

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



SERVICE EMPLOYEES INTERNATIONAL
UNION, LOCAL 1000,

Charging Party,

v.

STATE OF CALIFORNIA (DEPARTMENT OF
CORRECTIONS & REHABILITATION),

Respondent.

Case No. SA-CE-1795-S

PERB Decision No. 2282-S

August 21, 2012

Appearances: Daniel Luna, Attorney, for Service Employees International Union, Local 1000; State of California (Department of Personnel Administration) by David M. Villalba, Legal Counsel, for State of California (Department of Corrections & Rehabilitation).

Before Martinez, Chair; Dowdin Calvillo and Huguenin, Members.

DECISION

HUGUENIN, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the State of California (Department of Corrections & Rehabilitation) (CDCR) to the proposed decision (attached) of an administrative law judge (ALJ). The proposed decision concludes that CDCR violated section 3519(a) and (b) of the Ralph C. Dills Act (Dills Act)¹ when it disciplined an employee for her conduct undertaken as a union job steward for Service Employees International Union, Local 1000 (SEIU).

The Board has reviewed the hearing record, the proposed decision, CDCR's exceptions and supporting brief, and SEIU's responses thereto. The ALJ's findings of fact are free of prejudicial error, therefore we adopt them as the findings of the Board itself, except as noted

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

specifically below. We likewise adopt the ALJ's conclusions of law which correctly state the law and are well-reasoned, subject to our discussion below of issues raised by the exceptions.

PROCEDURAL HISTORY

In April 2009, SEIU filed a charge alleging that its job steward, Isabel Guerra (Guerra), had engaged in protected activity when representing employees in meetings with supervisors on October 24, 2008, that CDCR agents had interfered with Guerra's representation during the meetings, and that on October 28, 2008, CDCR had retaliated against Guerra by disciplining her because of behavior when representing the employees on October 24, 2008.

On September 16, 2009, PERB's Office of General Counsel issued a complaint, alleging that Guerra engaged in protected activity by representing employees on October 24, 2008, and that on October 28, 2008, CDCR took adverse action against her in the form of discipline because of that protected activity. Following a hearing in February 2010, the ALJ issued the proposed decision on April 14, 2010. CDCR timely filed exceptions, to which SEIU timely responded.

FACTUAL SUMMARY

On the morning of October 24, 2008, Supervising Registered Nurse Richard Hall (Hall) conducted a staff meeting with Level III unit registered nurse (RN) employees, including Michelle Adams (Adams), assigned to the California correctional institution. (Proposed Dec., at pp. 5-6.) During the meeting, Adams and Hall had a sharp exchange in which Hall offered to take their disagreement "outside." They did not do so. Soon thereafter, Adams was summoned by Director of Nursing Dana Buford (Buford) to a meeting. Believing her exchange with Hall in the meeting to be the reason for Buford's summons, Adams asked Guerra, one of two SEIU job stewards, to represent her at the meeting, and if possible, to

arrange for a meeting only with Buford. Guerra agreed. (Proposed Dec., at p. 6.) Later, as Guerra and Adams approached Buford at the designated meeting time and place, Guerra asked Buford if they could meet only with her. Buford responded no, it was Hall's meeting. Hall then approached and asked if Guerra sought to exclude him. A brief exchange ensued. (Proposed Dec., at pp. 6-7.) The meeting then went forward with Adams, Guerra, Hall and Buford. As the meeting ended, Adams went to her separate meeting with Buford. As Guerra was leaving the area, she reminded Adams that Adams should not forget to file an Equal Employment Opportunity complaint. (Proposed Dec., at p. 7.)

Later the same day, a Level II unit RN employee, Hollis Bennett (Bennett), requested that Guerra, also assigned to the Level II unit, represent her in a meeting with supervisors to receive a Letter of Instruction (LOI), a formal "corrective action" describing unacceptable conduct and instructing the employee as to future conduct. Again Hall and Buford were present. During the meeting Guerra twice asked a question, and once gestured with her hand toward Hall indicating that she was speaking not to him but to Buford. (Proposed Dec., at pp. 7-9.)

On October 28, 2008, Hall disciplined Guerra, issuing her an LOI citing conduct in the Adams and Bennett meetings. The LOI accused Guerra of improper behavior while "acting as a representative" on October 24, 2008, charged Guerra with insubordination, discourteous treatment of employees, and willful disobedience, and instructed Guerra henceforth to conduct herself courteously, professionally and with respect to supervisors. The LOI also threatened to exclude and replace Guerra as steward in future employee disciplinary meetings if her conduct of October 24, 2008 were to recur. Finally, the LOI stated that a copy of the LOI would be placed in Guerra's personnel file for a year. (Proposed Dec., at pp. 9-11.)

PROPOSED DECISION

The complaint issued by PERB's Office of General Counsel alleged retaliation for protected activity. Accordingly, the ALJ applied the Board's discrimination test articulated in *Novato Unified School District* (1982) PERB Decision No. 210 (*Novato*). Under *Novato* a charging party must establish that there was protected activity, that the respondent knew thereof, that the respondent took action adverse to the interest of the person who engaged in protected activity, and that such adverse action was taken because of the protected activity. (*Novato*.) Upon such showing, the burden shifts to the respondent to show, if it can, that it would have taken the adverse action even in the absence of the protected activity.

The ALJ concluded that Guerra was acting as the SEIU's job steward at the two meetings on October 24, 2008, that her activity was therefore protected, that CDCR's issuance to Guerra of an LOI was adverse, and that the LOI was issued because of Guerra's protected activity. The ALJ relied on the LOI issued to Guerra, in which Hall stated:

On October 24, 2008, you were insubordinate, discourteous, unprofessional, and disrespectful to me during two meetings involving employee discipline where you were acting as a representative.

(Proposed Dec., at p. 9, emphasis in original.) CDCR urged that Guerra's conduct exceeded the bounds of statutory protection. The ALJ disagreed, ruling that Guerra's speech was not "so opprobrious, flagrant, insulting, defamatory, insubordinate, or fraught with malice" that it caused "substantial disruption or material interference" with CDCR's operations.² Concluding that SEIU had established a prima facie case of retaliation, the ALJ considered CDCR's rejoinder that it would have disciplined Guerra even if she had not engaged in protected

² *Rancho Santiago Community College District* (1986) PERB Decision No. 602 (*Rancho Santiago*); *State of California (Department of Corrections)* (2001) PERB Decision No. 1435-S (*Corrections*).

activity. The ALJ found this claim unpersuasive, reasoning the LOI itself declared that the conduct serving as basis for the discipline was that undertaken by Guerra on October 24, 2008, “as a representative.” Thus, concluded the ALJ, CDCR had failed to rebut SEIU’s prima facie case. He ruled that CDCR’s conduct had violated Dills Act section 3519(a) and (b) as alleged in the complaint. The ALJ proposed a traditional remedy including rescission of the discipline and posting of PERB’s order.

EXCEPTIONS

CDCR’s exceptions challenge the ALJ’s determination that SEIU proved its allegations of retaliation. CDCR contends that: (1) Guerra’s conduct was not protected, but rather unprotected and thus subject to discipline; (2) nexus was not demonstrated between the discipline and alleged protected conduct; (3) in any event CDCR would have taken the same action against Guerra despite any protected conduct. In addition, CDCR contends that the ALJ: (4) mistakenly determined that the CDCR violated the Dills Act section 3519(b), and (5) wrongly proposed as a remedy that CDCR rescind the discipline. Below we address CDCR’s contentions, after a brief discussion of employee and organizational rights under the Dills Act.

DISCUSSION

The Dills Act protects the right of employees 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” (Dills Act § 3515), and the right of employee organizations to “represent their members in their employment relations with the state” (Dills Act § 3515.5). The Dills Act effectuates these rights by prohibiting the state employer either to “[i]mpose or threaten to impose reprisals on employees, discriminate or threaten to

discriminate against employees, or otherwise interfere with, restrain, or coerce employees because of their exercise of rights” afforded by the Dills Act, or to “[d]eny to employee organizations rights” guaranteed to them by the Dills Act. (Dills Act § 3519(a) and (b).)

