STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

VICTOR LEE MARTIN,	)	
	)	
Charging Party,	)	Case No. LA-CE-345-S
	)	
v.	)	PERB Decision No. 1224-S
	)	
STATE OF CALIFORNIA (DEPARTMENT OF CORRECTIONS),	)	October 31, 1997
	)	
Respondent.	)	
	)	

Appearance: State of California (Department of Personnel Administration) by Robert K. Roskoph, Labor Relations Counsel, for State of California (Department of Corrections).

Before Caffrey, Chairman; Johnson and Dyer, Members.

DECISION

CAFFREY, Chairman: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the State of California (Department of Corrections) (State) to a proposed decision (attached) by a PERB administrative law judge (ALJ). In the proposed decision, the ALJ dismissed the unfair practice charge and complaint alleging that the State laid off Victor Lee Martin (Martin) because of his union activities in violation of section 3519(a) of the Ralph C. Dills Act (Dills Act).[1]

[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. Section 3519 states, in pertinent part:

> It shall be unlawful for the state to do any of the following:
>
> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise

The State, while prevailing on the merits in this case, excepts to the ALJ's finding that Martin was a civil service employee within the meaning of Dills Act section 3513(c).[2] As a result, the State contends that PERB lacks jurisdiction over the instant unfair practice charge and complaint.

The Board has reviewed the entire record in this case, including the proposed decision and the State's exceptions

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> to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter. For purposes of this subdivision, "employee" includes an applicant for employment or reemployment.

[2]Dills Act section 3513 states, in pertinent part:

> As used in this chapter:
>
> (c) "State employee" means any civil service employee of the state, and the teaching staff of schools under the jurisdiction of the State Department of Education or the Superintendent of Public Instruction, except managerial employees, confidential employees, supervisory employees, employees of the Department of Personnel Administration, professional employees of the Department of Finance engaged in technical or analytical state budget preparation other than the auditing staff, professional employees in the Personnel/Payroll Services Division of the Controller's office engaged in technical or analytical duties in support of the state's personnel and payroll systems other than the training staff, employees of the Legislative Counsel Bureau, employees of the Bureau of State Audits, employees of the board, conciliators employed by the State Conciliation Service within the Department of Industrial Relations, and intermittent athletic inspectors who are employees of the State Athletic Commission.

thereto.[3] The Board finds the ALJ's findings of fact and conclusions of law to be free of prejudicial error and hereby adopts them as the decision of the Board itself, consistent with the following discussion.

DISCUSSION

As the ALJ notes, the Board specifically addressed the definition of state civil service employee under the Dills Act in State of California (Department of Personnel Administration) (1990) PERB Decision No. 787-S (DPA I). The Board noted that Article VII, section 1 of the California Constitution[4] states that the civil service includes every employee of the state "except as otherwise provided in this Constitution." Article VII, section 4[5] then lists thirteen specific exemptions

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[3]The State's request for oral argument in this case was denied on October 22, 1997.

[4]The relevant portion of the California Constitution, Article VII, section 1 provides:

> (a) The civil service includes every officer and employee of the State except as otherwise provided in this Constitution.

[5]California Constitution, Article VII, section 4 provides:

> The following are exempt from civil service:
>
> (a) Officers and employees appointed or employed by the Legislature, either house, or legislative committees.
>
> (b) Officers and employees appointed or employed by councils, commissions or public corporations in the judicial branch or by a court of record or officer thereof.
>
> (c) Officers elected by the people and a deputy and an employee selected by each

from the civil service, none of which is relevant to this case.

The Board concluded:

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elected officer.

(d) Members of boards and commissions.

(e) A deputy or employee selected by each board or commission either appointed by the Governor or authorized by statute.

(f) State officers directly anointed by the Governor with or without the consent or confirmation of the Senate and the employees of the Governor's office, and the employees of the Lieutenant Governor's office directly appointed or employed by the Lieutenant Governor.

(g) A deputy or employee selected by each officer, except members of boards and commissions, exempted under Section 4(f).

(h) Officers and employees of the University of California and the California State Colleges.

(i) The teaching staff of schools under the jurisdiction of the Department of Education or the Superintendent of Public Instruction.

(j) Member, inmate, and patient help in State homes, charitable or correctional institutions, and State facilities for mentally ill or retarded persons.

(k) Members of the militia while engaged in military service.

