STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

PATRICIA L. WOODS, Charging Party, v. STATE OF CALIFORNIA (DEPARTMENT OF CORRECTIONS & REHABILITATION), Respondent.	Case No. SA-CE-1640-S PERB Decision No. 2136-S October 12, 2010

Appearances: Patricia L. Woods, on her own behalf; State of California (Department of Personnel Administration) by Kevin A. Geckeler, Labor Relations Counsel, for State of California (Department of Corrections & Rehabilitation).

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

DECISION

DOWDIN CALVILLO, Chair: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by Patricia L. Woods (Woods) to the proposed decision (attached) of an administrative law judge (ALJ). The complaint issued by PERB's Office of the General Counsel alleged that the State of California (Department of Corrections & Rehabilitation) (CDCR) violated the Ralph C. Dills Act (Dills Act)[1] by rejecting Woods on probation because she received assistance from her union, SEIU Local 1000 (SEIU), regarding numerous workplace issues. The ALJ concluded that Woods failed to establish a prima face case of retaliation and, alternatively, that CDCR would have rejected Woods on probation even if she had not engaged SEIU on her behalf.

The Board has reviewed the proposed decision and the record in light of Woods' exceptions, CDCR's response thereto, and the relevant law. Based on this review, we find the

[1] The Dills Act is codified at Government Code section 3512 et seq.

proposed decision to be well-reasoned, adequately supported by the record and in accordance with applicable law. Accordingly, the Board adopts the proposed decision as the decision of the Board itself, as supplemented by the discussion below.

DISCUSSION

Most of Woods' exceptions raise issues that are fully and correctly addressed in the ALJ's proposed decision. Therefore, we discuss here only those exceptions that raise new issues. Before turning to those exceptions, however, it is necessary to address the documents Woods filed in addition to her exceptions.

1. Additional Documents on Appeal

a. Exhibits and Declarations Attached to Woods' Exceptions

Attached to Woods' exceptions and supporting brief are two exhibits, labeled A and B, and five declarations by individuals, including Woods herself, who were present during some or all of the evidentiary hearing. CDCR objects to all but Exhibit B.

Exhibit A

As detailed fully in *State of California (Department of Corrections & Rehabilitation)* (2009) PERB Order No. Ad-382-S, the PERB Appeals Assistant rejected this exhibit as part of Woods' exceptions because it was not served on CDCR. In its decision, the Board affirmed the rejection but granted Woods leave to resubmit the exhibit in compliance with PERB's regulations governing service of documents. Woods did so on January 19, 2010.[2]

CDCR objects to Exhibit A on the ground that it is an attempt to introduce new evidence into the record. When considering a request to reopen the record to admit new

[2] As a result, CDCR's objection that Exhibit A was not properly served on CDCR is now moot.

evidence, the Board applies the standard set forth in PERB Regulation 32410(a)[3] for a request for reconsideration based on the discovery of new evidence. (*State of California (Department of Parks and Recreation)* (1995) PERB Decision No. 1125-S.) The regulation provides, in relevant part:

> A request for reconsideration based upon the discovery of new evidence must be supported by a declaration under the penalty of perjury which establishes that the evidence: (1) was not previously available; (2) could not have been discovered prior to the hearing with the exercise of reasonable diligence; (3) was submitted within a reasonable time of its discovery; (4) is relevant to the issues sought to be reconsidered; and (5) impacts or alters the decision of the previously decided case.

Exhibit A consists of documents related to a dispute between Woods, PERB and PERB's transcription contractor over an increase in transcription fees between the May and October 2008 hearing dates in this matter. CDCR argues the exhibit should be excluded because these documents were in Woods' possession before the ALJ closed the record on March 11, 2009.

Regulation 32410(a) refers to evidence that "could not have been discovered prior to the hearing." Woods obtained or created most of the documents in Exhibit A between October 31 and December 16, 2008, after the final hearing date but before the record was closed upon the submission of reply briefs to the ALJ. The remaining documents were in Woods' possession before the final hearing date. However, because the dispute over transcription fees did not arise until after the final hearing date, there would have been no

[3] PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

reason for Woods to introduce them at hearing. Finding all of the Regulation 32410(a) criteria met, we will consider Exhibit A as part of the record on appeal.[4]

Declarations

Along with her exceptions, Woods filed five declarations from individuals, including herself, who were present during some or all of the evidentiary hearing. CDCR objects that the declarations are not signed under penalty of perjury as required by Code of Civil Procedure section 2015.5. Once alerted to this defect by CDCR's response to her exceptions, Woods resubmitted each of the declarations with the required affirmation. Therefore, this objection is moot.

CDCR also objects to the declaration of Carolyn Moore (Moore) on the ground that it attempts to introduce new evidence into the record. At hearing, the ALJ ruled that Moore did not qualify as an expert witness on the subject of State probationary employee evaluation and rejection procedures and excluded her testimony. The declaration appears to contain the testimony Moore would have provided had the judge allowed her to testify, along with the basis for her qualification as an expert witness. Because it is offered by Woods in support of her exception to the ALJ's ruling on the evidentiary issue, we view the declaration as an offer of proof rather than new evidence. Consequently, we will consider all five declarations, including Moore's, as part of the record on appeal.

b. Woods' Reply Brief

On November 5, 2009, Woods filed a document entitled "Reply to Response to Charging Party's Statement of Exceptions (Optional Brief)." PERB regulations do not

