STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA CORRECTIONAL PEACE OFFICERS' ASSOCIATION, Charging Party, v. STATE OF CALIFORNIA (DEPARTMENT OF PERSONNEL ADMINISTRATION), Respondent.	Case No. SA-CE-1636-S PERB Decision No. 2106a-S March 1, 2011

Appearances: Carroll, Burdick & McDonough by Gregg McLean Adam and Erick V. Munoz, Attorneys, for California Correctional Peace Officers' Association; Christopher E. Thomas, Labor Relations Counsel, for State of California (Department of Personnel Administration).

Before Dowdin Calvillo, Chair; McKeag and Wesley, Members.

DECISION

WESLEY, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the California Correctional Peace Officers' Association (CCPOA) of a Board agent's dismissal of its unfair practice charge. The charge alleged that the State of California (Department of Personnel Administration) (DPA or State) violated the Ralph C. Dills Act (Dills Act)[1] by interfering with and discriminating against union members when it provided enhanced dental benefits at a reduced cost to non-union members.[2] CCPOA alleged that this conduct constituted a violation of Dills Act section 3519(a). The Board agent dismissed the charge for failing to state a prima facie case of discrimination or interference.

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

[2] CCPOA withdrew a unilateral change allegation during the investigation of the charge.

The Board reviewed the dismissal and the record in light of CCPOA's appeal, DPA's response to the appeal and the relevant law. Based on this review, the Board reverses the dismissal of the unfair practice charge.

PROCEDURAL HISTORY

CCPOA filed the instant unfair practice charge on December 7, 2007. The charge, as amended, alleged that the State violated Dills Act section 3519(a) by providing enhanced dental benefits to non-members at a lower cost than that paid by CCPOA members. The Board agent found that the allegations failed to establish a prima facie case under either a discrimination or interference theory and dismissed the charge.

CCPOA appealed the dismissal to the Board. On April 30, 2010, the Board issued *State of California (Department of Personnel Administration)* (2010) PERB Decision No. 2106-S. In that decision, the Board affirmed the dismissal of the discrimination allegation but found the charge established a prima facie case of interference. The Board remanded the case to the Office of the General Counsel for issuance of a complaint on the interference allegation.

On May 28, 2010, CCPOA filed a petition for writ of mandate in Alameda Superior Court, seeking to compel PERB to issue a complaint on the discrimination allegation in its charge based on *Campbell Municipal Employees Assn. v. City of Campbell* (1982) 131 Cal.App.3d 416 (*Campbell*). On September 27, 2010, the superior court granted CCPOA's petition and ordered PERB to issue a complaint on the discrimination allegation. As part of PERB's compliance with that order, the Board hereby vacates *State of California (Department of Personnel Administration)*, *supra,* PERB Decision No. 2106-S and replaces it with this decision.

BACKGROUND

CCPOA is the exclusive representative of the employees in State Bargaining Unit 6. CCPOA and the State are parties to an expired memorandum of understanding (MOU) with a term of July 1, 2001 through July 2, 2006. For many years, CCPOA and the State agreed that the CCPOA Benefit Trust Fund would provide certain benefits to Unit 6 members, including dental and vision benefits.[3] Article 13.02 of the MOU required the State "to provide CCPOA the net sum of $44.33 per month per eligible employee for the duration of this agreement to provide a dental benefit through the CCPOA Benefit Trust Fund."

Prior to expiration of the MOU, CCPOA and the State initiated negotiations for a successor agreement. Negotiations eventually stalled and the parties participated in impasse procedures with a mediator. On September 6, 2007, the mediator confirmed that CCPOA had withdrawn from mediation. On September 18, 2007, DPA notified CCPOA that the State was implementing its last, best and final offer (LBFO).

The LBFO "rolled-over" numerous provisions of the expired MOU, including Article 13.02. Pursuant to this article, the State continued to provide funding to CCPOA to provide Unit 6 employees with a dental benefit through the Benefit Trust Fund.