The Legislature’s purpose in establishing these rights of employees and their organizations is stated in Dills Act section 3512, which provides, in pertinent part:

It is also the purpose of this chapter to promote the improvement of personnel management and employer-employee relations within the State of California by providing a uniform basis for recognizing the right of state employees to join organizations of their own choosing and be represented by those organizations in their employment relations with the state.

(Dills Act § 3512.) Thus, in the Dills Act, the Legislature established for state employees, their organizations and the state employer, a system of collective negotiations in which employees in appropriate bargaining units are represented by organizations of their choosing. The Legislature’s policy design contemplates that employer and organizational representatives meet as equals, exchange views, and advocate their respective positions, subject to the standards of good faith and to the Dills Act’s prohibitions against employer or organization interference, restraint or coercion of employees.

Under a system of collective negotiations, employee organizations (unions) engage in various types of representational activity, including without limitation, negotiating collective bargaining agreements or memoranda of understanding, processing grievances or complaints, and attending investigatory or other meetings as the representative of individual employees. Unions are represented in these activities either by the union’s own staff, or more frequently by individual employees of the employer who are designated and authorized by the union to act as

union agents when representing other employees on behalf of the union.³ While engaged in this representation, employees designated as union agents (stewards) fulfill the union's statutory duty fairly to represent the other employee or employees.⁴ We recognize that while seeking to resolve divergent and often conflicting interests, representatives of both unions and employers may resort occasionally during representational meetings to intemperate speech or less than civil conduct. It is for this reason that party representatives are afforded significant latitude in their representational speech and conduct, which serves the ultimate goal of accommodating divergent interests and resolving conflicts. Consequently stewards must be free to speak and act for the union, consistent with good faith and free of employer interference, restraint or coercion.

Under our statutes, employee speech and conduct are protected when related to matters of legitimate concern to employees thus coming within the right to participate in the activities of an employee organization for the purpose of representation on matters of employer-employee relations. (*Rancho Santiago*, p. 12; *Mt. San Antonio Community College District* (1982) PERB Decision No. 224.) Employee speech and conduct may lose statutory protection where found to be sufficiently opprobrious, flagrant, insulting, defamatory, insubordinate, or fraught with malice as to cause substantial disruption of or material interference in the workplace. (*Id.*, p. 13.) Thus, an employer who would discipline an employee for speech or action as a job steward must take care not to punish protected activity. To justify such discipline, an employer must demonstrate that the employee's speech or actions were so disruptive as to shed the protected status such activity otherwise enjoys.

³ *Santa Ana Unified School District* (1978) PERB Decision No. 73.

⁴ *California State Employees' Association (Norgard)* (1984) PERB Decision No. 451-S.

We conclude, with the ALJ, that CDCR did not demonstrate that Guerra's speech and action, while serving as SEIU job steward representing Adams and Bennett on October 24, 2008, exceeded the bounds of statutory protection. We thus conclude, with the ALJ, that Guerra's conduct on October 24, 2008 was protected. We also conclude, with the ALJ, that CDCR was motivated to, and did, discipline Guerra because of her protected representational activity, and that CDCR failed to prove up its claim that it would have disciplined Guerra even in absence of that protected activity. Thus, we affirm the ALJ's determination that CDCR: (1) retaliated against Guerra because she participated in protected activity, and (2) denied to SEIU its right to represent employees Adams and Bennett . (Dills Act § 3519(a) and (b).)

CDCR's Exceptions

We now examine CDCR's exceptions, as described above.

The pre-eminent issue raised by CDCR's exceptions is whether the behavior for which Guerra was disciplined was representational activity protected by the Dills Act, or whether Guerra's behavior exceeded Dills Act protection. The facts are clear that CDCR did discipline Guerra for her representational conduct. Thus, if the conduct is protected, CDCR's discipline was unlawful. Contrarily, if Guerra's conduct was unprotected, the prima facie case of retaliation fails, and the complaint should be dismissed.

1. CDCR excepts to the ALJ's conclusion that Guerra engaged in protected conduct on October 24, 2008, urging that Guerra's speech and actions violated CDCR's employee conduct rules, and therefore were unprotected. We deny the exception.

CDCR relies on case law supporting an employer's right to discipline employees for workplace conduct deemed unprotected. None of the cited cases involves discipline of a

steward for representational activity. As such, the authorities are not persuasive. We review each.

In *Konocti Unified School District* (1982) PERB Decision No. 217 (*Konocti*), a school bus driver transporting students stopped the bus away from the school and solicited students to boycott their classes. Relying on private sector authorities, the Board held that the driver's speech and actions "were conducted in an indefensible manner and are, consequently, unprotected." (*Id.*, at p. 7.) Neither *Konocti* nor National Labor Relations Board (NLRB) authorities cited therein⁵ involved a steward engaged in representational speech or action.

In *Regents of the University of California (Berkeley)* (1985) PERB Decision No. 534-H, a former library employee, who had been terminated for harassing other library employees, returned to the library as a non-employee union agent where he continued to harass those employees whose complaints had produced his earlier termination. The university banned the non-employee union agent from the library, but did not deny him access to other facilities on campus. The union brought a charge of interference (not retaliation). Employing the Board's *Carlsbad*⁶ balancing test, the Board balanced the university's business necessity to protect its library employees from on-the-job harassment, against the slight harm to employee rights

⁵ *NLRB v. Local Union No. 1229, International Brotherhood of Electrical Workers* (1953) 346 U.S. 464 (workers who publicly disparaged employer's services, without publicizing existence of a labor dispute and at a location distant from employer's premises, deemed not engaged in protected conduct); *Elk Lumber Company* (1950) 91 NLRB 333 (workers engaged in on-the-job slow down deemed not engaged in protected conduct). Although the language of the Dills Act is not identical to that of the National Labor Relations Act (NLRA), the Board looks to NLRB and federal judicial construction of the NLRA for guidance in interpreting the various statutes it administers. (See e.g., *Oakdale Union Elementary School District* (1998) PERB Decision No. 1246, at pp. 18-19, fn. 8; citing *McPherson v. Public Employment Relations Bd.* (1987) 189 Cal.App.3d 293, 311; *Modesto City Schools* (1983) PERB Decision No. 291, at pp. 61-62.)

⁶ *Carlsbad Unified School District* (1979) PERB Decision No. 89 (*Carlsbad*).

caused by the university excluding the non-employee union agent from only the library, and ruled for the university. This case involved neither a steward, nor representational speech or action.

In *Riverside Unified School District* (1987) PERB Decision No. 639, an employee engaged in protected activity by filing grievances and unfair practice charges, but failed to prove that his termination was motivated by his protected conduct. This case involved neither a steward nor retaliation because of representational speech or action.

In *Office of the Los Angeles County Superintendent of Schools* (1982) PERB Decision No. 263, two employees were transferred to less advantageous positions, allegedly because they participated in union activities. The Board affirmed an ALJ's dismissal, based on application of *Carlsbad* and of the Board's then-recent ruling in *Novato*. The employer proved that the transfer decisions were based on the employees' relative scores on performance evaluations. The union proved that one employee's evaluation rating had been influenced improperly by her absences from duty for union activities, but failed to prove that this influence caused the overall lower evaluation culminating in the transfer. The case involved a steward, but not representational speech or action.