[4] Woods' resubmission of Exhibit A was not accompanied by a declaration under penalty of perjury as required by PERB Regulation 32410(a). CDCR did not object to the exhibit for lack of such a declaration. Nonetheless, Woods submitted a proper declaration along with her response to CDCR's objections to Exhibit A.

expressly provide for or preclude the filing of reply briefs on appeal. (*Los Angeles Unified School District/Los Angeles Community College District* (1984) PERB Decision No. 408.) Consequently, the Board has ruled that it has discretion to allow the filing of a reply brief when a response to exceptions "raises new issues, discusses new case law or formulates new defenses to allegations."[5] (*Ibid.*) Because CDCR's response to Woods' exceptions does none of these, the Board declines to accept Woods' reply brief.

c. Documents Filed with Resubmitted Exhibit A

Woods' resubmission of Exhibit A was accompanied by a 21 page document entitled "Charging Party's Procedural Overview For Placing Exhibit A Into Admissible Evidence: Including Any And All Reservations and Exceptions Taken To The Board's Decision of December 30, 2009 Pertaining To The Charging Party's Administrative Appeal." CDCR filed objections to Exhibit A which included an objection that Woods' "Procedural Overview" was an unauthorized additional brief in support of her exceptions. Woods responded to CDCR's objections with a four page brief and attached declaration.

As indicated by its full title, Woods' "Procedural Overview" is essentially a request for reconsideration of the Board's decision in *State of California (Department of Corrections & Rehabilitation)*, *supra*, PERB Order No. Ad-382-S. PERB Regulation 32410(a) allows a party to request reconsideration of a Board decision on only two grounds: (1) the decision contains "prejudicial errors of fact"; or (2) newly discovered evidence would have a material impact on the decision. These limited grounds preclude a party from using the reconsideration process to reargue or relitigate issues that have already been decided. (*Chula Vista Elementary School District* (2003) PERB Decision No. 1557; *San Bernardino Teachers Association, CTA/NEA*

[5] By letters dated October 22 and 29, 2009, the PERB Appeals Assistant informed Woods that the Board has discretion to consider a reply brief.

(Cooksey) (2000) PERB Decision No. 1387.) In her "Procedural Overview," Woods does not claim to have newly discovered evidence relevant to the Board's prior decision but merely reiterates the legal arguments she presented to the Board in her administrative appeal. As a result, the document is not a proper request for reconsideration under PERB Regulation 32410(a).

Additionally, the Board's order in *State of California (Department of Corrections & Rehabilitation)*, *supra*, PERB Order No. Ad-382-S granted Woods leave to resubmit Exhibit A in compliance with PERB regulations but did not grant her leave to file additional briefing over the exhibit or to amend her exceptions. Accordingly, we decline to accept Woods' "Procedural Overview" and response to CDCR's objections as part of the record on appeal. We do, however, consider CDCR's objections to Exhibit A as part of the record on appeal because the document was submitted pursuant to the Board's order in *State of California (Department of Corrections & Rehabilitation)*, *supra*, PERB Order No. Ad-382-S, which allowed CDCR to respond to Exhibit A in the event it was resubmitted by Woods.

2. Exceptions to Rulings on Evidence

a. Grant of Motions to Quash Subpoenas

At Woods' request, PERB issued subpoenas to Carolina Garcia (Garcia), the *Skelly*[6] officer who reviewed Woods' rejection on probation, and Elizabeth Ohlendorf (Ohlendorf), the employee from CDCR's Employee Discipline Unit who served Woods with her notice of rejection. CDCR filed written motions to quash both subpoenas; Woods filed written opposition to both motions. On the first day of hearing, the ALJ granted CDCR's motions.

[6] In *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194, the California Supreme Court held that due process requires a public employer to provide an employee with the opportunity for a hearing prior to imposing discipline.

Woods contends that the ALJ improperly quashed the subpoenas because the ruling resulted in the exclusion of critical evidence. CDCR responds that the issue is not properly before the Board because Woods failed to appeal the ALJ's rulings on the motions pursuant to applicable PERB regulations.

In support of its argument, CDCR relies on PERB Regulation 32190(f), which states in full: "Rulings on motions shall not be appealable except as specified in Sections 32200 and 32360." Based on this language, CDCR argues that the procedures in PERB Regulations 32200 and 32360 provide the exclusive means to obtain Board review of an ALJ's ruling on a motion and, therefore, Woods cannot challenge the ALJ's rulings on the motions to quash in her exceptions.

PERB Regulation 32200 provides that a party may request Board review of a Board agent's ruling on a motion only if the Board agent joins in the request. The regulation does not provide for an appeal of a Board agent's refusal to join in the request.[7] Thus, under CDCR's interpretation of the regulations, a large number of rulings by Board agents would never be subject to review by the Board itself. We do not believe the Board intended this result when it adopted PERB Regulation 32190.

Instead, PERB Regulation 32190 (and thus the procedures in PERB Regulation 32200) applies only when a party chooses to appeal a ruling on a motion prior to the Board agent's issuance of a decision on the merits. Nothing in PERB's regulations precludes a party from forgoing an interlocutory appeal and challenging the Board agent's ruling on the motion in its exceptions. This interpretation is consistent with the Board's de novo review of the record

[7] PERB Regulation 32360 sets out the procedure for an appeal of a Board agent's administrative decision. However, PERB Regulation 32380 provides that "any interlocutory order or ruling on a motion" is not appealable as an administrative decision but may only be appealed "as provided in Section 32200." Thus, PERB Regulations 32360 and 32380 merely refer one back to PERB Regulation 32200.

when exceptions are filed and avoids the filing of numerous interlocutory motions for fear of waiving an appeal.