On October 29, 2007, the Benefit Trust Fund administrator sent a letter to the State Controller's Office (SCO) requesting that the SCO stop collecting and remitting to the Benefit Trust Fund the dental and vision benefit contributions from non-union member employees. The letter further stated:

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[3] The CCPOA Benefit Trust Fund is an independent corporation established by CCPOA and maintained in accordance with the terms of the federal Employee Retirement Income Security Act of 1974 (ERISA). Three trustees are selected by CCPOA members and two trustees are appointed by the CCPOA president. In addition, the CCPOA president and the treasurer are ex-officio trustees. The Benefit Trust Fund defines a "Participant" as "a person who is or was a member of CCPOA or Bargaining Unit No. 6 or who may become eligible for benefits under the Plan or who otherwise qualifies as a participant under ERISA."

> As such, it will be the responsibility of the DPA to arrange for these benefits to be provided to the impacted employees through another source.

On October 31, 2007, in a letter to the Department of Corrections and Rehabilitation, the Benefit Trust Fund administrator stated:

> [E]ffective November 1, 2007, the CCPOA Benefit Trust Fund ("Trust Fund") is no longer able to provide former fair share members with dental and vision benefits through the CCPOA Dental and Vision Plans. Therefore, it is absolutely necessary that notice be provided to these individuals immediately to inform them of this change and advise them to immediately contact their State Personnel Offices to enroll in another State of California vision and dental plan.

In a letter dated November 5, 2007, DPA notified non-union member employees that the Benefit Trust Fund had terminated their dental and vision benefits effective October 31, 2007. Non-union members were told they would automatically be enrolled in the state-sponsored vision plan. DPA also invited non-union members to enroll in one of several existing state-sponsored dental plans that were offered to other state employees. As a result, while the State's contribution toward a union member's dental benefit remains at $44.33 per month, the State's contribution for non-union members can, according to the charge, be as much as $93.75 per month. After enrolling in a state-sponsored dental plan, non-union members with two dependents pay $30.94 per month toward their dental benefit premiums, while CCPOA members with two dependents pay a dental premium of $41.80 per month. DPA did not offer the lower cost dental plan to union members.

DISCUSSION

This case presents an opportunity for the Board to clarify PERB's interference and discrimination standards. Before doing so, however, it is instructive to examine the

interference and discrimination standards under the National Labor Relations Act (NLRA),[4] as well as California courts' application of those standards in cases arising under the Meyers-Milias-Brown Act (MMBA).[5]

1. Interference and Discrimination Under the NLRA

Section 7 of the NLRA provides, in relevant part:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

Under section 8(a)(1) of the NLRA, it is an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section [7]." To establish interference, the NLRB's general counsel must prove that: (1) employees engaged in protected activity; (2) the employer's conduct tends to interfere with, restrain, or coerce employees in the exercise of those activities; and (3) the employer's conduct was not justified by legitimate business reasons. (*Fun Striders, Inc. v. NLRB* (9th Cir. 1981) 686 F.2d 659, 661-662.) The general counsel need not prove that the employer acted with unlawful intent or motive. (*American Freightways Co.* (1959) 124 NLRB 146, 147.)

Under NLRA section 8(a)(3), it is an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." The majority

[4] The NLRA is codified at 29 U.S.C. section 151 et seq. Although it is not bound by decisions of the National Labor Relations Board (NLRB), the Board will take cognizance of NLRB precedent, where appropriate, as an aid in interpreting identical or analogous provisions in the statutes PERB administers. (*Carlsbad Unified School District* (1979) PERB Decision No. 89 (*Carlsbad*).)

[5] The MMBA is codified at Section 3500 et seq. Although PERB must follow judicial interpretations of the MMBA in unfair practice cases arising under that statute (MMBA, § 3509, subd. (b)), it is not bound by those interpretations in cases arising under the other statutes it administers, including the Dills Act.

of section 8(a)(3) cases are decided under the framework set out by the NLRB in *Wright Line* (1980) 251 NLRB 1083 (*Wright Line*). The object of the *Wright Line* analysis is to determine whether the employer took an adverse action against an employee because of the employee's protected activity. (*Id.* at p. 1089.) To establish a prima facie case of discrimination under *Wright Line*, the general counsel must prove that the employee's protected activity was a motivating factor in the employer's decision to take the adverse action. (*Ibid.*) Once a prima facie case is established, the employer bears the burden of demonstrating that it would have taken the same action in the absence of the employee's protected activity. (*Ibid.*) Thus, under the *Wright Line* discrimination standard, the general counsel must prove that the employer acted with unlawful intent or motive. (*NLRB v. Transportation Management Corp.* (1983) 462 U.S. 393, 401.)

