

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



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|----------------------------|---|--------------------------|
| CESSALY D. HUTCHINSON, |) | |
| |) | |
| Charging Party, |) | Case No. SF-CO-39-S |
| |) | |
| v. |) | PERB Decision No. 1355-S |
| |) | |
| CALIFORNIA STATE EMPLOYEES |) | October 7, 1999 |
| ASSOCIATION, |) | |
| |) | |
| Respondent. |) | |

Appearance; Cessaly D. Hutchinson, on her own behalf.
Before Caffrey, Chairman; Dyer and Amador, Members.

DECISION

CAFFREY, Chairman: This case is before the Public Employment Relations Board (Board) on appeal by Cessaly D. Hutchinson (Hutchinson) of a Board agent's dismissal (attached) of her unfair practice charge. In the charge, Hutchinson alleged that the California State Employees Association breached its duty of fair representation by retaliating against her for protected activities in violation of section 3519.5(b) of the Ralph C. Dills Act (Dills Act), and by causing the State of California (Department of Transportation) to terminate her employment in violation of Dills Act section 3519.5 (a)¹.

¹The Dills Act is codified at Government Code section 3512 et seq. Section 3519.5 states, in pertinent part:

It shall be unlawful for an employee organization to:

(a) Cause or attempt to cause the state to violate Section 3519.

The Board has reviewed the entire record in this case, including Hutchinson's original and amended unfair practice charge, the Board agent's warning and dismissal letters and Hutchinson's appeal. The Board finds the warning and dismissal letters to be free of prejudicial error and adopts them as the decision of the Board itself.

ORDER

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

Members Dyer and Amador joined in this Decision.

(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.

PUBLIC EMPLOYMENT RELATIONS BOARD



San Francisco Regional Office
177 Post Street, 9th Floor
San Francisco, CA 94108-4737
(415)439-6940



July 12, 1999

Cessaly D. Hutchinson

Re: **DISMISSAL OF UNFAIR PRACTICE CHARGE/REFUSAL TO ISSUE COMPLAINT**

Cessaly D. Hutchinson v. California State Employees Association

Unfair Practice Charge No. SF-CO-39-S

Dear Ms. Hutchinson:

The above-referenced unfair practice charge filed on March 8, 1999, and amended on March 15, March 24, May 11, and July 12, 1999, alleges that the California State Employees Association (Association) has retaliated against Charging Party as a result of her participation in certain activities within the Association. This conduct is alleged to violate Government Code section 3519.5(b) of the Ralph C. Dills Act (Dills Act).

I indicated to you, in my attached letter dated July 7, 1999, 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 which would correct the deficiencies explained in that letter, you should amend the charge. You were further advised that, unless you amended the charge to state a prima facie case or withdrew it prior to July 16, 1999, the charge would be dismissed.

On July 12, 1999, an amended charge was filed. The amended charge reiterates a previous allegation that Hutchinson was denied outside counsel to represent her in the appeal of her termination from the Department of Transportation (Department). Nothing new is added with respect to this allegation.

Hutchinson alleges that the Association activists named in an unfair practice complaint previously issued by this agency (case number SF-CE-108-S) on January 15, 1993, -as well as two others, were also terminated by the Department. At the time of her termination, she was the only remaining activist of those named in the complaint. In addition, Hutchinson alleges that Gladys Perry, who was identified previously as having denied one or more of Hutchinson's travel claims, was the person in charge of the Association's Alameda office that was responsible for representing these other employees. It is not demonstrated how these allegations bolster in any meaningful way Hutchinson's

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claim that the Association caused or attempted to cause the Department to terminate her because of her union activities.

Hutchinson further alleges in the amended charge that she lost the vote to be elected vice-president in September 1998 when a white female was nominated from the floor. This allegedly-deprived Hutchinson of votes needed to win the election. Hutchinson also alludes to racially motivated statements by Yolanda Solari, a past president of the Association. However, there is nothing demonstrating that Solari was connected to the alleged ongoing conspiracy among certain prominent Association officials. The allegations of racial animus are attenuated and not germane to the claims of discrimination based on Hutchinson's protected activities within the Association. Indeed, in one of the allegations, Hutchinson cites the racially discriminatory conduct of Tut Tate, who is herself African-American.