Addressing the exception itself, we find no basis to overturn the ALJ's grant of CDCR's motions to quash the subpoenas of Garcia and Ohlendorf. Neither witness became involved in Woods' rejection on probation until after CDCR had decided to reject her. Based on this undisputed fact, the ALJ ruled that neither Garcia nor Ohlendorf had any relevant testimony to give because neither was involved in the decision making process nor did either witness have personal knowledge of Woods' job performance or incidents with co-workers. Because nothing in the record indicates that Garcia or Ohlendorf would have provided relevant testimony, we affirm the ALJ's rulings on the motions to quash.

b. Exclusion of Moore's Testimony

As noted above, Woods attempted to call Moore as an expert witness on State probationary employee evaluation and rejection procedures. After reviewing Moore's history of State employment, the ALJ declined to qualify Moore as an expert witness and excluded her from testifying. Woods claims this was prejudicial error as Moore's testimony would have helped Woods establish that CDCR failed to follow statewide procedures for rejection on probation.

"A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates. Against the objection of a party, such special knowledge, skill, experience, training, or education must be shown before the witness may testify as an expert." (Evid. Code, § 720, subd. (a).) Woods offered Moore as an expert on the State civil service process for evaluation and rejection of probationary employees. However, Moore never worked for the State Personnel Board, which promulgates and enforces the statewide civil

service standards, nor did she ever work for CDCR in any capacity. Rather, her claimed expertise is based solely on her personal experiences with probationary employees while holding supervisory positions in various State agencies. We agree with the ALJ that this experience is insufficient to establish Moore as an expert on State civil service procedures.

Furthermore, even if Moore qualified as an expert, we find the exclusion of Moore's testimony constituted harmless error. Woods argues that Moore's testimony would have helped establish that CDCR retaliated against her because it failed to follow State civil service procedures. While we agree that Moore could have helped establish what those procedures are, we find that Moore's testimony was not necessary for Woods to prove her case.

PERB has long held that an employer's unlawful motive for an adverse action may be established by showing a "departure from established procedures and standards" when dealing with the employee who suffered the adverse action. (*Novato Unified School District* (1982) PERB Decision No. 210.) Yet demonstrating that the employer failed to comply with a particular standard is not enough in itself to establish unlawful motive. For example, in *Novato Unified School District*, *supra*, the Board found that the school district's failure to notify a teacher that derogatory material had been placed in his personnel file, as required by Education Code section 44031.10, constituted a departure from established standards indicative of a retaliatory motive. The Board's finding was based on the fact that the principal only kept a "secret file" on the teacher against whom the district was found to have retaliated. On the other hand, in *Baker Valley Unified School District* (2008) PERB Decision No. 1993, the Board found no retaliatory motive where the school district offered two teachers the option to resign in lieu of involuntary separation from service, an arguable violation of Education Code sections 44948.5 and 44949. The record in that case established that the district had a consistent practice of making such offers regardless of the teacher's union activity.

This authority shows that PERB's inquiry as to whether an employer has deviated from established standards in dealing with a particular employee is based upon the standards that exist within the specific workplace, not on adherence to statewide standards. (See *State of California (Department of Corrections)* (2001) PERB Decision No. 1435-S [unlawful motive found where employer initiated investigation of employee for alleged violation of tool control standards when practice at particular institution was to loosely enforce those standards].) Accordingly, we find that Moore's proffered testimony was of limited relevance and therefore exclusion of her testimony did not prejudice Woods' case.

3. Exception to ALJ's Conduct at PERB Hearing

Though not addressed in her exceptions or supporting brief, Woods argues in her declaration and those of three other hearing attendees that the ALJ engaged in unprofessional conduct during breaks in the hearing. Woods alleges in her declaration that she overheard the ALJ speaking with one of CDCR's witnesses about their children's sporting events. Declarant Mac Worthy describes the same incident and also alleges that one of CDCR's attorneys mentioned to the ALJ that she had called SEIU to determine whether the union would be representing Woods at the hearing. Declarant John Woods Sr. alleges that he overheard the sporting events conversation as well as others between the ALJ and a CDCR witness about family matters. Dr. Roosevelt Hughes (Hughes) alleges in his declaration that, following the end of the final day of hearing, he and Woods overheard the ALJ in conversation with a CDCR witness and one of CDCR's attorneys.

Woods argues that these "off the record" conversations indicated bias by the ALJ toward CDCR. None of the declarations alleges that these conversations involved Woods' case or the hearing itself. Thus, we find no prohibited ex parte communication occurred

between CDCR attorneys and the ALJ.[8] Nor is there any evidence that the personal conversations between the ALJ and CDCR attorneys and witnesses during breaks in the hearing had any influence on the ALJ's decision in this matter. For these reasons, we find Woods' exception to the ALJ's "off the record" conversations is without merit.

4. Exceptions Related to Hearing Transcripts

a. Change in Transcription Fee

As with the alleged improper conversations by the ALJ, this exception is not explicitly raised in Woods' exceptions but rather is contained in Exhibit A. As noted, Exhibit A consists of various documents Woods claims establish an unlawful fee increase by PERB's transcription contractor. One of the included documents is a December 16, 2008 letter to PERB's General Counsel in which Woods claims that the fee increase violates PERB's contract with the transcriber and that PERB's Division of Administrative Law has acquiesced in the violation. In the same letter, Woods expresses concern that her pursuit of this matter while her case is pending before the ALJ may result in an adverse ruling in her case.