In *Los Angeles County Superior Court* (2008) PERB Decision No. 1979-C, a union president was disciplined for violating access policies adopted by the employer under the Trial Court Act⁷ limiting union and employee access to the employer's email system and to courtrooms for union meetings. The Board rejected the ALJ's analysis under *Carlsbad* which found an interference violation of the union's right of access to facilities and internal means of communication. The Board instead applied *Novato*. The Board concluded that the union

⁷ The Trial Court Act is codified at Government Code section 71600 et seq.

president's use of the employer's email was partially protected and that her scheduling of the courtroom for a union meeting was protected. The Board then reasoned that the employer's imposition of discipline was not unlawful, since at least some emails sent by the union president over the employer's email system violated the employer's email access policy. This case did not involve representational speech or action.

By contrast, authorities relied on by the ALJ in this case do involve representational speech and action by stewards. As such, they are persuasive. We review them.

In *Corrections*, a steward made statements to the Department of Corrections (CDC) representatives during a meeting called to investigate alleged mishandling of state property. The steward stated that if the CDC's investigation interfered with his (the steward's) approved and pending promotion, he would litigate the matter, and/or provide to the public media information indicating the CDC had violated federal standards when disposing of hazardous materials. The CDC claimed the statements were threats and unprotected, and thus a proper basis for discipline. The Board, adopting the proposed decision, ruled that: (1) when assessing workplace speech, the Board applies an objective standard and considers the overall context; (2) protected workplace speech may lose protection only where it is so "opprobrious, flagrant, insulting, defamatory, insubordinate, or fraught with malice as to cause substantial disruption or material interference with operations," and (3) that the right to engage in protected activity includes occasional "impulsive behavior" which must be balanced against the CDC's right to maintain order and respect. (*Ibid.*, Proposed Dec., at p. 14, and authorities therein cited.) Applying these principles, the Board held that the job steward's statements were protected.

In *Rio Hondo Community College District* (1982) PERB Decision No. 260

(*Rio Hondo*), the Board considered a comment⁸ made by a steward (faculty member and union officer) in a representational capacity during a question and answer session with the college president at the end of an official faculty meeting. Relying on NLRB authorities,⁹ the Board held that protected activity includes “impulsive behavior” which must be “balanced against the employer’s right to maintain order and respect” and that an employee’s speech may lose its protected status if “so disrespectful of the employer as seriously to impair the maintenance of discipline.” (*Rio Hondo*, at p. 12.)

We conclude, with the ALJ, that the speech for which Guerra received the LOI, was not so “opprobrious, flagrant, insulting, defamatory, insubordinate, or fraught with malice as to cause substantial disruption or material interference with operations.” (*Corrections*, citing *Rancho Santiago*.) The speech occurred in a hallway just before and after the meeting with Adams, and later in a closed door meeting with Bennett . Witnesses in each instance included only three persons in addition to Guerra, viz., the represented employee, Hall, and Buford, who was Hall’s supervisor. In this context, the opportunity for interference with CDCR’s operations or discipline was minimal to non-existent.

We deem Guerra’s hand gestures, signifying her request to speak not with Hall but with Buford, to constitute speech, not action, for the purpose of this analysis. We thus assess the impact of the gestures under the speech standard. Alternatively, even if we did consider the gestures to be conduct, and not speech, we would deem them impulsive, and not so egregious as to interfere with CDCR’s discipline and operations in the circumstances presented here.

⁸ “Chickenshit.”

⁹ *NLRB v. Thor Power Tool Company* (1965) 351 F.2d 584, 585; *NLRB v. Blue Bell Inc.* (1955) 219 F.2d 796, 797.

Likewise, we deem Guerra's effort to obtain for Adams a separate meeting with Buford, to be well within the ambit of protected activity. Adams had requested that Guerra arrange a meeting with Buford, and Guerra sought to do so. The tactic ultimately was successful as Adams met separately with Buford following the meeting with Hall, although it likely angered Hall. In any case, CDCR did not adduce evidence that Guerra's speech or conduct regarding the separate meeting with Buford disrupted or otherwise interfered with Hall's investigation of Adams' conduct at the earlier RN staff meeting.

Guerra's speech and conduct during the Bennett meeting was neither so opprobrious, nor so egregious as to interfere with discipline or operations. Guerra interrupted Hall's presentation of the LOI only minimally. CDCR adduced no evidence that Guerra's speech or conduct interfered with CDCR's delivery to Bennett of the LOI, or that the CDCR was unable to maintain order during the meeting. Both Guerra's speech and her gestures on the afternoon of October 24, 2008, may have resonated with Hall, who at his morning staff meeting that very day may have experienced a challenge to his supervisory authority. But the Board assesses speech and conduct in the workplace on an objective, not subjective, standard. Thus, a supervisor's personal pique over perceived disrespect is not sufficient basis to find that Guerra's speech and gestures, undertaken in a representational capacity on behalf of SEIU, exceeded the bounds of statutory protection.

In sum, we conclude that Guerra's speech, including her gestures which we deem speech, were protected activity.

2. CDCR excepts to the ALJ's conclusion that SEIU demonstrated nexus between Guerra's representational activity on October 24, 2008, and the disciplinary LOI issued to her on October 28, 2008. We deny the exception.

With the ALJ, we find direct evidence of nexus. The LOI issued to Guerra on October 28, 2008, states that the conduct which CDCR deems to violate its standards for employees, and for which Guerra is being disciplined, is that undertaken by Guerra on October 24, 2008, “acting as a representative.” The CDCR’s intent is clear and unambiguous. We need look no further.

Having declared that Guerra’s representational activity forms the basis for the discipline, the only issue left is whether such activity was protected or not. Having reached above a decision on that issue, we conclude that this element of the prima facie case is established. CDCR disciplined Guerra “because of” her protected representational conduct.

3. CDCR excepts to the ALJ’s conclusion that the CDCR failed to demonstrate that it would have disciplined Guerra in the absence of her protected conduct on October 24, 2008. We deny the exception.

With the ALJ, we conclude that CDCR did demonstrate that it disciplined Guerra for conduct on October 24, 2008, while “acting as a representative.” We conclude that having done so, CDCR is bound by its description of the basis for the discipline. Indeed, it proffers no other conduct of Guerra which might have provided an alternative, and lawful, basis for the discipline of October 28, 2008.

CDCR reasons that such conduct as forms the basis for the discipline was not protected, and violated its conduct standards for employees, thus providing it a lawful basis for the discipline. Were its initial premise correct, that would be so. However, we have determined that the conduct forming the basis of the discipline is protected. Thus, there is no unprotected conduct to serve as a lawful basis for the discipline, and Guerra’s discipline is seen to arise from, and only from, her protected conduct. CDCR’s claims to the contrary must fail.

4. CDCR excepts to the ALJ's conclusion that CDCR violated the Dills Act section 3519(b). We deny the exception.

With the ALJ, we find that SEIU has established a violation of the Dills Act section 3519(b). We explain.

Where the same employer conduct concurrently violates more than one unfair practice provision, it is the duty of the Board to find more than one violation. (*San Francisco Community College District* (1979) PERB Decision No. 105.) CDCR issued a disciplinary LOI to SEIU steward Guerra because of her protected conduct while acting as an SEIU representative. CDCR thus violated the Dills Act section 3519(a) by retaliating against Guerra because of her exercise the right to participate in activities of an employee organization for the purpose of representation. The same conduct, disciplining an SEIU steward for her conduct while representing bargaining unit employees and SEIU members violated the Dills Act section 3519(b) by denying to SEIU its Dills Act right to represent bargaining unit employees in their employment relations.

CDCR relies on *State of California (Franchise Tax Board)* 1992 PERB Decision No. 954-S (*FTB*). We are not persuaded. *FTB* presented wholly different facts, in a wholly different setting. There, a union steward and her union brought numerous allegations of retaliation and interference under the Dills Act section 3519(a) and (b). All the Dills Act section 3519(a) violations, and fourteen (14) of thirty-seven (37) Section 3519(b) allegations were deferred to arbitration under the parties' contract and dismissed, leaving for resolution by PERB only twenty-three (23) alleged violations of Section 3519(b). The ALJ found the remaining allegations insufficient to make out a case of interference with or denial of the

union's rights, and dismissed these remaining alleged violations of Section 3519(b). The Board affirmed.