Lastly, Hutchinson includes in her amended charge a copy of the book The Last Days of Marilyn Monroe by Donald H. Wolfe. The book purportedly contains parallels to her case in terms of the role of organized crime in executing conspiracy plans. The book has no material evidentiary value to Hutchinson's case due to the attenuated nature of its subject matter.

The amended charge fails to cure the deficiencies identified in the attached letter dated July 7, 1999. Therefore, I am dismissing the charge based on the facts and reasons contained above as well as in my July 7, 1999 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. (Cal. Code Regs., tit. 8, sec. 32635(a).) Any document filed with the Board must contain the case name and number, and the original and five (5) copies of all documents must be provided to the Board.

A document is considered "filed" when actually received before the close of business (5 p.m.) on the last day set for filing or when mailed by certified or Express United States mail, as shown on the postal receipt or postmark, or delivered to a common carrier promising overnight delivery, as shown on the carrier's receipt, not later than the last day set for filing. (Cal. Code Regs., tit. 8, sec. 32135 (a); see also Cal. Code Regs., tit. 8, sec. 32130.)

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

The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95814-4174
FAX: (916) 327-7960

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 (20) calendar days following the date of service of the appeal. (Cal. Code Regs., tit. 8, sec. 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 Cal. Code Regs., tit. 8, sec. 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. A document filed by facsimile transmission may be concurrently served via facsimile transmission on all parties to the proceeding. (Cal. Code Regs., tit. 8, sec. 32135(c) .)

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 (3) 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. (Cal. Code Regs., tit. 8, sec. 32132.)

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Final Date

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

Sincerely,

ROBERT THOMPSON
Deputy General Counsel

DONN GINOZA

Regional Attorney

Attachment

cc: Harry J. Gibbons

PUBLIC EMPLOYMENT RELATIONS BOARD



San Francisco Regional Office
177 Post Street, 9th Floor
San Francisco, CA 94108-4737
(415) 439-6940



July 7, 1999

Cessaly D. Hutchinson

Re: **WARNING LETTER**

Cessaly P., Hutchinson v. California State Employees
Association
Unfair Practice Charge No. SF-CO-39-S

Dear Ms. Hutchinson:

The above-referenced unfair practice charge filed on March 8, 1999, and amended on March 15, March 24, and May 11, 1999, alleges that the California State Employees Association (Association) has retaliated against Charging Party as a result of her participation in certain activities within the Association. This conduct is alleged to violate Government Code section 3519.5(b) of the Ralph C. Dills Act (Dills Act).

Investigation of the charge revealed the following. For the past nine or more years, Cessaly D. Hutchinson has been employed as a Legal Analyst for the Legal Division of Department of Transportation (Department). During this period of time, she has been active in the Association, serving as a chief steward and a president of the Association's District Labor Council (DLC) 750. On or about September 18, 1998, the Department gave notice of its intent to terminate Hutchinson. The notice of adverse action included charges of failing to do work within her job description and unauthorized use of state equipment for personal business.

The Association is a large employee organization that exclusively represents numerous bargaining units within the State. Organizationally, the Association is divided into four divisions. These divisions include the Civil Service Division, the Retirees Division, the Supervisors Division, and the State University Division. The Civil Service Division is divided geographically into 56 DLCs. A DLC is governed similarly to a local union chapter. It elects a president and other officers. Each DLC president serves on the Association's Civil Service Division Council (Council). The Council governs the Civil Service Division, although the Association Board of Directors has ultimate authority over the Civil Service Division. The Association Board of Directors governs all of the four divisions.

Early in the 1990s, the Caucus for a Democratic Union (CDU) began as an internal reform movement, challenging the leadership within the Association. As the CDU movement gathered strength, it was

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able to gain control of the leadership within the Civil Service Division. Hutchinson was opposed to the CDU movement. The CDU campaign advocated a more aggressive stance in bargaining during the period between 1995 and 1999, when the Association refused to sign agreements with Governor Pete Wilson.

During late 1997 and early 1998, the Civil Service Division under the leadership of individual CDU sympathizers undertook to realign the geographic boundaries of the DLCs. Hutchinson and others opposed to CDU believed that the realignment was for the purpose of gerrymandering the DLCs in a way that would disenfranchise non-CDU DLC presidents including herself. Hutchinson and another DLC president, Jean Laosantos, took action to oppose the realignment by protesting to the Association Board of Directors, filing an unfair practice charge with the Public Employment Relations Board (PERB) (case no. SF-CO-35-S), and filing Superior Court civil suits in the counties of San Francisco and Sacramento.