Woods has produced no evidence that the dispute over the transcription fee had any effect on the outcome of her case or even that the ALJ who decided her case knew of the dispute. Absent such evidence, we refuse to indulge Woods' baseless speculation on this issue. Moreover, we find the fee increase did not prejudice Woods as she had access to the transcripts prior to filing her reply brief with the ALJ, as indicated by her transcript citations in that document. We therefore find no merit in this exception.

[8] PERB Regulation 32185(a) provides, in relevant part: "No party to a formal hearing before the Board on an unfair practice complaint shall, outside the hearing of the other parties, orally communicate about the merits of the matter at issue with the Board agent presiding."

b. Alleged Incomplete Transcripts

Woods alleges in her declaration that "there are important and relevant testimonies missing, lost, or that have been removed from the PERB's hearings transcripts and/or may be 'missing' from the hearing tapes." Woods also offers to hire a forensic specialist to examine the hearing recordings to determine if any testimony has been removed from them.[9] However, Woods does not specifically identify any testimony she believes occurred that is not reflected in the transcript.

In his declaration, Hughes claims that the transcript does not contain questions that he read to Woods during her direct examination and is also missing some of her responses to those questions. Our review of the list of questions attached to Hughes' declaration, which Woods contends is the same list used at the hearing, indicates that eight of the questions listed are not in the transcript. From the transcript, it appears that some of the questions were omitted by Hughes because Woods had covered their subject matter in a previous answer, and the ALJ specifically said another question was already asked and Woods agreed. The remaining questions are not in the transcript but there is no indication this is the result of an omission by the transcriber. Instead, the omissions appear to be the result of Hughes' not asking the questions for whatever reason, perhaps because the omitted questions largely repeat subjects already covered.

In sum, we find no evidence that there was any intentional or inadvertent omission of testimony from the hearing transcripts. We therefore find this exception wholly without merit.

[9] Exhibit B to Woods' exceptions is the resume and supporting documentation of the forensic specialist.

5. Exceptions to ALJ's Weighing of Evidence and Credibility Determinations

Woods contends in her exceptions that the ALJ gave inordinate weight to CDCR's evidence while virtually ignoring her evidence.[10] She also argues that the ALJ's credibility determinations are incorrect because the ALJ mischaracterized her behavior at the hearing and failed to consider the uncooperative demeanor of CDCR witnesses Robert Storms and Larry Norris.

The court of appeal recently stated the following about the Board's review of an ALJ's proposed decision:

> When a party files a statement of exceptions to an ALJ's proposed decision, the Board reviews the record de novo, and is empowered to reweigh the evidence and draw its own factual conclusions. Although the Board generally gives deference to the ALJ's credibility determinations, which may be based on considerations such as witness demeanor (*Beverly Hills Unified School Dist* (1990) PERB Dec. No. 789 [14 PERC ¶ 21042]), it is not bound by the ALJ's evaluation of the weight to be given to disputed evidence. '[T]he [Board], not the hearing officer, is the ultimate fact finder, entitled to draw inferences from the available evidence.'

(*California Teachers Assn. v. Public Employment Relations Bd.* (2009) 169 Cal.App.4th 1076, 1086-1087, quoting *McPherson v. Public Employment Relations Bd.* (1987) 189 Cal.App.3d 293, 304.)

"[T]he Board has determined that it will normally afford deference to administrative law judges' findings of fact involving credibility determinations unless they are unsupported by the record as a whole." (*Anaheim City School District* (1984) PERB Decision No. 364a.) "The ALJ, after hearing live testimony in [a] case and, in such a role, determining the credibility of the witnesses based upon first hand observation, is in a much better position to accurately make such determinations of [the witness'] testimony than is the Board, which is

[10] Woods also contends that the record is missing crucial evidence because CDCR did not call certain individuals as witnesses. However, nothing prevented Woods from calling them as witnesses.

only in the position to review the written transcripts of the hearing." (*Marin Community College District* (1995) PERB Decision No. 1092.)

Having thoroughly reviewed the entire record in this matter, we conclude the ALJ properly weighed the evidence presented by the parties at hearing. We also agree with the ALJ's credibility determinations, particularly as they appear largely based on witness demeanor.

Three of Woods' declarants object to the ALJ's characterization of Woods' demeanor at hearing. Hughes, for example, declares that "[t]here was no wandering, use of profanity or unfavorable conduct by Woods" at the hearing. However, the proposed decision does not mention any behavior of this sort. The ALJ merely found that "Woods' strident demeanor at hearing undermined her credibility" because, despite repeated admonitions, she continued to testify while questioning witnesses and to mischaracterize witness testimony. The transcript contains ample support for the ALJ's determination. Moreover, Woods' hearing conduct provides further support for the ALJ's finding that CDCR rejected Woods on probation in part because of her inability to take direction and other behavioral issues.

Finally, as can be gleaned from the discussion above, Woods' exceptions are replete with explicit and implicit charges of bias by the ALJ. However, these claims find no basis in the record before us. Under these circumstances, we find it appropriate to quote Chairman Caffrey's concurrence in *Hacienda La Puente Unified School District* (1997) PERB Decision No. 1186:

> [T]he fundamental component of PERB's role in administering the EERA and the other collective bargaining statutes PERB oversees, is its neutrality. Evidence of bias or any lack of neutrality by PERB, its ALJs or any of its agents should be brought to the attention of the Board immediately. Conversely, unsubstantiated and self-serving suggestions of bias by a party displeased with the outcome of a case pending before PERB, as it

appears has occurred here, do a disservice to PERB and bring discredit to the party offering the unfounded suggestions.