Not all section 8(a)(3) cases, however, require the general counsel to establish the employer's unlawful motive. In *NLRB v. Great Dane Trailers* (1967) 388 U.S. 26 (*Great Dane*), the U.S. Supreme Court set out a two-part standard for determining discrimination in violation of section 8(a)(3):

> First, if it can reasonably be concluded that the employer's discriminatory conduct was 'inherently destructive' of important employee rights, no proof of an antiunion motivation is needed and the Board can find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by business considerations. Second, if the adverse effect of the discriminatory conduct on employee rights is 'comparatively slight,' an antiunion motivation must be proved to sustain the charge *if* the employer has come forward with evidence of legitimate and substantial business justifications for the conduct. Thus, in either situation, once it has been proved that the employer engaged in discriminatory conduct which could have adversely affected employee rights to *some* extent, the burden is upon the employer to establish that he was motivated by legitimate objectives since proof of motivation is most accessible to him.

(*Id.* at p. 34; emphasis in original.)

The Court did not require the general counsel to establish the employer's unlawful motive in "inherently destructive" conduct cases, finding that such conduct in itself demonstrates the employer's unlawful motive. (*Great Dane.*) In a subsequent decision, the Court emphasized that, even in "inherently destructive" conduct cases, the NLRB must weigh the effect of the employer's conduct on employee rights against the employer's business justifications to determine whether an unfair labor practice has been committed. (*Metropolitan Edison Co. v. NLRB* (1983) 460 U.S. 693, 703.)

The *Great Dane* discrimination standard applies when the employer has treated groups of employees differently based on their participation in protected activity. (*National Fabricators v. NLRB* (5th Cir. 1990) 903 F.2d 396 [employer selected for layoff those employees likely to engage in picketing]; *Northeast Constructors* (1972) 198 NLRB 846 [employer refused to rehire laid off employees who had previously served as union stewards].) However, because the *Great Dane* standard is nearly identical to the NLRB's interference standard, it is difficult to discern what circumstances trigger the application of one standard or the other. Often the NLRB applies the *Great Dane* standard to both 8(a)(3) and 8(a)(1) allegations based on the same facts. (E.g., *Peerless Pump Co.* (2005) 345 NLRB 371; *H.B. Zachry Co.* (1995) 319 NLRB 967.) On the other hand, the NLRB has used the *Great Dane* standard to find 8(a)(1) violations in cases where the conduct at issue was not alleged to also violate section 8(a)(3). (E.g., *Mainline Contracting Corp.* (2001) 334 NLRB 922; *Matador Lines, Inc.* (1997) 323 NLRB 189.) In both types of cases, the same result would have occurred had the NLRB simply applied its interference standard. Thus, the *Great Dane* discrimination standard and the interference standard appear to be interchangeable in practice.

2. Interference and Discrimination Under the MMBA

MMBA section 3502 provides that "public 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." Section 3506 makes it unlawful for public agencies and employee organizations to "interfere with, intimidate, restrain, coerce or discriminate against public employees because of their exercise of their rights under Section 3502."

Only a handful of court decisions have addressed discrimination and interference under MMBA section 3506. In the earliest of these, *San Leandro Police Officers Assn. v. City of San Leandro* (1976) 55 Cal.App.3d 553 (*San Leandro*), the city created a deferred compensation plan that would give a benefit equal to three percent of base salary to all management employees except those who were members of the police and firefighters unions. (*Id.* at p. 556.) The court held this differential treatment constituted discrimination and interference in violation of Section 3506. (*Id.* at p. 558.) The court reached this conclusion with minimal analysis and no citations to authority other than the statute. (*Id.* at pp. 557-558.)

In *Campbell*, the association and the city agreed during bargaining that all negotiated increases in salary and medical insurance premium contributions would be paid retroactive to October 1, 1978, the same retroactive date agreed upon by all other city employee unions. (*Id.* at p. 419.) The association and the city reached impasse over two other issues. (*Ibid.*) In the final step of the mandated impasse procedures, the city council ruled in favor of the city on the two disputed issues; it also made the increases retroactive to February 1, 1979 instead of October 1, 1978. (*Id.* at p. 420.) As a result, employees represented by the association received three fewer months of the salary and premium contribution increases than other represented city employees.