As a result of these efforts, Hutchinson, Laosantos, and their supporters were able to convince the Board of Directors to rescind the Civil Service Division action prompting the realignment. This occurred in the spring of 1998. New elections were then held during the summer of 1998.

During the summer of 1998, Hutchinson ran for the office of vice-president of the Civil Service Division Council.

Hutchinson alleges that her supervisor at the Department, Daniel C. Murphy, was coerced into terminating her by unnamed agents of the Association. Her claim relies on circumstantial evidence consisting of a series of encounters she has had with various officials of the Association. In this connection, she alleges that the Association has undertaken a systematic campaign of race, sexual, and financial abuse against her so as to deny her the opportunity to advance in the Association as an elected official. This campaign has been orchestrated principally by Perry Kenny, President of the Association. Hutchinson also alleges that Kenny orchestrated her termination because she opposed his idea of incorporating the Civil Service Division as a separate entity from the Association. Incorporation of the Civil Service Division is viewed as a means to remove the division from the control of the Board of Directors.

Hutchinson further alleges that Kenny permitted CDU to gain control of the Civil Service Division because he knew its leaders, including its director, Jim Hard, would violate internal Association policies, leading directly to Hard's removal from his

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position and allowing Kenny to use his power as president to appoint a successor.

The charge and amended charge contain approximately 36 pages of typewritten allegations and voluminous documentation. It is not practicable to include anything but an abbreviated summary of the allegations supporting Hutchinson's claims that the Association orchestrated her termination.

Around the time Hutchinson was served with the notice of action, Michael E. Soffa, a regional director within the Association, informed her that the chief counsel for the Association, Gary Reynolds, "took it personally" that she had gotten the Board of Directors to rescind the DLC realignment. Soffa claimed to have connections to organized crime. Soffa falsely accused Hutchinson of failing to reimburse him for Association activities. Soffa informed Hutchinson that Kenny and Kenny's father were members of the Teamsters.

Ray Vanzant, also a friend of Kenny's, revealed that he knew that Hutchinson had been accused by the Department of falsifying documents -- something that was not public knowledge. Vanzant told Hutchinson that as a Teamster, if he was told to "drop a load," he would do that.

Christy Christensen is a friend of Kenny. In the summer of 1998, she reported to another Association member that she expected to be nominated as a candidate for vice-president of the Civil Service Division, the position Hutchinson was unsuccessful in winning. Kenny expressed to another member that he was very upset that Hutchinson had decided to run for vice-president and abandon him. Ron Franklin, a candidate for president, with whom Hutchinson ran as a vice-presidential candidate, also opposed incorporation of the Civil Service Division.

Hutchinson claims that in August 1995 she was harassed by Frank Sulla, a chief steward in another DLC. Sulla told Hutchinson that she was "high up in the union" and that she would "go to bed" with whom he told her. Sulla also told her that his ancestor was a Roman who wrote Roman law. He told her he was attracted to her. In the same month, Hutchinson filed a police report charging Sulla with sexual harassment and extortion. In the report, she named Kenny as a possible accomplice. Sulla approached her offering her assistance after the Association had refused to provide her with a travel advance to attend an out-of-town conference. Kenny acted suspiciously during the conference by avoiding her and her problem. Hutchinson asserts that she was fired because she refused to be used to provide sexual favors as demanded by Sulla.

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In February 1998, the Association denied travel claims filed by Hutchinson for lack of adequate documentation.

In the spring of 1998, Kenny put pressure on Laosantos to remove herself from the San Francisco county action. Laosantos told Hutchinson that after she told another union member's supervisor that the member was "destroying" the Association, the supervisor vowed to discipline the employee. Hutchinson believes that the same thing has happened in her case.

Hutchinson also claims that she has been subjected to abuse by Gladys Perry, Association Coastal Office Manager. In July 1998, Perry also refused to authorize reimbursement for some of Hutchinson's travel expenses. In addition, Perry supported another staff member who was abusive toward her.

In December 1998, Harry Gibbons, attorney for the Association, became agitated with her when she made an offer to settle the San Francisco County lawsuit. In response, he threatened to move to dismiss the entire action.

Based on the facts stated above, the charge as presently written fails to state prima facie violation of the Dills Act for the reasons that follow.