ORDER

The complaint and underlying unfair practice charge in Case No. SA-CE-1640-S are hereby DISMISSED.

Members McKeag and Wesley joined in this Decision.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

PATRICIA L. WOODS, Charging Party, v. STATE OF CALIFORNIA (DEPARTMENT OF CORRECTIONS & REHABILITATION), Respondent.	UNFAIR PRACTICE CASE NO. SA-CE-1640-S PROPOSED DECISION (August 24, 2009)

Appearances: Patricia L. Woods, in pro per; Casey C. Tichy, Legal Counsel, and Linda M. Kelly, Labor Relations Counsel, Department of Personnel Administration, for Department of Corrections and Rehabilitation.

Before Christine A. Bologna, Administrative Law Judge.

PROCEDURAL HISTORY

This case alleges discrimination/retaliation against an employee by rejecting her during the probationary period (rejection) after she and her union expressed concerns about job duties and supervision. The employer denies commission of any unfair practices, asserts failure to state a prima facie case due to lack of nexus between protected activity and the rejection, and contends that it would have rejected the employee for nondiscriminatory reasons based on operational necessity.

On December 14, 2007, Charging Party Patricia L. Woods (Charging Party or Woods) filed an unfair practice charge against the State of California, Department of Corrections and Rehabilitation (CDCR or employer). On January 23, 2008, the Public Employment Relations Board (PERB or Board) Office of the General Counsel issued an unfair practice complaint[1] (complaint) alleging discrimination against Woods, a bargaining unit employee, in rejecting

[1] Charging Party withdrew allegations of unilateral change in the assignment of job duties and that she was required to disclose her Social Security Number on timesheets.

her in late November 2007 after she and/or her exclusive representative, Service International Employees Union Local 1000 (SEIU or union) expressed concerns about assigned job duties outside her civil service job classification ("out of class work") and other employment issues, and requested a transfer away from her current supervisor on five occasions in October 2007, in violation of Government Code section 3519(a) of the Ralph C. Dills Act (Dills Act).[2]

On February 8, 2008, Respondent CDCR answered the complaint, admitting that it issued the notice of rejection to Charging Party, denying all substantive allegations, and asserting affirmative defenses. On February 20, 2008, an informal settlement conference was conducted but the dispute was not resolved.

On May 19, 20, October 20, 21, and 22, 2008, formal hearing was held in Sacramento. On March 11, 2009, the case was submitted for decision following receipt of the parties' post-hearing briefs.[3]

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[2] Unless otherwise indicated, all references are to the Government Code. The Dills Act is codified at Government Code sections 3512 et seq. PERB regulations are codified at California Code of Regulations, title 8, sections 31001 et seq.

[3] On April 25, 2008, Respondent moved to hold the formal hearing in abeyance pending resolution of Woods' appeal of the rejection to the State Personnel Board (SPB). Charging Party opposed the motion. On May 5, the motion was denied. (*State of California (Department of Industrial Relations)* (1998) PERB Decision No. 1299-S.) On June 26, SPB granted Woods' request to remove her appeal from rejection from its hearing calendar.

In late March and early April 2008, Charging Party filed requests for discovery and investigative subpoenas. The request was denied because PERB Regulations do not provide for discovery procedures. In May, Respondent filed motions to quash three subpoenas which Charging Party opposed. Two subpoenas were quashed. In June, Charging Party filed a motion to correct errors in the hearing transcript but did not identify the errors. On August 11, Charging Party requested a continuance of the hearing which Respondent opposed; the continuance was granted. In September, a conference call was conducted over Charging Party's request for a list of Respondent's witnesses and to depose such witnesses; the request for deposition was denied and the witness list was granted. On December 22, Charging Party's request for extension of time to file the opening brief was granted; Respondent did not oppose the request. On January 20, 2009, Charging Party filed a Letter of Intentions and request to shorten time to file all post-hearing briefs. The request was denied.

FINDINGS OF FACT

Jurisdiction

Respondent CDCR admitted that CDCR is a state appointing power and the Department of Personnel Administration is the state employer under Government Code section 3513(j). It is found that Charging Party Woods is a state employee under Government Code section 3513(c) in a bargaining unit represented by SEIU.

Background

SEIU is the exclusive representative for state bargaining unit 1 and other state bargaining units. Lois Kugelmass (Kugelmass) is a Senior Labor Relations Representative working in the union's resource center. Kugelmass provides representation in adverse actions and grievances to employees represented by SEIU.

On September 10, 2007, Woods was appointed as an Associate Government Program Analyst (AGPA) by CDCR, Division of Adult Parole Operations (DAPO or division), Crisis Placement Unit (CPU or unit), transferring from a Behavioral Specialist II position with the Department of Mental Health, Coalinga State Hospital.[4] There are 4,200 employees are employed in the division. The DAPO Director is Thomas Hoffman, and the Assistant Deputy Director was Marilyn Kalvelage. The unit is responsible for monitoring contracts for programs of parole outpatient clinics and transitional case management. More than 60 employees work in CPU. Larry Norris (Norris) is a Staff Services Manager III (SSM III) in DAPO. Robert

[4] Charging Party returned to state civil service in her position with Coalinga State Hospital following an eight-year break as a government consultant. She entered state service as a Graduate Research Assistant in 1972. After a four year break in service, she held staff positions with the Department of the Youth Authority in 1976-1977, and was a staff consultant and held executive and exempt appointments with the California Conservation Corps from 1977-1980. From 1981-1998 on a full and part-time basis, Woods served as an examiner and chairperson on civil service examination (exam) panels for six state departments, including SPB. As of mid-October 2007, she had 10.8 years of state service.

