Board (PERB), for the reasons that follow.

Government Code section 3514.5(a)(1) provides in part that PERB "shall not ... 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." The present charge was filed on October 5, 1990. Alleged unfair practices occurring before April 5, 1990, are thus outside the six-month Dills Act statute of limitations.

PERB Regulation 32615(a)(5) requires that an unfair practice charge contain a "clear and concise statement of the facts and conduct alleged to constitute an unfair practice." The present charge does not clearly state specific facts and conduct constituting an unfair practice within the six-month statute of limitations. Furthermore, the supplementary information you have provided, while more specific, does not establish a prima facie case of unlawful conduct.

The charge essentially alleges a violation of the duty of fair representation. While this duty extends to grievance handling and collective bargaining, it does not extend to extra-contractual matters, such as matters before the State Personnel Board (California Correctional Peace Officers Association (1987) PERB Decision No. 657-S, American Federation of State, County and Municipal Employees (1988) PERB Decision No. 683-S, California State Employees Association (1989) PERB Decision No. 733-S) or civil lawsuits (California Faculty Association (1988) PERB Decision No. 698-H). CAHP's failure or refusal to assist you with a civil lawsuit thus could not violate its duty of fair representation.

Furthermore, in order to state a prima facie violation of the duty of fair representation, a Charging Party must show that the exclusive representative's conduct was arbitrary, discriminatory, or in bad faith. In United Teachers of Los Angeles (Collins), Id., the PERB stated:

Absent bad faith, discrimination, or arbitrary conduct, mere negligence or poor judgment in handling a grievance does not constitute a breach of the union's duty.

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A union may exercise its discretion to determine how far to pursue a grievance on the employee's behalf as long as it does not arbitrarily ignore a meritorious grievance or process a grievance in a perfunctory fashion. A union is also not required to process an employee's grievance if the chances for success are minimal.

In order to state a prima facie case of arbitrary conduct violating the duty of fair representation, a Charging Party:

. . . must, at a minimum, include an assertion of sufficient facts from which it becomes apparent how or in what manner the exclusive representative's action or inaction was without a rational basis or devoid of honest judgment. Reed District Teachers Association, CTA/NEA (Reyes) (1983) PERB Decision No. 332, citing Rocklin Teachers Professional Association (Romero) (1980) PERB Decision No. 124.

The present charge does not include sufficient facts from which it is apparent how CAHP's action or inaction was without rational basis or devoid of honest judgment or was discriminatory or in bad faith. Although you apparently disagree with CAHP's assessment of whether your lawsuit would succeed, that is the kind of assessment an exclusive representative may reasonably make (California School Employees Association (1983) PERB Decision No. 372, California State Employees Association (1987) PERB Decision No. 614-S).

For these reasons, the charge as presently written does not state a prima facie case. If there are any factual inaccuracies in this letter or any additional facts that would correct the deficiencies explained above, please amend the charge accordingly. The amended charge should be prepared on a standard PERB unfair practice charge form clearly labeled First Amended Charge, contain all the facts and allegations you wish to make, and must be signed under penalty of perjury by the charging party. The amended charge must be served on the respondent and the original proof of service must be filed with PERB. If I do

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not receive an amended charge or withdrawal from you before January 18, 1991, I shall dismiss your charge. If you have any questions, please call me at (213) 736-3127.

Sincerely,

Thomas J. Allen
Regional Attorney