Looking to federal precedent, the court adopted and applied the *Great Dane* standard. (*Id.* at pp. 423-424.) Like the U.S. Supreme Court in *Great Dane*, the court of appeal concluded that it need not determine the level of harm to employee rights because the city offered no justification for its conduct other than to reward those unions that did not utilize the impasse procedures. (*Id.* at p. 424.) The court thus held, citing *San Leandro*, that the city discriminated against employees represented by the association in violation of Section 3506. (*Ibid.*) In so holding, the court did not make a finding that the city's actions were unlawfully motivated.

Los Angeles County Employees Assn. v. County of Los Angeles (1985) 168 Cal.App.3d 683 (*Los Angeles County*), involved similar facts. The county reached a tentative agreement on health insurance contributions with a coalition of unions representing its employees. (*Id.* at p. 685.) The county board of supervisors then passed an ordinance approving the increase only for those unions that had reached agreement with the county in wage negotiations. (*Ibid.*) The court, relying on *Campbell* and *San Leandro*, held that the differential treatment constituted discrimination prohibited by Section 3506 because the purpose of the ordinance was to reward those unions that had reached agreement with the county on wages. (*Id.* at pp. 688-689.) As in *Campbell*, the court did not find that the county's actions were unlawfully motivated.

Public Employees Association of Tulare County, Inc. v. Board of Supervisors of Tulare County (1985) 167 Cal.App.3d 797 (*Tulare County*), is the only published case to address interference under Section 3506. In that case, the employer proposed to pay the full amount of a lump sum salary payment if the parties reached agreement on a successor MOU by a certain date. (*Id.* at p. 802.) At the conclusion of the applicable impasse procedures, the board of supervisors adopted the county's last offer, but reduced the amount of the lump sum payment

to reflect the two pay periods that had passed since the proposed agreement date. (*Id.* at p. 803.) Applying a standard identical to the NLRB's 8(a)(1) interference test,[6] the court held that the county's reduction of the lump sum payment did not interfere with the union's right to invoke and participate in the impasse procedures. (*Id.* at pp. 806-807.)

It is clear from the above cases that the courts have applied the nearly identical 8(a)(3) *Great Dane* discrimination standard and 8(a)(1) interference standard under the MMBA. Indeed, even though the courts in *San Leandro*, *Campbell*, and *Los Angeles County* labeled the employer's unlawful conduct "discrimination," each analyzed the conduct under a test identical to the interference standard, i.e., whether the employer's conduct harmed or impeded employee rights and was not justified by reasons that outweighed the harm. Thus, the interference and discrimination standards under the MMBA mirror those under the NLRA.[7]

3. PERB's Interference and Discrimination Standards

In its early decisions, PERB also looked to NLRB precedent for guidance in formulating a standard for interference and discrimination under section 3543.5(a) of the

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[6] The court formulated the following standard:

> All [a charging party] must prove to establish an interference violation of section 3506 is: (1) That employees were engaged in protected activity; (2) that the employer engaged in conduct which tends to interfere with, restrain or coerce employees in the exercise of those activities, and (3) [the] employer's conduct was not justified by legitimate business reasons.

(*Tulare County, supra,* at p. 807.)

[7] In *Santa Clara County Counsel Attorneys Association v. Woodside* (1994) 7 Cal.4th 525 (*Woodside*), the California Supreme Court suggested that the *Wright Line* 8(a)(3) discrimination standard would apply to an alleged violation of Section 3506 in a case where an employee was discharged or disciplined for engaging in activity protected by the MMBA. (*Woodside, supra,* at pp. 556-557.)

Educational Employment Relations Act (EERA).[8] (*San Dieguito Union High School District* (1977) EERB[9] Decision No. 22; *Carlsbad.*) In *Carlsbad*, the Board observed that, unlike the NLRA, EERA's prohibitions on interference and discrimination are contained in the same subsection of the statute. Accordingly, the Board laid out a single standard to establish a violation of EERA section 3543.5(a):

> 2. Where the charging party establishes that the employer's conduct tends to or does result in some harm to employee rights granted under the EERA, a prima facie case shall be deemed to exist;
>
> 3. Where the harm to the employees' rights is slight, and the employer offers justification based on operational necessity, the competing interest of the employer and the rights of the employees will be balanced and the charge resolved accordingly;
>
> 4. Where the harm is inherently destructive of employee rights, the employer's conduct will be excused only on proof that it was occasioned by circumstances beyond the employer's control and that no alternative course of action was available;
>
> 5. Irrespective of the foregoing, a charge will be sustained where it is shown that the employer would not have engaged in the complained-of conduct but for an unlawful motivation, purpose or intent.