(1) Officers and employees of district agricultural associations employed less than 6 months in a calendar year.

(m) In addition to positions exempted by other provisions of this section, the Attorney General may appoint or employ six deputies or employees, the Public Utilities Commission may appoint or employ one deputy or employee, and the Legislative Counsel may appoint or employ two deputies or employees.

> All personnel appointments other than the specific exempt appointments are therefore part of the civil service system and have some form of civil service status, whether it be seasonal, limited term, permanent, part-time, or any other type.
> (DPA I at p. 14.)

Similarly in State of California, Department of Personnel Administration (1991) PERB Decision No. 871-S (DPA II), PERB held that members of the California Conservation Corps are state civil service employees under the Dills Act because they are not specifically exempted from the civil service in Article VII, section 4 even though they lack the traditional civil service attributes of permanent appointment from an employment list resulting from a competitive examination.

Noting that Martin's appointment as a casual laborer also is not specifically exempted from the civil service in Article VII, section 4, the ALJ concludes that Martin was a state employee under the Dills Act. The ALJ also notes that Martin's official separation notice lists his appointment status as "Civil Service Temporary."

The State contends that PERB lacks jurisdiction over this unfair practice charge because Martin was not a "state employee" under Dills Act section 3513(c). Dills Act section 3513(c) defines "state employee" as "any civil service employee of the State." The State maintains that temporary employees such as Martin are exempted from the civil service under the California Constitution. The State asserts that the Board erred in DPA I and DPA II by failing to recognize that Article VII, section 5

provides an exemption from the civil service. Article VII, section 5 states:

> A temporary appointment may be made to a position for which there is no employment list. No person may serve in one or more positions under temporary appointment longer than 9 months in 12 consecutive months.

In construing constitutional provisions, we must first look to the language of the constitutional text and give the words their ordinary meaning. (Powers v. City of Richmond (1995) 10 Cal.4th 85 [40 Cal.Rptr.2d 839].) Nothing in section 5 conveys the intent to create a separate exemption from civil service. Unlike section 4, which clearly states that "the following are exempt from civil service," section 5 provides no statement that temporary appointments are exempt. Giving the words their ordinary meaning, the provision serves to define temporary appointments to positions within state service, not temporary appointments which are exempt from civil service.

Legislative efforts to interpret a word in the Constitution are upheld unless they are clearly inconsistent with the express language of the Constitution. (People v. 8.000 Punchboard Card Devices (1983) 142 Cal.App.3d 618 [191 Cal.Rptr. 154].) A review of the State Civil Service Act confirms that temporary appointments are not exempt from civil service. Government Code section 18500 states that the purpose of the State Civil Service Act is to "facilitate the operation of article VII of the Constitution." Government Code section 18525 defines "appointment" as the "offer to and acceptance by a person of a

position in the state civil service . . ." Government Code section 18529 defines "temporary appointment" as "an appointment made in the absence of any appropriate employment list permitted by section 5 of Article VII of the Constitution." Thus, as defined by the Legislature, a temporary appointment made pursuant to Article VII, section 5 is an appointment to a position in the state civil service.

To support its position that section 5 creates an additional exemption to the civil service, the State points to Spaulding v. Philbrick (1940) 42 Cal.App.2d 58 [108 P.2d 59] (Spaulding). In that case, the court held that temporary employees have no civil service status because they lack the procedural protection of permanent employees. Spaulding deals with the procedural protections offered to permanent civil service employees, not the definition of "civil service" under the California Constitution or "state employee" under Dills Act section 3513(c). The courts have distinguished between the procedural rights granted by the merit system of civil service and employees' collective bargaining rights. The State Personnel Board is charged with protecting the civil service employee's substantive and procedural rights under the merit system. PERB has the task of administering the Dills Act protections against violation of collective bargaining rights. (Pacific Legal Foundation v. Brown (1981) 29 Cal.3d 168 [172 Cal.Rptr. 487].) The Dills Act assigns those rights to "any civil service employee of the State" not expressly excluded. As a temporary employee, Martin did not fall

under any of the exemptions to the civil service listed in Article VII, section 4. Therefore, Martin was a state employee under Dills Act section 3513(c), PERB has jurisdiction over this case, and the State's exceptions are without merit.