Here, by contrast, both the Dills Act section 3519(a) and (b) allegations were litigated together. Thus, having found a violation of the Section 3519(a), the ALJ appropriately concluded that the same conduct, to wit, disciplining a SEIU steward because of her activity as steward, violated Section 3519(b). We agree.

We view alleged violations of the Dills Act section 3519(b) on standards similar to those for interference under Section 3519(a). Thus, where a union establishes that an employer's conduct tends to or does result in some harm to the union's rights, and an employer offers justification based on operational necessity, we balance the claims. However, where an employer's conduct is inherently destructive of the union's rights, we will excuse the employer only upon proof that the employer's conduct was caused by outside forces beyond the employer's control, and that no alternative course was available. (*Carlsbad*; *Regents of the University of California, Lawrence Livermore National Laboratory* (1982) PERB Decision No. 212-H, at pp. 12-13 [*Carlsbad* analysis appropriate in assessing denial of union rights]; *Newark Unified School District* (1991) PERB Decision No. 864 [retaliatory transfer of union activist violated union's rights].)

Applying *Carlsbad*, we view CDCR's conduct here as inherently destructive of SEIU's rights. CDCR did not discipline Guerra for a work rule infraction unrelated to her job as steward. Rather, CDCR disciplined Guerra solely for conduct undertaken as a SEIU steward. Moreover, CDCR threatened Guerra with future exclusion from SEIU representational activity if she exceeded the limitations on her conduct prescribed by CDCR. CDCR thus sought to control the manner in which SEIU stewards represent bargaining unit employees in meetings

with CDCR supervisors and managers. Moreover, even if we deemed CDCR's conduct to result merely in some harm to SEIU's rights, we would reach the same result. CDCR's asserted operational necessity justification for its interference with SEIU's rights does not outweigh the harm to SEIU's rights worked by discipline of the SEIU steward because of her representational activity and the accompanying threat to exclude her from SEIU representational activity if she exceeded CDCR's prescribed limitations on her speech and conduct. Thus, with the ALJ, we conclude that CDCR's discipline of Guerra interfered with and denied to SEIU its Dills Act rights to represent bargaining unit employees.

5. CDCR excepts to the ALJ's proposed remedy insofar as it requires CDCR to "[r]escind, remove and destroy the Letter of Instruction issued to the job steward [Guerra] including removing it from her personnel file(s) and destroying all references thereto." We deny the exception.

With the ALJ, we conclude that the order is appropriate. CDCR contends that the LOI was placed in the file for a year only, that it has been removed, and thus that the removal order is unnecessary. While it may be true that the LOI has already been removed from Guerra's personnel file, we deem it unlikely that the LOI was either rescinded or destroyed, or that all references thereto were destroyed. And even if this were the case, we still would include this provision in our Order for other reasons. First, we require a posting of the full remedial order pursuant to paragraph B(2), so that employees may learn of PERB's remedial order. Second, we require that CDCR comply fully with the notification provisions in paragraph B(3), including, without limitation, notification of the actions taken to comply and service of such notification on SEIU.

PERB has broad authority under the Dills Act to remedy unfair practices. (Dills Act § 3514.5(c).) We conclude that the ALJ's proposed order falls well within the ambit of that authority.

CONCLUSION

We hold that by issuing to Guerra a LOI on October 28, 2008, imposing discipline for her protected representational activity on October 24, 2008, CDCR retaliated against Guerra because of her exercise of rights to participate in the activities of an employee organization, thereby violating the Dills Act section 3519(a). We hold that this conduct concurrently denied to SEIU, an employee organization, its rights to represent employees in their employment relations with the CDCR, thereby violating the Dills Act section 3519(b).

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, and pursuant to the Ralph C. Dills Act (Dills Act), Government Code section 3514.5(c), it is hereby ORDERED that the State of California (Department of Corrections and Rehabilitation) (CDCR) and its representatives shall:

A. CEASE AND DESIST FROM:

1. Retaliating against employees for engaging in protected conduct.
2. Denying Service Employees International Union, Local 1000 (SEIU) its

right to represent its bargaining unit members as guaranteed by the Dills Act.

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

1. Rescind, remove and destroy the Letter of Instruction issued to

Isabel Guerra, including removing it from her personnel file and destroying all references thereto.

2. Within ten (10) workdays of the service of a final decision in this matter, post at CDCR, California Correctional Institution work location(s) where notices to employees customarily are posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of CDCR, indicating that it will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced or covered with any other material.

3. Written notification of the actions taken to comply with this Order shall be made to the General Counsel of the Public Employment Relations Board, or the General Counsel's designee. CDCR or its representatives shall provide reports, in writing, as directed by the General Counsel or his/her designee. All reports regarding compliance with this Order shall be concurrently served on SEIU.

Chair Martinez joined in this Decision.

Member Dowdin Calvillo's concurrence begins on page 20.

DOWDIN CALVILLO, Member, concurring: I concur with the result reached by the majority in this case. Given the facts of this case involving the efforts of a union steward to engage in what State of California (Department of Corrections & Rehabilitation) (CDCR) acknowledges was representational activity and the minimal disruption that actually occurred, I agree that Isabel Guerra's conduct was not so egregious as to constitute conduct that is so "opprobrious, flagrant, insulting, defamatory, insubordinate, or fraught with malice" as to cause 'substantial disruption or material interference' with operations," as set forth in *State of California (Department of Corrections)* (2001) PERB Decision No. 1435-S and *Rancho Santiago Community College District* (1986) PERB Decision No. 602 (*Rancho Santiago*). This determination should not, however, be viewed as license for employees to use their protected activity as a shield from discipline for violating the employer's rules with impunity. Employers may lawfully discipline employees who violate employer rules even while engaged in protected activity. (See, e.g., *Konocti Unified School District* (1982) PERB Decision No. 217 (*Konocti*) [school district could lawfully discipline a bus driver for stopping bus without authorization to speak to students about an upcoming strike; while driver's comments may have been protected, the manner in which they were made was not]; *Los Angeles County Superior Court* (2008) PERB Decision No. 1979-C (*Los Angeles County Superior Court*) [union president could be disciplined for sending emails announcing union meetings in violation of employer's email and courtroom reservation policies]; see also *Carrier Corp.* (2000) 331 NLRB 126 [employer lawfully warned and suspended employee for interrupting meeting]; *Eagle-Picher Industries, Inc.* (2000) 331 NLRB 169, 170 [employer lawfully disciplined employee for interrupting during employer meeting seeking to dissuade employees from voting for union].)

In reaching this decision, I disagree with the majority that the cases cited above and at pages 9-11 of the majority opinion are not persuasive authority because they did not involve a union steward engaged in representational speech or action. Both *Konocti* and *Los Angeles County Superior Court* involved the conduct of union representatives. In *Konocti*, the bus driver, who encouraged students to boycott classes and for their parents to contact the school on behalf of striking employees, had been the president and chairman of the union's negotiating committee. *Los Angeles County Superior Court* involved the activities of the union president in utilizing the employer's email system to schedule union meetings. In both cases, the employees were clearly involved in representational activities that violated the employer's policies. I view these cases as persuasive authority that employees engaged in protected activities may still be disciplined for conduct that violates the employer's work rules.

Furthermore, I note that, while the conduct in this case was not so egregious to warrant loss of the protections under *Rancho Santiago*, such conduct was neither appropriate nor professional. Both employee and employer representatives are expected to maintain professional standards of behavior in the workplace.