This standard incorporates the "inherently destructive"/"comparatively slight" framework from *Great Dane*, along with elements of the NLRA section 8(a)(1) interference standard.

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[8] EERA is codified at Section 3540 et seq. EERA section 3543.5(a) states, in relevant part, that:

> It is unlawful for a public school employer to . . .
>
> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.

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

In *Novato Unified School District* (1982) PERB Decision No. 210 (*Novato*), the Board separated the discrimination and interference standards by adopting the NLRB's *Wright Line* standard for cases "where it is alleged that the school employer has taken reprisals against employees for participation in protected activity." In such cases, the charging party can establish a prima facie case by showing: (1) the employee exercised protected rights; (2) the employer had knowledge of the exercise of those rights; (3) the employer took adverse action against the employee; and (4) the employer took the action because of the exercise of those rights. (*Ibid.*) Once a prima facie case is established, the employer bears the burden of proving that it would have taken the adverse action even if the employee had not engaged in protected activity. (*Ibid.*)

In *Novato*, the Board also affirmed that the *Carlsbad* standard would still apply in cases alleging interference with employee rights. Though it has formulated the test slightly differently over the years, the Board continues to apply the *Carlsbad* standard in interference cases, including those arising under the Dills Act. (E.g., *State of California (Employment Development Department)* (1999) PERB Decision No. 1365-S; *State of California (Department of Corrections)* (1995) PERB Decision No. 1100-S; *State of California (Departments of Personnel Administration, Developmental Services, and Mental Health)* (1986) PERB Decision No. 601-S.)

Although *Carlsbad* and *Campbell* both adopted the *Great Dane* framework, the *Campbell* court's use of the term "discrimination" rather than "interference" has led to some confusion over the years. In some of its early decisions under the MMBA, PERB stated that harm to employee rights under the *Campbell* standard could be used to establish adverse action in reprisal cases under *Novato*. (*County of Santa Cruz* (2006) PERB Decision No. 1849-M;

City & County of San Francisco (2004) PERB Decision No. 1664-M.) In *City of San Diego* (2005) PERB Decision No. 1738-M (*San Diego*), the Board addressed whether *Campbell* or *Palo Verde Unified School District* (1988) PERB Decision No. 689 (*Palo Verde*)[10] was the appropriate test for establishing adverse action under the *Novato* standard. In *San Diego*, the charging party was denied access to dental and vision benefits under a negotiated flexible benefits plan because she was neither a union member nor an agency fee payer. The Board held that "there is an adverse action when an employee is denied a benefit based on whether or not he or she is a union member just as in *Campbell*." (*Ibid.*)

We disagree with the Board's application of *Campbell* in *San Diego*. Instead of using *Campbell* to establish adverse action under the *Novato* standard, the Board should have analyzed the facts under the standard set out in *Campbell* itself, i.e., whether the denial of benefits could have harmed employee rights to some extent and whether the employer's and union's justification for the denial outweighed that harm. Accordingly, we overrule that portion of *San Diego* which applied the *Novato* standard to find discrimination.[11] In so doing, we also hold that *Palo Verde*, not *Campbell*, sets forth the proper test for determining whether an employer's action is adverse under the *Novato* standard.

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[10] *Palo Verde* requires an objective showing of an adverse effect on the employee's employment. In a later decision, the Board further explained that:

> The test which must be satisfied is not whether the employee found the employer's action to be adverse, but whether a reasonable person under the same circumstances would consider the action to have an *adverse impact on the employee's employment.*

(*Newark Unified School District* (1991) PERB Decision No. 864; emphasis added; fn. omitted.)

[11] We note, however, that the Board also found the union and the city interfered with the charging party's rights under the standard set out in *Tulare County*, which is nearly identical to the NLRB's 8(a)(1) interference standard and consistent with PERB's *Carlsbad* interference standard.