ORDER

The unfair practice charge and complaint in Case No. LA-CE-345-S are hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Johnson and Dyer joined in this Decision.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

VICTOR LEE MARTIN, Charging Party, v. STATE OF CALIFORNIA (DEPARTMENT OF CORRECTIONS), Respondent.	)	Unfair Practice Case No. LA-CE-345-S PROPOSED DECISION (3/19/97)

Appearances: Victor Lee Martin, on his own behalf; Robert K. Roskoph, Labor Relations Counsel, for State of California (Department of Corrections).

Before Thomas J. Allen, Administrative Law Judge.

PROCEDURAL HISTORY

In this case, Victor Lee Martin (Martin) alleges that the State of California (Department of Corrections) (State) laid him off because of union activities, in violation of section 3519(a) of the Ralph C. Dills Act (Dills Act).[1] The State contends that Martin was not a state employee under the Dills Act and that his layoff was not discriminatory in any case.

Martin filed an unfair practice charge against the State on June 14, 1996. On July 31, 1996, the Office of the General

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[1]The Dills Act is codified at Government Code section 3512 and following. Unless otherwise indicated, all statutory references herein are to the Government Code. In relevant part, section 3519 provides that it shall be unlawful for the State 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. For purposes of this subdivision, "employee" includes an applicant for employment or reemployment.

Counsel of the Public Employment Relations Board (PERB) issued a complaint, alleging that Martin was laid off on May 13, 1996, because he attended a union event and then discussed union politics at work, on May 11 and 13, 1996. On August 14, 1996, the State filed an answer to the complaint, denying all allegations. An informal settlement conference scheduled for September 10, 1996, was cancelled.

A formal hearing was held on November 7 and 21, 1996. After the filing of post-hearing briefs, the matter was submitted for decision on January 27, 1997.

FINDINGS OF FACT

Martin was hired by the State on February 7, 1996, and laid off on May 13, 1996. The official Report of Separation issued by the State gave Martin's appointment status as "Civil Service Temporary" and his classification title as "Skilled Trades Journeyperson (Casual Employment) (Laborer)."

Martin was hired through the hiring hall of Local 220 of the Laborers' International Union of North America (LIUNA), to work in the construction of additional dormitories at state prisons. Martin was told it was a nine-month position. He started work at the North Kern State Prison in Delano, but sometime later he was transferred to work at the Wasco State Prison, where he worked directly under carpenter foreman Ray Hollibaugh (Hollibaugh). In March or early April of 1996, Dan Rippee (Rippee) began working at Wasco State Prison as a Construction Supervisor I, with Hollibaugh and Martin under him. In late April or early May, Rippee transferred Martin to work directly under labor foreman

Mario Ortiz (Ortiz), a recently hired casual employee from LIUNA Local 220, who was also under Rippee.

At the hearing, Martin testified under oath that on Saturday, May 11, 1996, he attended a LIUNA delegates meeting, at the invitation of members of LIUNA Local 300 in Los Angeles. In his opening statement, before he was under oath, Martin stated that on Monday, May 13, 1996, when he got back to work, he told his fellow employees about the meeting, bragging that he was the only laborer from Local 220 there, and later heard that Ortiz was displeased by this. When Martin took the stand as a witness under oath, however, he did not testify about any of these discussions, nor did any other witness. Therefore, although I find that Martin attended the union event on May 11, 1996, as alleged in the complaint, I cannot find that Martin discussed union politics at work on May 13, 1996, as is also alleged in the complaint.[2]

Martin testified that on May 13, 1996, Ortiz told him he was laid off. According to Martin, Ortiz also told him the reason for his layoff was that "Mike Cunningham [a Construction Supervisor II and Rippee's superior] and Ray [Hollibaugh] believed I [Martin] was standing around on work time and discussing politics." Martin testified that a superintendent named Bruce "gave other reasons dealing with qualifications."

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[2]PERB Regulation 32176 states in relevant part, "Oral evidence [in unfair practice cases] shall be taken only on oath or affirmation." (PERB regulations are codified at California Code of Regulations, title 8, section 31001 and following.)

Martin testified he did not get any paperwork at the time of his layoff, which other witnesses testified was unusual. About two weeks later, Martin received from the State an official Report of Separation. It bore an issue date of "5/14/96," but it was in an envelope postmarked May 23, 1996. At the hearing, no explanation for the delay was given. The Report of Separation gave Martin's separation type as "Termination Without Fault."