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

After a hearing in Unfair Practice Case No. SA-CE-1795-S, *Service Employees International Union, Local 1000 v. State of California (Department of Corrections & Rehabilitation)*, in which all parties had the right to participate, it has been found that the State of California (Department of Corrections & Rehabilitation) violated the Ralph C. Dills Act (Dills Act), Government Code section 3512 et seq., by issuing a Letter of Instruction (LOI) to a job steward in retaliation of her exercise of protected activities under the Dills Act. As a result of this conduct, we have been ordered to post this Notice and we will:

A. CEASE AND DESIST FROM:

1. Retaliating against employees for engaging in protected conduct.
2. Denying Service Employees International Union, Local 1000 its right to represent its bargaining unit members as guaranteed by the Dills Act.

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

1. Rescind, remove and destroy the LOI issued to the job steward including removing it from her personnel file(s) and destroying all references thereto.

Dated: _____

STATE OF CALIFORNIA
(DEPARTMENT OF CORRECTIONS &
REHABILITATION)

By: _____
Authorized Agent

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

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD



SERVICE EMPLOYEES INTERNATIONAL
UNION, LOCAL 1000,

Charging Party,

v.

STATE OF CALIFORNIA (DEPARTMENT OF
CORRECTIONS & REHABILITATION),

Respondent.

UNFAIR PRACTICE
CASE NO. SA-CE-1795-S

PROPOSED DECISION
(4/14/2010)

Appearances: Daniel Luna, Attorney. for Service Employees International Union, Local 1000; State of California (Department of Personnel Administration) by David M. Villalba, Legal Counsel, and Nikki Mozdyniewicz, Labor Relations Counsel, for State of California (Department of Corrections & Rehabilitation).

Before Shawn P. Cloughesy, Administrative Law Judge.

PROCEDURAL HISTORY

This case alleges retaliation by a State of California (State) employer against a job steward by issuing her a Letter of Instruction. The employer denies committing any unfair practices.

On April 27, 2009, Service Employees International Union, Local 1000 (Local 1000) filed an unfair practice charge against the State of California (Department of Corrections & Rehabilitation) (CDCR). On April 30 and September 14, 2009, Local 1000 filed amended charges. On September 16, 2009, the Public Employment Relations Board (PERB or Board) Office of the General Counsel issued a notice of partial dismissal dismissing the charge that CDCR interfered with a Local 1000 job steward's right to represent its members pursuant to *NLRB v. J. Weingarten, Inc.* (1975) 420 U.S. 251 (*Weingarten*) by not allowing her to speak at two October 24, 2008, employer-employee meetings. Local 1000 did not appeal the partial

dismissal to the Board. On September 16, 2009, the PERB Office of the General Counsel also issued a complaint alleging that CDCR violated the Ralph C. Dills Act¹ (Dills Act) section 3519(a) and (b) by retaliating against Local 1000 job steward Isabel Guerra (Guerra) in issuing her a Letter of Instruction (LOI) on October 28, 2008.

On October 12, 2009, CDCR answered the complaint, denying any violations of the Dills Act. An informal settlement conference was conducted on October 20, 2009, but the case was not resolved.

On February 1 and 2, 2010, formal hearing was held. On the first day of hearing, Local 1000 requested that the dismissed *Weingarten* charges be amended into the complaint. Local 1000 admitted it had not filed an appeal of the notice of partial dismissal to the Board. The ALJ denied the proposed amendment.² Upon receipt of post-hearing briefs, the case was submitted for proposed decision on March 15, 2010.

FINDINGS OF FACT

Jurisdiction

CDCR is a State employer within the meaning of Dills Act section 3513(j). California Correctional Institution (CCI) is a State prison within CDCR. (Penal Code, §§ 2048 and 5003.) Local 1000 is a recognized employee organization within the meaning of Dills Act section 3513(b), and exclusively represents statewide Bargaining Unit 17 (Registered Nurses or RNs). Guerra is a State employee within the meaning of Dills Act section 3513(c).

¹ The Dills Act is codified at Government Code section 3512 and following.

² PERB Regulation 32635(a) allows a charging party to appeal the dismissal of a charge to the Board within 20 days of service of the dismissal. Local 1000's failure to appeal the partial dismissal precluded the matter from being raised at the hearing. (PERB regs. are codified at Cal. Code Regs., tit. 8, § 31001 et seq.)

Background

Dr. Willam Walsh is the CCI Health Care Manager responsible for inmate health care, including health care delivery by physicians, nurses, pharamacists and other medical support staff. Dana Buford (Buford) is the CCI Director of Nursing (DON) over approximately 135 nursing staff including RNs, Licensed Vocational Nurses, Psychiatric Technicians, and Certified Nursing Assistants. Supervising Registered Nurse II (SRN) Richard Hall (Hall) supervises nurses at the Level III facility. Before promoting to SRN, Hall was a Local 1000 job steward at California State Prison, Sacramento and CCI. CCI Local 1000 job stewards representing RNs are Ann Salzman (Salzman) and Guerra. RN Guerra has been a CCI Local 1000 job steward for six years. She has had no previous disciplinary or corrective action. She has been issued three Letters of Appreciation.

LOIs and Job Steward Representation

CCI issues LOIs to employees when a supervisor believes an employee has violated a procedural requirement of an employee's job or has behaved in such a manner that will not be tolerated. The LOI sets forth the employer's expectations and a corrective plan to meet those expectations. The LOI is placed in the employee's personnel file for a period of one year. When a supervisor issues an LOI to an employee, the supervisor meets with the employee "face-to-face" and reads the written document to the employee. Some supervisors discuss the contents of the LOI with the employee to ensure the employee understands why they received the LOI and what they are to do in the future. At the end of the discussion of the LOI, the employee may ask questions about the merits of it. The LOI is considered corrective action and is not an adverse action pursuant to Government Code section 19570 which can be

appealed to the State Personnel Board (SPB) for a hearing.³ The employee may file a written rebuttal which is attached to the LOI in the employee's personnel file and/or may file a grievance, which can result in a face-to-face grievance conference where the merits of the LOI are disputed.

The procedure followed by health care supervisors to issue LOIs to subordinates begin with the supervisor sending an e-mail to the California Prison Health Care Receivership Corporation (Receiver's Office), *Plata*⁴ Disciplinary Unit, which sets forth the facts of the incident/conduct. The Receiver's Office drafts the LOI and returns it to the supervisor. The supervisor receives approval from the DON and the Health Care Manager to issue the LOI, and schedules a meeting with the employee to present it.

The memorandum of understanding (MOU) between Local 1000 and the State between July 1, 2005 and June 30, 2008 for Bargaining Unit 17 does not include face-to-face discussions for LOIs as within Local 1000's scope of representation,⁵ however, CCI has a past

³ Government Code section 19570 provides:

As used in this article "adverse action" means dismissal, demotion, suspension, or other disciplinary action. . . .

Government Code sections 19576 and 19589 include "formal reprimand" or "letters of reprimand" when quantifying the level of penalty as an adverse action. These definitions of adverse action, however, do not bind PERB when making its determination of what constitutes an adverse action for purposes of determining a violation of the Dills Act.

⁴ *Marciano Plata, et al., v. Arnold Schwarzenegger, et al.* (N.D. Cal.) No. C 01-1351 TEH.

⁵ MOU section 2.1, Union Representatives, provides in part:

B. Scope of Representation

The State recognizes and agrees to deal with designated Union stewards, elected bargaining unit council representatives and/or Union staff on the following:

practice of allowing a job steward to be present at these meetings as an observer to support the employee. After the supervisor has concluded reading and discussing the LOI with the employee, the job steward is free to speak on the employee's behalf regarding its merits.

October 24, 2008 Meetings

1. Level III Medical Staff Meeting

On Friday, October 24, 2008, at 0730 hours, SRN Hall conducted his weekly meeting with Level III nursing staff. Ten to fifteen staff attended. Hall prepared an agenda for the meeting and distributed memos and information. The agenda specifically scheduled an "open forum" time for employees to ask questions or express concerns. At the end of the meeting, employees were also allowed to ask questions or express concerns.