In light of the above discussion, we clarify that under applicable case law there are three standards for establishing a violation of the provisions of PERB-administered statutes, such as Dills Act section 3519(a), that make it unlawful for an employer to "[i]mpose 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" the statute:

1. The *Novato* discrimination/retaliation standard applies in cases where an employer is alleged to have taken an adverse action against an individual employee because of the employee's participation in protected activity. Once the charging party establishes that the employer's action was motivated at least in part by the employee's protected activity, the burden shifts to the employer to prove that it would have taken the action even if the employee had not engaged in protected activity.

2. The *Carlsbad* interference standard applies in cases where an employer is alleged to have interfered with the rights of employees, or restrained or coerced employees in their exercise of their rights. To establish a prima facie case, the charging party must demonstrate that the employer's conduct tends to or does result in harm to employee rights. Once a prima facie case is established, the burden shifts to the employer to justify its conduct. If the harm to employees' rights is slight, and the employer offers justification based on operational necessity, the competing interest of the employer and the rights of the employees will be balanced to determine if the employer's conduct constitutes an unfair practice. If the harm is inherently destructive of employee rights, the employer's conduct will be excused only on proof that it was occasioned by circumstances beyond the employer's control and that no alternative course of action was available.[12]

[12] As noted, the *Tulare County* standard, which applies in interference cases under the MMBA, is consistent with the *Carlsbad* interference standard.

3. The *Campbell* discrimination standard applies in cases where an employer is alleged to have discriminated between two groups of employees because one of the groups participated in protected activity. To establish a prima facie case under this standard, the charging party must show that the employer engaged in conduct which could have harmed employee rights to some extent. Once a prima facie case is established, the burden shifts to the employer to justify its conduct. If the harm to employees' rights is slight, and the employer offers justification based on operational necessity, the competing interest of the employer and the rights of the employees will be balanced to determine if the employer's conduct constitutes an unfair practice. If the harm is inherently destructive of employee rights, the employer's conduct will be excused only on proof that it was occasioned by circumstances beyond the employer's control and that no alternative course of action was available.

We acknowledge that the *Carlsbad* and *Campbell* standards are nearly identical and will in most cases lead to the same result. Nonetheless, at this time *Campbell* is still valid and PERB is bound to follow it in cases arising under the MMBA. (MMBA, § 3509, subd. (b).) We caution, however, that the *Campbell* discrimination standard, which mirrors the *Carlsbad* interference standard, is not to be confused with the *Novato* discrimination standard, which is actually a test for retaliation.

4. Application of PERB's Standards to CCPOA's Allegations

The charge did not allege that the State took adverse action against an individual employee because of the employee's participation in protected activity. Therefore, the *Novato* discrimination/retaliation standard does not apply in this case. Nonetheless, the charge alleged conduct that falls under the other two standards listed above.

a. *Carlsbad* Interference

CCPOA contends that the State interfered with union members' rights because non-union members were able to obtain enhanced dental benefits at a slightly lower cost than union members. To establish a prima facie case of unlawful interference under the Dills Act, a charging party must establish that the employer's conduct tends to or does result in some harm to employee rights granted under the statute. (*Carlsbad*; *State of California (Department of Developmental Services)* (1983) PERB Decision No. 344-S.) In *Clovis Unified School District* (1984) PERB Decision No. 389, the Board held that a finding of coercion does not require evidence that the employee actually felt threatened or intimidated or was in fact discouraged from participating in protected activity. Once a prima facie case of interference is established, the burden shifts to the employer to justify its conduct due to operational necessity if the harm is slight, or where the harm is inherently destructive of employee rights, to show that its conduct should be excused because of circumstances beyond the employer's control. (*Carlsbad.*)

On October 31, 2007, the CCPOA Benefit Trust Fund notified the State that it would stop providing dental benefits to non-union members effective November 1, 2007. The Benefit Trust Fund advised the State to inform non-union members to enroll in another state dental benefit plan. DPA quickly notified non-union members of their option to enroll in the state-sponsored dental plans. The option to enroll in state-sponsored dental plans was not offered to union members.

According to CCPOA, the State has provided enhanced dental benefits to non-union members because the amount of the State's contribution for the state-sponsored dental plan is larger than the State's contribution toward the CCPOA dental plan. This claim fails, however, because there are no facts to show that the state-sponsored dental plan provides greater

benefits. The mere fact that the State pays more for the state-sponsored plan does not demonstrate that the State plan provides enhanced benefits over the CCPOA dental plan.