Storms (Storms) and Jill Dubbs (Dubbs) are Staff Services Manager IIs (SSM II) in DAPO. Goldie Parino (Parino) promoted to Staff Services Manager I (SSM I) in early October 2007 from an associate analyst position within the division. Rhonda Carr (Carr) is a Staff Services Analyst (SSA) new to state service who began working in CPU approximately September 20, 2007. DeAnna Gonzales (Gonzales) is a supervisor in the CDCR headquarters personnel office.

When Woods was hired as an AGPA in September 2007, she was directly supervised by Storms because the SSM I position was vacant. There were also vacant SSA positions in the unit. When Parino was appointed as an SSM I in October 2007,[5] she became Charging Party's immediate supervisor, with Storms the second-line supervisor, and Norris the third line manager in the chain of command.

September 2007 Events

Storms was out of the office on Woods' first day of work. On September 11, 2007, Storms provided Woods with an overview of CPU and DAPO functions and staffing, and gave her documents to review. Over the next two to three days, Storms and Woods had many discussions over the different roles of the SSA and AGPA, and which staff should be traveling to and communicating with contractors, and processing invoices and other paperwork. Woods believed she should be the sole contact with contractors as the SSAs' supervisor, and the SSAs should complete all paperwork. Storms informed Woods that all staff would perform all functions, and her position was lead, not supervisory.

The following week, on September 18, 2007, Woods sought to meet with Storms about a contract as he was leaving to attend another meeting. Woods wanted to meet immediately

[5] In late August 2007, Woods applied for the vacant SSM I position ultimately filled by Parino. She was not interviewed or selected due to lack of experience, according to Storms. At the time she applied, Woods had already been hired as an AGPA on August 17.

but agreed to meet later. During the subsequent meeting, Woods interrupted Storms several times, and told him that she had held positions higher than his. The next day, September 19, Woods and Storms met to discuss her role as the AGPA versus the role of the SSAs in the unit in processing invoices and communicating with contractors. Woods again stated that she had held higher positions than Storms. Neither individual changed positions, and Woods again interrupted Storms. The next day, September 20, Woods and Storms met on the same subject. Woods said that the new SSA Carr should handle all the invoices. Storms responded that all staff needed to work together until they learned internal work processes, and the unit was fully staffed; staff roles could be re-evaluated then. Storms further advised that training would start the next day.[6] The following morning, September 21, Woods sought to meet with Storms in his office as he was leaving to go to a meeting. Storms told Woods that they could meet later since it was not an emergency. Woods responded that Storms should make more time for her, and left. When they met later, Storms directed Woods to attend meetings with Carr, accompany her to an institution, and obtain the meeting and visitation dates from her.[7]

Also on September 21, 2007, Parino attempted to provide training to Woods and Carr on invoicing. Woods insisted that Parino was doing it wrong, and it was Carr's job, not hers. Woods also interrupted Parino. Parino decided to train the employees separately.[8]

The following week, on September 24 and 25, 2007, Woods told Storms that Carr did not know how to track budgets and process invoices. Storms responded that both Carr and

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[6] On September 20, 2007, Storms began to document his interactions with Woods, and her conduct reported to him by others, at the time the incidents occurred. Storms did not show or otherwise share this documentation with Woods.

[7] Storms also offered Woods "assistance" from the Employee Assistance Program (EAP).

[8] Parino did not complete Woods' training on invoicing.

Woods needed to learn procedures, and reminded Woods to go with Carr to the institution to meet with the contractor. Woods replied that the SSA should not leave the office, and only process invoices. Storms disagreed.

On the morning of September 26, 2007, Storms requested Woods to attend a presentation with Carr. Woods complained that she did not know about the meeting, would need a rental car, and had another meeting to attend. Storms responded that the rental car was prearranged and the second meeting was optional. Woods was so upset that Storms relieved her from attending the presentation. Storms told Woods to calm down and go to the second meeting. Storms again mentioned the EAP.

Also on September 26, 2007, another unit supervisor advised Storms that Woods had some problems with headquarters personnel staff. Storms spoke with Gonzales who told him that she and other personnel staff were uncomfortable dealing with Woods because of her aggressive, demanding behavior. Storms asked Gonzales to document the contacts with Woods.

October 2007 Events

On October 1, 2007, Woods came to Storms' office to complain about her salary, claiming it was not at the level that he mentioned at the interview. Storms disputed any promise of a set salary as that issue was handled by personnel. Storms further informed Woods that he would not meet with her one-on-one without another supervisor because she continually misrepresented what he said. Storms arranged for a meeting with Dubbs, Woods, and himself. Dubbs was also on the interview panel, and confirmed that personnel determines pay rates, Woods was not promised a specific salary, and the AGPA position was not represented as a field assignment although some travel would be required.

On October 3, 2007, Storms requested Woods' September 2007 timesheet so he could sign it. Woods responded that she had already sent it to personnel, but had a copy. Storms explained that personnel would not process timesheets without a supervisor's signature because supervisors had to verify employee work hours, and directed Woods to provide her original signed timesheet to him each month. Woods brought the timesheet to Storms, and left abruptly.[9]

On the morning of October 4, 2007, Storms sent an electronic mail message (e-mail) to all unit staff that Parino was hired for the SSM I position effective October 8.[10]

Also on October 4, 2007, Woods submitted her written resignation/notice of separation from the AGPA position effective at the close of business on November 8. The resignation was addressed to Storms, and copied to Dubbs, Norris, and her official personnel file.