After his layoff, Martin went to the office of LIUNA Local 220 and spoke to Mario Hernandez (Hernandez), who was the dispatcher and office manager. Hernandez testified at the hearing that he called Rippee and asked why Martin had been laid off, and that the best answer Hernandez got was that there had been a reduction in force. Rippee's own testimony at the hearing confirmed that Martin's layoff was officially designated a reduction in force.

No other employees were laid off during the week of May 13, 1996, or the week thereafter. In fact, four additional laborers were hired through LIUNA Local 220 to work at Wasco State Prison the week of May 13, 1996.[3] Eight laborers were laid off during the week of May 27, 1996, however, including two of the laborers hired just two weeks earlier.

One of the laborers hired during the week of May 13, 1996, was Greg Humpheres (Humpheres). Martin testified that Humpheres

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[3]Rippee and another witness for the State testified that as various stages of construction ended and others began it was not unusual for there to be reductions in force and hirings at the same time. A witness for Martin from LIUNA, however, testified that this was rare.

told Martin that Rippee told Humpheres that Martin had been laid for talking about union politics. In his testimony, Rippee denied making such a statement. Humpheres himself did not testify, and there was no evidence to corroborate what Martin said Humpheres said. I therefore cannot find that Rippee told Humpheres that Martin had been laid off for talking about union politics.[4]

Clifford Shears (Shears), who volunteered in the LIUNA Local 220 office, testified he overheard a conversation in the office between Ortiz and LIUNA Local 220 President Jeremias Lopez (Lopez) on or about May 20, 1996. Shears testified he heard Ortiz and Lopez laughing and joking about a layoff "like it was funny." Martin was the only laborer who had been laid off at the time. Shears interpreted what he heard as evidence that Ortiz was directly involved in Martin's layoff, but I find Shears testimony insufficient in itself to support such a finding.

Rippee testified he himself had made the decision to lay Martin off, after consulting with two other construction supervisors. Rippee further testified that, although he knew a big layoff was coming up, the real reason he laid Martin off was that Martin's work performance was unsatisfactory. Rippee's testimony was corroborated by Rippee's own daily diary report for May 13, 1996, which stated in relevant part, "Talked to Mario Ortiz. Victor Martin to be laid off unsatisfactory performance."

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[4]PERB Regulation 32176 states in relevant part, "Hearsay evidence [in unfair practice cases] is admissible but shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions."

Rippee gave the following explanation why Martin's layoff was nonetheless officially designated a reduction in force:

> . . . I don't like to fire anybody unless it's a real extreme circumstance, a fight or something that really is dramatic and I have to deal with that problem right now.
>
> I realize that these men that come and work for me have families. And if you fire a man on a job, then he can't draw his unemployment. And what little bit you can get from unemployment could buy groceries for your family. And it's kind of my conviction and I believe it's the right thing to do.

Rippee testified he first became concerned about Martin's performance while Martin was working under Hollibaugh. Rippee testified that on one occasion Hollibaugh reported Martin was not doing his job while assigned to work with the backhoe, and that on another occasion Hollibaugh reported Martin had hit construction "batter boards" with a dump truck. Rippee's testimony was corroborated by Hollibaugh's daily diary report for April 10, 1996, which stated in relevant part, "1 labor working with backhoe. Warned to work not stand around," and by Hollibaugh's daily diary report for April 15, 1996, which stated in relevant part, "Labor hit batter board with dump truck." A later memo by Hollibaugh stated that these reports referred to Martin, who had been one of three laborers on Hollibaugh's crew.

Rippee testified that Hollibaugh's reports led to Martin's transfer to work under Ortiz. Rippee explained as follows:

> . . . I'm a firm believer, like I said, that a man may not work good with a certain group of people or doing a certain task, but he may have a talent for another area. So after conferring with Ray Hollibaugh, I went to Mario Ortiz and I said, why don't we put Mr.

> Martin maybe on a rock and sand crew or in another portion of the work. Just trying to give him the benefit of the doubt.
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> I'm a firm believer that you -- I have to evaluate a man. And I got to -- I have to be involved, too. If I'm going to terminate a man, I want to know that it's correct and it's true. And it's the only fair thing to do; give a man a few chances and see where he can work.