During the staff meeting, RNs Michelle Adams (Adams) and Cynthia Marble (Marble) interrupted Hall during his presentation of the sick and vacation leave policy. Hall attempted to defer their comments or issues until later in the meeting, but was unsuccessful. Adams

-
1. The enforcement of this Contract;
 2. Employee discipline cases, including investigatory interviews of an employee who is the subject of a non-criminal investigation;
 3. Informal settlement conferences or formal hearings conducted by the [PERB];
 4. Matters scheduled for hearing by the Victims Compensation and Government Claims Board (VCGCB);
 5. Matters pending before the [SPB];
 6. Absence Without Leaves (AWOLs) and appeals to set aside resignations;
 7. Discussions with management regarding denials of reasonable accommodation;
 8. DPA statutory appeal hearings.

testified that during the meeting, Hall asked if she had a problem with him. Hall responded that they could step outside and handle it now. Adams also testified that SRN Hall cursed during the meeting.

Later that day, DON Buford contacted Adams and told her to come to the nursing office. Adams asked if she could bring a union representative, and Buford granted that request.⁶ Adams contacted Guerra who agreed to represent her. Adams suspected that Buford wanted to talk to her about the staff meeting that morning. Adams told Guerra about Hall's comments, and expressed her concern that Buford had only received Hall's version, which omitted his offensive comments. Adams asked Guerra whether she could meet with Buford alone, and Guerra replied that she would ask for her.

2. Discussion with Buford before Meeting with Adams

At approximately 1330 hours, Adams and Guerra met at the nursing office. The nursing office consists primarily of Buford's office, the SRN's office and the SRN annex. Inmates are not allowed in this area. The SRN annex is a former office/storage area which contains a six-foot table and x-ray files. Buford and the SRN's used the annex to privately meet with employee(s).

Guerra and Adams both approached Buford, and Guerra asked whether Adams could meet with Buford alone, and why Hall was involved. Buford replied that it was Hall's meeting, but Adams could meet with her privately after Hall's meeting. Hall approached the three of them, and accused Guerra of trying to exclude him from the meeting. Guerra held up her hand eight to ten feet from Hall and assertively replied, "I am not talking to you; I am

⁶ Buford never denied an employee's request for a representative.

talking to Dana [Buford].” Guerra finally stated to Hall, “if you don’t say anything, I won’t say anything.”⁷

All four went into the SRN annex and closed the door. It was disputed whether what followed was a fact-finding or investigatory interview, or a meeting where the LOI was merely recited and delivered to Adams. Adams and Guerra testified that the meeting was an investigatory interview where an LOI was not delivered, and Buford and Hall testified that the meeting only concerned the issuance of a LOI. Both Buford and Hall agreed that Guerra did not speak during the meeting.⁸

After this meeting was over, Adams and Buford stayed in the SRN annex to have a private meeting. Guerra stated to Adams, “Don’t forget to file your EEO complaint.”⁹ While Hall stated this was yelled loudly, Buford never heard the comment and Adams stated that it was only said as a reminder. Hall’s testimony that Guerra yelled loudly is therefore not credited as Buford, who was close to Adams, did not hear the comment.

3. Meeting with RN Bennett

RN Bennett and Guerra both work in Level II. At approximately 1445 hours, Bennett telephoned Guerra and informed her that SRN Hall called her to come to the nursing office to

⁷ Guerra believed that Buford would conduct the meeting.

⁸ While the parties seemed to place a great emphasis as to the characterization of the meeting, it was not relevant as the *Weingarten* charge had been dismissed and the LOI did not charge Guerra with wrongdoing during this meeting, but rather with what she said before and after the meeting. The October 28, 2008 LOI does not specifically mention that the October 24, 2008 meeting with Adams related to issuing her an LOI. It specifically mentioned issuing RN Hollis Bennett (Bennett) an LOI.

⁹ Adams later filed a workplace violence complaint with the Equal Employment Opportunity (EEO) coordinator due to Hall telling her that if she had a problem with her, they could step outside and handle it now.

meet. Bennett requested that Guerra come with her to represent her. Guerra agreed to stay after her shift to represent Bennett.¹⁰

Guerra and Bennett met Buford and Hall at the nursing office. Buford told Guerra that she was not needed and Buford could not pay her overtime. Guerra responded that Bennett was a friend, and she was representing Bennett on her “own time.” All four proceeded to the SRN annex, closed the door, and sat at the table. Guerra sat at the opposite corner of the table, diagonally, from Hall.

Before Hall began reading the LOI to Bennett, he told Guerra that she was there as an observer to support the employee. Hall began reading the LOI to Bennett. At a point during the reading, Hall paused, and Guerra asked whether she could ask a question. Hall loudly replied that she could not, as she was there as an observer and not a participant. Hall resumed reading the LOI. At another point, Guerra thought Hall had finished and asked him whether he had verbally counseled Bennett before issuing her a LOI. Hall again told Guerra that she was an observer and could not interject herself during the meeting. Guerra then asked Buford why she could not speak. Again, Hall asserted that she could not interject, and she was being rude and insubordinate. Guerra put her hand up toward Hall and stated that she was talking to Buford and not to him.¹¹ Hall’s recollection included Guerra again asking why the action taken against Bennett was not a verbal counseling, and explaining that the matter had already been reviewed and approved. Guerra again raised her hand, and stated she was talking to Buford not Hall. None of the other witnesses, including Buford, corroborated this second

¹⁰ Guerra’s shift ends at 1500 hours.

¹¹ Hall testified that Guerra’s hand was two to three feet away from his face, but since Hall sat diagonally across from Guerra at a six-foot table, her hand had to be four to five feet away. Bennett did not see Guerra put her hand in Hall’s face. Guerra did not testify that she lifted her hand during the meeting.

occurrence in the Bennett interview where Guerra raised her hand and told Hall she was talking to Buford. Therefore Hall's testimony about Guerra raising her hand a second time and follow-up comments is not credited. The meeting concluded with Bennett being served with the LOI. The meeting lasted 10 to 15 minutes.

After the meeting, Guerra approached Buford and asked whether she did anything inappropriate. Guerra and Bennett testified that Buford replied that Guerra was "okay." Buford testified that she did not state Guerra's conduct was okay, but shook her head in disbelief that Guerra asked this question.

October 28, 2008 LOI

On October 28, 2008, Hall issued Guerra an LOI which stated in pertinent part:

This Letter of Instruction (LOI) is a record of discussion between you and me regarding an area of your job performance in need of improvement. This letter is documentation of a specific problem area and sets forth specific measures for addressing the problem in an effort to resolve it.

On October 24, 2008, you were insubordinate, discourteous, unprofessional, and disrespectful to me during two meetings involving employee discipline where you were acting as a representative. Specifically, in the first meeting at approximately 0930 [hours,] RN Adams was called to the nursing office to have a meeting with myself and the Director of Nursing (DON) D. [Buford] regarding her conduct in a meeting earlier that day. When you arrived at the meeting with RN Adams you attempted to have me removed from my own meeting and meet with the DON without me. You stated in general, "Can we just meet with Dana." I told you "No." You then raised your hand towards me and stated in a threatening and loud voice, "Stop! I am not talking to you. I am talking to Dana." Ms. [Buford] also told you no to meeting without my presence. At that time[,] you appeared to be upset and you then began to talk fast and raise your voice. You asked if RN Adams could speak to Ms. [Buford] alone. You were then told that RN Adams could meet with the DON alone after the meeting. When the meeting was over as you were departing you yelled out in a threatening tone, "Don't forget to file your EEO complaint!" This conduct is unacceptable and will not be tolerated.