On October 5, 2007, Norris left work for two weeks to undergo back surgery. Norris' scheduled return to work date was October 22. Norris sent an e-mail to unit/division staff advising that Dubbs would act as SSM III in his absence. Also on October 5, Woods sent a letter to Dubbs seeking an informal one-on-one meeting that week to discuss and resolve employment concerns that she was unable to resolve with Storms;[11] Norris and Storms were copied with Woods' letter.

October 8, 2007 was a state holiday, Columbus Day.

On October 9, 2007, Parino reported to the unit as SSM I. Parino gave a memorandum (memo) to Woods and Carr outlining their assignments effective the next day, October 10.

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[9] Woods signed and submitted the timesheet on October 2, 2007. Storms signed it on October 4.

[10] Storms' documentation of Woods ended on October 4, 2007 since Parino would now be her first-line supervisor.

[11] Dubbs was traveling out of the office on October 4, 5, and 9, 2007.

Woods was assigned six contracts, and Carr four contracts. Woods and Parino discussed the assignments that day. Woods told Parino that her duty statement did not include such assignments, and she would have to discuss it with Dubbs.

On October 10, 11, and 12, 2007, Woods called in sick. She submitted a medical doctor's note dated October 12 that Woods was unable to work those dates due to flu and work-related stress, and was released to return to work on October 15. Also on October 10, Dubbs received Woods' October 5 letter. Dubbs e-mailed Woods that Dubbs was scheduled to travel on October 11, 12, and 15, but would meet with Woods after her new employee orientation training on October 16 through 19 when both were in the office.

October 12, 2007 SEIU Letter (Union Letter)

On October 12, 2007, Kugelmass sent a letter to Norris,[12] with copies to Dubbs, Storms, and a CDCR labor relations officer. The letter stated that SEIU represented Woods. The letter complained about preparing and processing contractor invoices, stating that these additional duties were assigned to Woods on October 8, and were functions outside her original duty statement and civil service job classification (class). "Other related personnel-management concerns" expressed in the letter were the unfair treatment of Woods which forced her to submit an untimely resignation. The letter requested Norris to meet with Woods to resolve her concerns; work with Woods to relocate her to another comparable position in the unit, division, or department;[13] and consider relocating Woods from her current supervisor to avoid a hostile work environment. Kugelmass included her direct telephone (phone) line should staff need it.

[12] The letter was hand-delivered and sent by certified mail. Kugelmass prepared the letter with Woods' assistance.

[13] The letter stated that the union had requested Woods to reconsider her resignation to work with Norris to find a new position.

Storms and Dubbs did not receive the October 12, 2007 union letter until October 15 because both were out of the office that day. Norris did not receive it until his return to work on October 22.

Subsequent October 2007 Events

Also on October 12, 2007, Storms received an e-mail from Gonzales supplying the requested documentation of Woods' encounters with CDCR headquarters personnel staff from September 4 through the week of October 1. Described were 10 to 12 instances of Woods' personal and phone contacts inquiring about her salary, transfer paperwork, appointment, and a salary advance.

On the afternoon of October 15, 2007, Woods met with Dubbs for one hour after Dubbs' travel plans were postponed. Woods wanted to discuss the October 12 union letter but Dubbs declined since it was an informal meeting. Dubbs further informed Woods that a formal response to the letter would be prepared after staff review. Woods mentioned concerns about her current assignment as a field position; a contractor; scheduled site visits to meet with contractors; attendance at the new employee training given her resignation; Storms' unavailability and refusal to meet with her unless another supervisor was present; the SSM I position and hire of Parino into it; Parino's refusal to discuss the assignments in the October 9 memo; assignment of work between the AGPA and SSA; attendance at a meeting; Parino's refusal to work on contractor invoices while the unit was understaffed; and the inequality of the assigned contracts to the AGPA and SSA. Dubbs responded to all these concerns. Dubbs also told Woods that she should give her resignation more thought since it was a drastic step. Woods replied that the union advised her that it was a forced resignation and recommended she revoke it. In addition, the union did not expect a response to the letter other than resolution of the situation. Woods also told Dubbs that the only resolution was to place her in a different

position outside the unit. Dubbs summarized the meeting with Woods in a memo and e-mailed to Norris on October 17. Dubbs discussed the memo with Norris between October 17 and 22.

On October 16 through 19, 2007, Woods attended new employee orientation training. During breaks, she returned to the unit. Woods asked Parino why she would not answer questions by e-mail. Parino responded that she preferred to talk. Woods replied that she liked to document her work.

October 22, 2007 Meeting

On October 22, 2007, Norris returned to work. At 4:00 p.m., he met with Woods for over an hour to discuss the October 12 union letter; this was one of the requested actions in the union letter. Norris told Woods that he would meet with managers, supervisors, and employees, and conduct a full "360 degree" review before taking action.

The union letter also requested removal of Woods from Storms' supervision, and Woods expressed concerns about Storms in the meeting. At the time, Parino was Woods' immediate supervisor, and Woods did not then express any problems with Parino. Therefore, this second request was resolved, and Storms was told to back away.

The union letter further requested that Norris work with Woods to relocate her to another position in the unit, division, or department. Norris gave Woods time off to interview for other positions and look for other jobs with prior notice. Norris may have said something to the effect that supervisors and employees should try to work things out before involving the union.[14] Norris told Woods that he would try to get back to her by the end of the week.