Rippee further testified that Ortiz also reported problems with Martin's performance. On one occasion, which Rippee described as "the straw that broke the camel's back," Rippee noticed a concrete truck on prison grounds without the required labor escort. Rippee told Ortiz the situation was unacceptable and asked who was supposed to be the escort, and Ortiz said it was Martin. Rippee's testimony is corroborated by Ortiz's daily diary report for May 3, 1996, which stated in relevant part, "I had problem with Martin. Left concrete truck, find another escort," and by Rippee's own daily diary report for the same date, which stated in relevant part, "Advised foreman Mario Ortiz laborer escort must stay with truck drivers as per institution policy."

Rippee also testified that on another occasion Ortiz reported Martin had been assigned to lead some inmate laborers in laying down rock and sand to prepare a foundation, and when Ortiz came back hardly anything had been accomplished. This testimony appears to be corroborated by Ortiz's daily diary report for May 13, 1996, which stated in relevant part, "Victor Martin cleaning Pad D and rocking. Talked to Victor -- rocking too slow and inmates not working." The date of this,report, however, was

Martin's last day of work, and it is not clear whether the decision to lay Martin off had already been made.

Ortiz's daily diary report for May 3, 1996, stated in part, "Victor Martin was working on cleaning Pad A and D. Spoke to Victor. Does not follow orders." Rippee testified, however, he did not remember Ortiz reporting such an incident to him.

Rippee testified he made the decision to lay Martin off after consulting two other construction supervisors, Nate Wright and Bruce Hubble. Rippee described the conversation as follows:

> . . . I had discussed with Nate and Bruce what was going on with Victor. And I felt at that time that we had really tried, I had really tried to work Victor Martin in various places on the job site. And he just wasn't working out. He was not performing.
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> And so I had asked Bruce and Nate, you know, would you consider working Victor. And it was all three of our consensus that he should be laid off and it would be better off that way. He was not meeting our standards. He was not performing as we thought he should be performing. And it was just better off to lay him off rather than to pass on a problem.

Martin testified that no one had spoken to him about problems with his performance, and that on only one occasion was there any disagreement regarding his work.[5] Rippee testified that Hollibaugh and Ortiz told him they had discussed Martin's performance with Martin, and that Rippee had no reason to distrust Hollibaugh and Ortiz. I cannot, however, find that

[5]It is not clear from Martin's testimony what that one occasion was, but from Martin's opening statement it appears it may have been an occasion when Ortiz yelled at Martin for not jumping up on the concrete trucks. It is not clear when this may have happened.

these discussions actually took place, whatever Rippee may have reasonably believed.[6]

Rippee testified he "probably heard" but couldn't really remember being told that Ortiz and Martin were in opposite factions within LIUNA Local 220, something Rippee regarded as not really his concern. Rippee also testified he was unaware that Martin attended the LIUNA delegates meeting on May 11, 1996.

Rippee was a credible witness. He testified with confidence, and his testimony was internally consistent. He remained calm and responsive under cross-examination by Martin. His concern for the fair treatment of employees seemed sincere. I credit Rippee's testimony as a whole, and I specifically credit Rippee's testimony that he himself made the decision to lay Martin off, that he did not know about Martin's attendance at the LIUNA delegates meeting, that the decision to lay Martin off was based on concerns about Martin's performance, and that those concerns predated the LIUNA delegates meeting.

ISSUES

1. Was Martin a state employee?

2. If the answer to No. 1 is yes, did the State lay Martin off because of his union activities?

CONCLUSIONS OF LAW

Status of Martin as a State Employee

Dills Act section 3513(c) states a "state employee" for purposes of the Dills Act means "any civil service employee of

[6]PERB Regulation 32176.

the state" (with specific additions and exceptions not relevant here). The State argues that as a casual laborer Martin was not a "civil service employee" and thus not a "state employee" under the Dills Act.

In State of California (Department of Personnel Administration) (1990) PERB Decision No. 787-S (DPA I), PERB specifically addressed the definition of a state civil service employee. PERB noted that Article VII, section 1(a), of the California Constitution (Constitution) states, "The civil service includes every officer and employee of the state except as otherwise provided in this Constitution." Article VII, section 4, of the Constitution then lists a dozen specific positions (none relevant here) as exempt from civil service. PERB concluded as follows:

> . . . All personnel appointments other than the specific exempt appointments are therefore part of the civil service system and have some form of civil service status, whether it be seasonal, limited term, permanent, part-time, or any other type. (DPA I at p. 14.)

PERB thus held that lifeguards whose positions were seasonal, who did not compete in an examination, and who were not promoted by examination and tenure, were nonetheless state civil service employees under the Dills Act.