As a preliminary matter, it is noted that the charging party is required to provide a "clear and concise" statement of the conduct underlying the alleged unfair practice. (Cal. Code of Regs., tit. 8, sec. 32615(a)5.) Hutchinson has failed to comply with this requirement because many of the allegations appear to be unrelated to one another. There is voluminous documentation without a clear and concise explanation of their relationship to the written allegations.

In the written statement of the charge, Hutchinson specifically alleges that the Association has retaliated against her because she has taken positions opposed by Kenny. However, since the gravamen of the charge is that the Association caused the Department to terminate her because she was a dissident, the principal theory of the charge involves a claim under section 3519.5 (a). In order to state a prima facie violation, the charging party must allege facts showing how and in what manner the Association caused or attempted to cause the State to commit an unfair practice against the employee. (Tustin Unified School District (1987) PERB Decision No. 626.)

The charge fails to provide sufficient allegations demonstrating that the Association orchestrated or caused the employer to terminate her. There is no direct evidence that the Department's

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action was in response to a request or demand from the Association, and the circumstantial evidence alleged is too weak to support an inference that such occurred.

The only evidence that remotely suggests some involvement by the Association is the knowledge that some Association officers had knowledge of the nature of the charges against her. There is also a showing that the termination occurred in close proximity to her efforts to rescind the realignment. But this is insufficient, by itself or in conjunction with other allegations, to raise an inference that the Association demanded or requested her termination.

Hutchinson also alleges that Laosantos told her of another supervisor who vowed to discipline a member who had been criticized within the Association. But Hutchinson does not allege that the employee was actually disciplined nor does she offer anything remotely suggesting a pattern of retaliatory discharges.

To the extent any of the allegations may be construed as suggesting interference or retaliation in violation of section 3519.5(b), the charge also fails to state a prima facie violation. The alleged sexual harassment by Sulla and the denials of travel claims occurred more than six months prior to the filing of the charge and are therefore untimely. (Sec. 3514.5(a).)

Even if timely, Hutchinson has failed to allege sufficient facts demonstrating that Sulla acted as an agent of the Association. It must be shown that the union "instigated, supported, ratified or encouraged" the activity in question. In the absence of evidence that Sulla acted with express authority of Kenny and the Association, apparent authority would suffice. However, "[in] ere surmise as to the authority of an agent is insufficient to impose liability on a principal based on theory of apparent authority." (Inglewood Unified School District (1990) PERB Decision No. 792.) There are insufficient facts showing that the Association instigated, ratified or encouraged any of Sulla's improper conduct.

There are also insufficient facts demonstrating that the denial of travel claims was retaliatory. (Carlsbad Unified School District (1978) PERB Decision No. 89; California State Employees' Association (O'Connell) (1989) PERB Decision No. 753-H; Novato Unified School District (1983) PERB Decision No. 210; California State Employees Association (Hackett) (1995) PERB Decision No. 1126-S.) In order to state a prima facie violation involving retaliation, the charging party must establish that (1) the

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charging party engaged in protected activity, (2) that the respondent had knowledge of such activity, and (3) that the respondent's harmful action against the charging party was motivated by unlawful intent. In determining whether sufficient evidence of intent exists, PERB will examine direct and circumstantial evidence to see whether, but for the exercise of protected rights, the disputed action would not have been taken against the charging parties. Respondent's words indicating unlawful motivation, failure to follow usual procedures, shifting justifications and cursory investigation, disparate treatment of the charging party, timing of the action, and a pattern of antagonism toward persons engaging in protected activity. (Id.)

The travel claim denials do not appear to have been motivated by any of Hutchinson's protected activity. There is an insufficient showing of the other elements demonstrating a nexus between the two. (Id.)

Finally, the alleged threat by Harry Gibbons in December 1998 does not constitute an illegal threat, because statements of intention to pursue legal remedies is protected speech. (See Rio Hondo Community College District (1980) PERB Decision No. 128.)

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 additional facts which would correct the deficiencies explained above, please amend the charge. 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 be signed under penalty of perjury by the charging party. The amended charge must have the case number written on the top right hand corner of the charge form. The amended charge must be served on the respondent's representative and the original proof of service must be filed with PERB. If I do not receive an amended charge or withdrawal from you before **July 16, 1999**. I shall dismiss your charge. If you have any questions, please call me at (415) 439-6940.

Sincerely,

DONN GINOZA
Regional Attorney