Furthermore, at approximately 1530 [hours,] you came to another meeting with RN Bennett acting as her representative. Before the meeting began[,] Ms. [Buford] reminded you that you were there as an observer and that you were not to interject during the meeting. As I was attempting to serve RN Bennett an LOI[,] you asked to interject and I told you “No.” You then stated, “I am not allowed to speak?” and I reminded you of your rol[e] during the meeting. At that point[,] I began to read the content of the LOI when you rudely interrupted me again asking why this employee action was not a verbal counseling. I had to again remind you of your rol[e] in the meeting for the third time, and you again raised your hand towards my face signaling me to be quiet and stated in a loud voice, “I am not talking to you. I am talking to Dana.” You then inappropriately interjected even though you were told that you did not have that right. You asked, “Why is this not a verbal counseling?” At that time[,] I told you that the authorization and approval for the LOI had gone through the proper approval process and was deemed to be appropriate. You then raised your hand towards my face again signaling me to be quiet and said in a loud voice, “I am not talking to you. I am talking to Dana.”

At that time[,] Ms. [Buford] told you that you did not have the authority to question employee discipline actions and that RN Bennett could write a rebuttal to the LOI. This conduct is unacceptable and will not be tolerated.

Your actions are in violation [of] Government Code section 19572 as follows:

- (e) Insubordination;
- (m) Discourteous treatment of the public or other employees; and
- (o) Willful disobedience.

Your actions further violated the following policies:

- CDCR DOM Section 33030.3.2[,] General Qualifications;
- CDCR DOM Section 33030.3.1[,] Code of Conduct;
- California Code of Regulations (CCR)[,] Title 15[,] Section 3391[,] Employee Conduct.

Your conduct on this occasion was undermining of authority, insubordinate, discourteous, willfully disobedient, and unprofessional. Your conduct was unacceptable and will not be tolerated by this department. If you engage in similar conduct in the future, the department will take adverse action against you based on the incidents cited in this memorandum, as well as any future incidents.

Ms. Guerra, I am hereby instructing you to be courteous and professional at all times during meetings with supervisors. You will not raise your voice. You will not signal or indicate for a supervisor to be quiet in any fashion to include raising your hand toward their face. As an employee representative in meetings regarding employee corrective action[,] you will be an observer and you are not to interject unless given permission to do so. You will not be disrespectful to supervisors and you will follow directions given to you by supervisors. If you act in this way during a meeting[,] you will be asked to leave and another representative will be located. Furthermore[,] i[f] you engage in this conduct again[,] you will be excluded from future meetings.

* * *

A copy of this LOI will remain in your personnel file for a period of one (1) year. On October 28, 2009, upon your written request to the Director of Nursing, this letter will be removed from your personnel file and given to you, unless you request it to be destroyed.

(Emphasis added.)

The LOI was signed by Hall and approved by the acting Healthcare Manager.

Buford and Hall testified that they have issued LOIs to other non-job steward employees who have been disrespectful to them at meetings, including Adams and Marble.

Buford and Hall testified they were holding Guerra accountable for violations of DOM

sections 33030.3.1 and 33030.3.2¹² and California Code of Regulations, title 15, section 3391¹³

as they did with other employees, and her job steward status did not excuse her from this

¹² DOM sections 33030.3.1 and 33030.3.2 provide:

33030.3.1 Code of Conduct

As employees and appointees of the Department, we are expected to perform our duties, at all times, as follows:

- Demonstrate professionalism, honesty, and integrity;
- Accept responsibility for our actions and their consequences;
- Appreciate differences in people, their ideas, and opinions;
- Treat fellow employees, inmates, wards, parolees, victims, their families, and the public with dignity and respect;
- Respect the rights of others and treat them fairly regardless of race, color, national origin, ancestry, gender, religion, marital status, age, disability, medical condition, pregnancy, sexual orientation, veteran status, or political affiliation;
- Comply with all applicable laws and regulations;
- Report misconduct or any unethical or illegal activity and cooperate fully with any investigation.

33030.3.2 General Qualifications

All employees are subject to the requirements as specified in the California Code of Regulations (CCR), Title 2, Section 172, General Qualifications, which states, in pertinent part, the following:

All candidates for, appointees to, and employees in the state civil service shall possess the general qualifications of integrity, honesty, sobriety, dependability, industry, thoroughness, accuracy, good judgment, initiative, resourcefulness, courtesy, ability to work cooperatively with others, willingness and ability to assume the responsibilities and to conform to the conditions of work characteristic of the employment, and a state of health, consistent with the ability to perform the assigned duties of the class.

(Italics in original.)

¹³ California Code of Regulations, title 15, section 3391(a) provides:

Employees shall be alert, courteous, and professional in their dealings with inmates, parolees, fellow employees, visitors and

obligation. Hall stated Guerra was his subordinate and must comply with his orders during a meeting, as it was his meeting and was conducive to good order.

After receiving the October 28, 2008 LOI, Guerra did not file any grievances until six months had passed. The grievance log showed Guerra filed only three grievances before October 28, 2008. Guerra did not attend monthly Joint Labor-Management meetings for a limited period of time. CCI Employee Relations Officer John Beckett testified that Guerra stopped attending monthly Joint Labor-Management meetings in early Spring 2008 to mid-Winter 2009 because Guerra and Salzman did not believe their issues were being heard.

On March 29, 2009, SRN II Adams issued Guerra a Letter of Appreciation for her thorough documentation of emergency response cases.

As of the hearing, the LOI had been removed from Guerra's official personnel file.

ISSUE

Did CDCR retaliate against Guerra for protected activity by issuing her the LOI?

CONCLUSIONS OF LAW

To demonstrate a prima facie case that CDCR retaliated against an employee in violation of Government Code section 3519(a), Local 1000 must show that: (1) Guerra exercised rights under the Dills Act; (2) CDCR had knowledge of the exercise of those rights; (3) CDCR took adverse action against Guerra; and (4) CDCR took the adverse action because of the exercise of those rights. (*Novato Unified School District (1982) PERB Decision*

members of the public. . . . Employees shall not use indecent, abusive, profane, or otherwise improper language while on duty. Irresponsible or unethical conduct or conduct reflecting discredit on themselves or the department, either on or off duty, shall be avoided by all employees.

(Emphasis added.)

No. 210 (*Novato*); *Campbell Municipal Employees Assn. v. City of Campbell* (1982) 131 Cal.App.3d 416; *San Leandro Police Officers Assn. v. City of San Leandro* (1976) 55 Cal.App.3d 553.) Once Local 1000 has established a prima facie case of retaliation, the burden shifts to CDCR to show that it would have taken the adverse action even in the absence of her protected activities. (*Novato*; *Wright Line, Inc.* (1980) 251 NLRB 1083.)

Protected Activities and Knowledge of Protected Activities

Dills Act section 3515 provides in pertinent part:

[S]tate 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. . . .

CDCR admits that Guerra was acting as an employee representative on October 24, 2008. It contends that Guerra's conduct at the meeting lost its protected status because Guerra must be held to the same standard as a subordinate employee for discourteousness and insubordination. When an employee occupies the role of a job steward, her conduct is not measured by the same standard as that of a subordinate employee. It is well settled that an employee representative's conduct loses its statutory protection only where that conduct is so "opprobrious, flagrant, insulting, defamatory, insubordinate, or fraught with malice" that it causes "substantial disruption of or material interference" with operations. (*Rancho Santiago Community College District* (1986) PERB Decision No. 602, p. 13.) "[A]n employee's right to engage in protected conduct permits some leeway for impulsive behavior, which must be balanced against the employer's right to maintain order and respect." (*State of California (Department of Corrections)* (2001) PERB Decision No. 1435-S, adopting the proposed decision, p. 37, citing *Rio Hondo Community College District* (1982) PERB Decision No. 260, p. 12 (*Rio Hondo*); and *NLRB v. Thor Power Tool Co.* (1965) 351 F.2d 584, p. 585.)