In State of California (Department of Personnel Administration) (1991) PERB Decision No. 871-S (DPA II), PERB followed and confirmed its decision in DPA I. In DPA II, PERB noted that members of the California Conservation Corps "are not listed under Article VII, section 4, as one of the categories of

employees specifically exempt from civil service." (Id. at p. 18.) PERB concluded corpmembers were state civil service employees under the Dills Act. PERB reached this conclusion even though a court had held corpmembers lacked the traditional civil service attributes of permanent status and selection for employment or promotion by competitive examination under the merit system. (Bush v. California Conservation Corps (1982) 136 Cal.App.3d 194 [185 Cal.Rptr. 892], cited in DPA II at pp. 16-17.)

In arguing that Martin was not a state employee, the State does not distinguish or even mention PERB's decisions in DPA I and DPA II. The State argues that Martin's appointment as a casual laborer was a "temporary appointment" under Article VII, section 5, of the Constitution and he therefore could not serve longer than 9 months in 12 consecutive months.[7] The State goes on to argue that Martin was therefore not entitled to the same benefits and protections as permanent civil servants, including rights under the Dills Act. Both DPA I and DPA II, however, stand for the proposition that an employee need not have permanent status in order to be a state employee under the Dills Act.

The State offers no reason to distinguish or depart from PERB's decisions in DPA I and DPA II. Martin's appointment as a casual laborer was not specifically exempt from civil service.

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[7]Article VII, section 5, states in relevant part, "No person may serve in one or more positions under temporary appointment longer than 9 months in 12 consecutive months."

The official Report of Separation the State issued to Martin gave his appointment status as "Civil Service Temporary." Martin's appointment thus fell within the broad category of "personnel appointments . . . with some form of civil service status, whether it be seasonal, limited term, permanent, part-time, or any other type." (DPA I at p. 14.) I therefore conclude that Martin was a state employee under the Dills Act.

Alleged Discrimination Against Martin

The complaint alleges Martin was laid off by Rippee and Ortiz in May 13, 1996, because Martin attended a union event and then discussed union politics at work, on May 11 and 13, 1996. The State denies such discrimination took place.

In order to prove an allegation of discrimination, the charging party must first demonstrate that the employee engaged in protected conduct. The charging party must next show that the employer knew of the employee's protected conduct[8] and that the employer took an adverse action against the employee.

Upon a showing of protected conduct, employer knowledge, and adverse action, the charging party must then make a prima facie showing of unlawful motivation. Under Novato Unified School District (1982) PERB Decision No. 210, unlawful motivation occurs where the employer's action against the employee was motivated by the employee's participation in the protected conduct.[9]

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[8]Moreland Elementary School District (1982) PERB Decision No. 227.

[9]Indications of unlawful motivation have been found in many aspects of an employer's conduct. Words indicating retaliatory intent can be persuasive evidence of unlawful motivation. (Santa

This test, applied by PERB in all discrimination cases since Novato, is consistent with other California and federal precedent. Under both state and federal cases, the trier of fact is required to weigh both direct and circumstantial evidence to determine whether an action would not have been taken against an employee "but for" the exercise of protected rights.[10] After the charging party has made a prima facie showing sufficient to support an inference of unlawful motive, the burden shifts to the respondent to produce evidence that the action against the employee "would have occurred in any event."[11]

In the present case, it is clear that Martin engaged in protected conduct by attending the LIUNA delegates meeting on May 11, 1996. Dills Act section 3515 specifically protects the right of state employees to "participate in the activities of employee organizations." I cannot conclude that Martin engaged in protected conduct by talking about the meeting at work on

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Clara Unified School District (1979) PERB Decision No. 104.) Other indications of unlawful motivation have been found in an employer's: failure to follow usual procedures (id.); shifting justifications and cursory investigation (State of California (Department of Parks and Recreation) (1983) PERB Decision No. 328-S); disparate treatment of a union adherent (State of California (Department of Transportation) (1984) PERB Decision No. 459-S); timing of the action (North Sacramento School District (1982) PERB Decision No. 264); and pattern of antagonism toward the union (Cupertino Union Elementary School District (1986) PERB Decision No. 572).

[10]See Martori Brothers Distributors v. Agricultural Labor Relations Bd. (1981) 29 Cal.3d 721, 727-730 [175 Cal.Rptr. 626]; Wright Line, Inc. (1980) 251 NLRB 1083 [105 LRRM 1169] enforced, in relevant part, (1st Cir. 1981) 662 F.2d 899 [108 LRRM 2513].