CCPOA union member employees exercised rights protected by the Dills Act when they chose to become members of the union. CCPOA has not alleged that the difference in dental benefit costs for union and non-union members resulted in actual harm to the rights of union members. There is no evidence that any union member employees opted to resign their union membership in order to obtain dental benefits at a reduced cost, or that any non-union employees declined membership because of the benefit cost. Nor did CCPOA allege that any union member requested to switch to the state-sponsored plan and was denied. Thus, there is no evidence of actual harm to employee rights.

However, providing benefits at a lower cost to non-union members, while excluding union members from this option, tends to result in at least slight harm to employees who choose to exercise the right to join a union. A reduced benefit cost available only to non-union members may influence an employee's decision to join the union. Accordingly, the charge states a prima facie case of interference under the *Carlsbad* standard.

b. *Campbell* Discrimination

CCPOA also alleges the State discriminated against union members by providing lower cost dental benefits to non-union members. To establish a prima facie case of discrimination under *Campbell*, the charging party must show that the employer engaged in conduct which could have harmed employee rights to some extent. Once a prima facie case is established, the burden shifts to the employer to justify its conduct. If the harm to employees' rights is slight, and the employer offers justification based on operational necessity, the competing interest of the employer and the rights of the employees will be balanced to determine if the employer's

conduct constitutes an unfair practice. If the harm is inherently destructive of employee rights, the employer's conduct will be excused only on proof that it was occasioned by circumstances beyond the employer's control and that no alternative course of action was available.

For the reasons discussed above, under the *Campbell* standard we find that the State's provision of dental benefits at a lower cost to non-union members while excluding union members from the same benefit plan could harm employee rights because it may influence employees to decline to join or to resign from CCPOA to obtain the lower cost benefit. Accordingly, the charge states a prima facie case of discrimination under the *Campbell* standard.

At this stage of the charge review, the Board decides only whether the factual allegations state a prima facie case. Having found a prima facie case of interference under the *Carlsbad* standard and discrimination under the *Campbell* standard, our inquiry is thus at an end. The determination of whether DPA's actions were justified due to operational necessity and/or circumstances beyond its control are matters to be resolved in further proceedings once a complaint has issued.

ORDER

The Public Employment Relations Board (PERB or Board) hereby vacates *State of California (Department of Personnel Administration)* (2010) PERB Decision No. 2106-S. The Board hereby REVERSES the dismissal of the unfair practice charge in Case No. SA-CE-1636-S and REMANDS this case to the Office of the General Counsel for issuance of a complaint consistent with this Decision.

Chair Dowdin Calvillo joined in this Decision.

Member McKeag's dissent begins on page 19.

McKEAG, Member, dissenting: I respectfully disagree with the majority's ruling that the California Correctional Peace Officers' Association (CCPOA) established a prima facie violation of the Ralph C. Dills Act (Dills Act) when, after CCPOA stopped providing former CCPOA agency fee payers with dental insurance, the State of California (Department of Personnel Administration) (State) provided enhanced dental benefits at a reduced cost to these employees. I dissent for the reasons set forth below.

In order to find unlawful interference, the Public Employment Relations Board (PERB) has held that the charging party must establish that the respondent's conduct tends to or does result in some harm to employee rights granted under the Dills Act. (*State of California (Department of Developmental Services)* (1983) PERB Decision No. 344-S, citing *Carlsbad Unified School District* (1979) PERB Decision No. 89 and *Service Employees International Union, Local 99 (Kimmett)* (1979) PERB Decision No. 106.)

In the instant case, the CCPOA members continued to enjoy the exact same dental benefits after the implementation of the State's last best and final offer. When the CCPOA Benefit Trust Fund refused to provide dental benefits to the former CCPOA agency fee payers, the State was faced with a choice to either offer the existing dental benefits currently offered to other State employees or to provide no dental benefits at all. Clearly, the latter option was untenable and would have likely resulted in litigation. Therefore, the State had only one legitimate option, and it exercised that option.

Based on the foregoing, I find the State's conduct simply did not result in any harm to employee rights. Accordingly, I believe this case should be dismissed for failure to establish a prima facie violation of the Dills Act.