Additionally, an employee's speech may lose its protected status if it "is so disrespectful of the employer as seriously to impair the maintenance of discipline." (*Rio Hondo, supra*, PERB Decision No. 260, p. 12, citing *NLRB v. Blue Bell, Inc.* (1955) 219 F.2d 796, 797.)

Guerra's conduct did not meet these standards so as to lose its protected status. During the first incident with Buford and Hall, Guerra was acting as Adams' representative in attempting to secure a private meeting with Buford without Hall. While Guerra was trying to omit Hall, her request was not rude or insubordinate, but was an attempt to appeal to the supervisor so that Adams' version of the story could be heard. When Hall learned of Guerra's request, he was offended and inserted himself in the conversation. Guerra redirected the conversation back to Buford, and raised her hand at a safe distance from Hall to accomplish this. Guerra also reminded Adams to file an EEO complaint. Guerra's conduct at most was aggressive and pointed, but was not "opprobrious" or "so disrespectful of the employer as seriously to impair the maintenance of discipline," especially when the conversation took place without any observers. Guerra's actions and/or comments did not lose their protected status during this incident.

During the second incident, Guerra interrupted the reading of a LOI to ask if she could ask a question; asked a question as to the merits of the LOI when she thought Hall had finished reading it; asked Buford why she could not speak; and held up her hand toward Hall and redirected the question to Buford for an answer. While Guerra was aggressive and forceful in her representation of Bennett, her conduct took place behind closed doors and was not so "opprobrious, flagrant, insulting, defamatory, insubordinate, or fraught with malice" as to cause "substantial disruption of or material interference" with operations. The incident was not malicious, and the LOI meeting, including these brief interruptions, was completed in a

short period of time. Guerra's conduct during the second meeting did not lose its protected status. (*Rancho Santiago Community College District, supra*, PERB Decision No. 602, p. 13.)

It is undisputed that Hall and Buford were aware of Guerra's protected activities as they were present at both meeting(s). Thus, Local 1000 has demonstrated that CDCR had knowledge of Guerra's protected activities.

Adverse Action

A corrective memorandum threatening future disciplinary action and its placement in an employee personnel file constitutes an adverse action. (*City of Long Beach (2008) PERB Decision No. 1977-M; Los Angeles Unified School District (2007) PERB Decision No. 1930; and Alisal Union Elementary School District (2000) PERB Decision No. 1412.*) The October 28, 2008 LOI contained both aspects. Thus, the October 28, 2008 LOI constituted an adverse action.

Nexus between Protected Activities and Adverse Action

Guerra's conduct at the October 24, 2008 meeting(s) did not lose its protected status. Guerra's responses were aggressive, direct, and firm, but not so opprobrious, flagrant, insulting, defamatory, insubordinate, or fraught with malice as to cause substantial disruption or material interference with operations. The LOI specifically stated that it was issued to Guerra while acting as an employee representative. While the LOI asserts that Guerra's conduct was "insubordinate, discourteous, unprofessional, and disrespectful," which violated the same departmental standards to which it held other employees, the Dills Act and PERB precedent has a different standard for employees who are acting in their capacity as an employee representative. The LOI was taken because of Guerra's protected activity; specifically her questions and comments during the October 24 representation of Adams and Bennett. Thus, Local 1000 has demonstrated a prima facie case of retaliation.

“But For” Test

Once Local 1000 has established a prima facie case of retaliation, the burden shifts to CDCR to show that it would have taken the adverse action even in the absence of Guerra’s protected activities. (*Novato; Wright Line, Inc.* (1980) 251 NLRB 1083.) Respondent contends that it would have issued the October 28, 2008 LOI to Guerra because she was insubordinate, discourteous, unprofessional, and disrespectful on October 24 as an employee representative. This argument merely repeats the contentions made earlier about protected activities which has been rejected. Thus, CDCR has failed to establish that it would have taken the adverse action even in the absence of Guerra’s protected activities.

REMEDY

Pursuant to Dills Act section 3514.5(c), PERB is given the authority to:

[I]ssue 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 reinstatement of employees with or without back pay, as will effectuate the policies of this chapter.

It has been found that CDCR retaliated against Guerra for engaging in protected activities during her representation of Adams and Bennett on October 24, 2008, by issuing her a LOI on October 28, 2008. By this conduct, CDCR violated Dills Act section 3519(a) and, derivatively, section 3519(b). It is appropriate to order CDCR to cease and desist from such conduct, and withdraw the LOI from Guerra’s personnel file(s) and destroy all references thereto. (*State of California (Department of Corrections)*, *supra*, PERB Decision No. 1435-S.)

Local 1000 requested that PERB direct CDCR to provide training to its supervisors/managers regarding the rights and role of job stewards, and Local 1000 be involved in that training. Although PERB’s remedial powers are broad and it can take actions which will effectuate the policies of the Dills Act (Gov. Code, § 3514.5(c)), to specifically

order that CDCR provide joint training with Local 1000 would create more compliance issues than the proposed remedy would provide. Rather, CDCR will be responsible to comply with the cease and desist order. Thus, the request for PERB mandated training is denied.

Local 1000 requested an award of litigation costs. To obtain litigation costs, Local 1000 must demonstrate that CDCR's defense was "without arguable merit" and pursued in "bad faith." (*City of Alhambra* (2009) PERB Decision No. 2036-M, p. 19.) The record lacks evidence that CDCR pursued its defense in bad faith. Litigation costs are therefore denied.

Finally, it is appropriate that CDCR be required to post a notice incorporating the terms of the Order at CCI. The Notice should be subscribed by an authorized agent of CDCR, indicating that it will comply with the terms thereof. The Notice shall not be reduced in size and reasonable effort will be taken to insure that it is not altered, covered by any material or defaced and will be replaced if necessary. Posting such a notice will inform employees that CDCR has acted in an unlawful manner, and 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 dispute, and CDCR's readiness to comply with the ordered remedy. (*State of California (Department of Personnel Administration, et al.)* (1998) PERB Decision No. 1279-S.)

PROPOSED ORDER

Based upon the foregoing findings of fact and conclusions of law and the entire record in this case, and pursuant to the Ralph C. Dills Act (Dills Act), Government Code section 3514.5(c), it is hereby ordered that the State of California (Department of Corrections & Rehabilitation) (CDCR) and its representatives shall:

A. CEASE AND DESIST FROM:

1. Retaliating against employees for engaging in protected conduct.
2. Denying Service Employees International Union, Local 1000 (Local 1000)

its right to represent its bargaining unit members as guaranteed by the Dills Act.

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

1. Rescind, remove and destroy the Letter of Instruction issued to Isabel Guerra, including removing it from her personnel file and destroying all references thereto.
2. Within ten (10) workdays of the service of a final decision in this matter, post at CDCR, California Correctional Institution work location(s) where notices to employees customarily are posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the CDCR, indicating that it will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced or covered with any other material.
3. Written notification of the actions taken to comply with this Order shall be made to the General Counsel of the Public Employment Relations Board (PERB or Board), or the General Counsel's designee. CDCR or its representatives shall provide reports, in writing, as directed by the General Counsel or his/her designee. All reports regarding compliance with this Order shall be concurrently served on Local 1000.

Pursuant to California Code of Regulations, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the Board itself within 20 days of service of this Decision. The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95811-4124
(916) 322-8231
FAX: (916) 327-7960

In accordance with PERB regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. (Cal. Code Regs., tit. 8, § 32300.)

A document is considered “filed” when actually received during a regular PERB business day. (Cal. Code Regs., tit. 8, §§ 32135, subd. (a) and 32130; see also Gov. Code, § 11020, subd. (a).) A document is also considered “filed” when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet which meets the requirements of California Code of Regulations, title 8, section 32135, subdivision (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, § 32135, subds. (b), (c) and (d); see also Cal. Code Regs., tit. 8, §§ 32090 and 32130.)

Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, §§ 32300, 32305, 32140, and 32135, subd. (c).)

Shawn Cloughesy
Administrative Law Judge