[11]Martori Brothers Distributors v. Agricultural Labor Relations Bd., supra, 29 Cal.3d at 730.

May 13, 1996, however, because, as stated above, there was no sworn testimony that Martin actually did so.

It is also clear that the State took adverse action against Martin by laying him off.[12] With regard to the State's knowledge of Martin's protected conduct, however, I have credited Rippee's testimony that he did not know about Martin's attendance at the LIUNA delegates meeting. In the absence of sworn testimony that Martin talked about the meeting at work, I have no basis for concluding that the State knew about Martin's protected conduct. This in itself is fatal to Martin's case, and the charge and complaint must be dismissed for that reason.

If Martin had proved that the State had knowledge of his protected conduct, he could have made a prima facie showing of unlawful motivation. Martin was the only laborer laid off on May 13, 1996, while other laborers were being hired, and the paperwork on his layoff was unusually and unaccountably slow. According to Martin's testimony, he was given varying reasons for his layoff, different from the performance problems cited by Rippee in his testimony, and those performance problems had not been discussed with Martin. Finally, Martin was laid off immediately after he returned to work from the LIUNA delegates meeting. Although timing alone is not adequate to support an

[12]Cupertino Union Elementary School District, supra, PERB Decision No. 572.

inference of unlawful motivation,[13] it may, along with other factors, constitute a basis for such a conclusion.[14]

The State, however, produced credible evidence that Martin's layoff would have occurred in any event. Rippee testified credibly that he made the decision to lay Martin off due to unsatisfactory work performance, after Martin had worked on two different crews with two different foremen. Rippee's daily diary report for May 13, 1996, corroborates Rippee's testimony that Martin was laid off for unsatisfactory performance, while the daily diary reports of Hollibaugh and Ortiz corroborate Rippee's testimony that concerns about Martin's performance predated the LIUNA delegates meeting on May 11, 1996. Rippee testified credibly that the "straw that broke the camel's back" was an incident Rippee himself witnessed, when he found Martin was not with a truck Martin was assigned to escort. According to Ortiz's daily diary report, this incident occurred on May 3, 1996, eight days before the LIUNA delegates meeting and ten days before Martin's layoff.

Rippee credibly explained why Martin's layoff was formally treated as a "reduction in force" or a "termination without fault" rather than a termination for cause: to make it easier for Martin to receive unemployment benefits. If, as Rippee testified, Martin's layoff was for unsatisfactory performance

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[13]Charter Oak Unified School District (1984) PERB Decision No. 404.

[14]Moreland Elementary School District, supra, PERB Decision No. 227; Campbell Union High School District (1988) PERB Decision No. 701.

rather than lack of work, then there was no inconsistency in the continued hiring of other laborers. No witness explained why Martin was given varying reasons for his layoff, why the paperwork was slow, or why the performance problems had not been discussed with Martin (as Martin testified), but overall there appears to be no reason to attach a sinister meaning to these circumstances.

Ultimately, the burden of proof in this case is on Martin, to prove the complaint by a preponderance of the evidence.[15] Hearsay evidence, although admissible, is generally not sufficient in itself to support a finding.[16] Given the limited amount of nonhearsay evidence presented by Martin, and given the credible testimony of Rippee, I cannot find that Martin's layoff would not have occurred "but for" his union activities.

PROPOSED ORDER

Based upon the foregoing findings of fact and conclusions of law, and upon the entire record in this matter, it is ordered that the complaint and the underlying charge in Unfair Practice Case No. LA-CE-345-S, Victor Lee Martin v. State of California (Department of Corrections), are hereby DISMISSED.

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 at the headquarters office in Sacramento within

[15]PERB Regulation 32178.

[16]PERB Regulation 32176.

20 days of service of this Decision. In accordance with PERB regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. (See Cal. Code Regs., tit. 8, sec. 32300.) A document is considered "filed" when actually received before the close of business (5 p.m.) on the last day set for filing ". . .or when sent by telegraph or certified or Express United States mail, postmarked not later than the last day set for filing . . . ." (See Cal. Code Regs., tit. 8, sec. 32135; Code Civ. Proc, sec. 1013 shall apply.) Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, secs. 32300, 32305 and 32140.)

THOMAS J. ALLEN
Administrative Law Judge