[14] Norris testified that he may have said "Give me a chance to work out issues before going to the union." Norris repeatedly asserted that he had no problems with employees seeking union assistance, and told Woods that she had a right to go to her union.

Later October 2007 Events

On October 26, 2007, Norris informed Woods that he did not have a final decision but would try to have one the following week.

Also on October 26, 2007, Woods rescinded her October 4 resignation by letter to the CDCR headquarters personnel office, and requested that a copy of the letter be placed in her official personnel file.[15]

On October 29, 2007, Woods sent a memo to Norris thanking him for the October 22 meeting and getting back to her regarding when to expect a response. The memo also attached Woods' rescission of her resignation, stating that she decided to rescind her resignation to allow time for her to transfer and to prevent a break in civil service. The memo requested her transfer by the end of the month to another unit under Norris' supervision, or a supervisor other than Storms or a supervisor directly reporting to Storms. The memo also acknowledged that Woods and Norris had been working to transfer her list eligibility scores to CDCR, and Woods was taking and passing civil service examinations (exam) conducted by CDCR and other state departments.

On October 30, 2007, Norris drafted a written response to the October 12 union letter; the draft was finalized and dated the next day, October 31. Norris' October 31 letter contained nine quotes from the union letter and responses to them. Norris intended to hand-deliver his letter to Kugelmass, and meet with her to discuss it. Norris called Kugelmass and left a voice-mail message on her direct line, and left a message for her on the SEIU main telephone number

[15] The letter stated that Woods was "asked to withdraw" the letter of resignation. Norris saw the resignation letter within one to two weeks after he returned to work. He told Woods that he would have tried to work things rather than resign. Norris did not ask or direct Woods to rescind the resignation.

within one or two weeks after the response was finalized. Norris did not hear from Kugelmass, so he did not sign or send the response to her.[16]

November 2007 Events

During the first week of November 2007, after Woods complained about Parino, Norris assumed direct supervision of her, giving her a special assignment to audit contracts.

Norris also met with Woods on November 9[17] and 16, 2007[18] to discuss her transfer out of the unit and the status of his review of her employment issues. Norris did not physically move Woods out of the unit because the floor was full and there were no extra desks. Also on November 9, Woods sent a memo to Norris updating him on the status of audited contracts. The memo stated that the project and contracts were assigned by Norris to Woods on October 22, and Woods was placed under Norris's direct supervision during that meeting. Norris disputed this, but did not respond to Woods' memo since he was directly supervising her at the time.

In November 2007, Norris continued his full review of Woods' employment concerns even after preparing his October 31 response to the October 12 union letter. On November 9, he met with Gonzales and another CDCR headquarters personnel employee.

On November 20, 2007, Woods and Parino had a confrontation. Parino overheard Woods telling Carr that she could not find information in the contractors' binders and there

[16] Kugelmass testified that she only received one voice-mail message from Kugelmass about the union letter, which was after Woods was rejected. Kugelmass also testified that she left voice-mails for Norris, but did not recall how many or the contents of the messages.

[17] Woods' first probationary performance review was due November 9, 2007, a few days after Norris began supervising her.

[18] Norris did not recall Woods requesting that he meet separately with her and Kugelmass or other union representative. Woods testified that she asked Norris to meet with the union seven to eight times.

were related boxes in another cubicle. Parino told Woods that Carr had to work on her own assignments, and Woods would have to look for the material alone. Woods raised her hand and told Parino not to talk to her like that. Parino responded that they could argue about it outside. Woods replied that she was not going anywhere with Parino. Carr and Parino walked away. Woods immediately reported the incident to Norris. Norris asked Parino to provide her version of the interaction in writing a day or two later.

Rejection of Charging Party

Norris and Storms testified that Woods was the first employee rejected in the division and unit.

Woods did not receive the probationary performance report due November 9, 2007, or any written notice of work deficiency before she was served with the notice of rejection on November 27. Storms and Norris testified that Storms prepared a draft probationary performance report but the CDCR Employee Discipline Unit directed them not to issue it due to the pending rejection.

The issuance of probationary performance reviews within DAPO and CPU is sporadic. Storms did not receive performance reports as an SSM I or SSM II; Norris did not recall if he gave Storms a performance evaluation. Storms did not give performance reports to two unit employees; one may have already obtained permanent status. Storms did give a written performance report to another employee who passed probation.[19] Norris testified that the department was not required to give written performance appraisals to employees before rejecting them.

Storms testified that he first considered rejecting Woods approximately September 20, 2007, and began documenting his interactions with her as a result. Storms advised Norris of

[19] The civil service job classes held by these unit employees were not identified.

this documentation, told Norris that he had verbally counseled Woods many times, and recommended Woods' rejection to Norris before Norris left on medical leave in early October 2007. Storms also recommended Woods' rejection to a deputy director one week before he received the October 12 union letter. Storms could only recommend rejection at his level.

Ultimately Norris made the decision to reject Woods although the notice of rejection had to be signed by the DAPO Director and Assistant Deputy Director. Prior to receiving the October 12, 2007 union letter on October 22, Norris was aware of Storms' recommendation to reject Woods but did not believe it was sufficient on its own. Norris decided to reject Woods in November 2007 after conducting the full review of Woods' and SEIU's employment claims, which took approximately one month.[20] Norris spoke with Storms, Parino, Dubbs, Carr, two headquarters personnel staff, and others. All Woods' supervisors, Storms, Parino, and Dubbs in Norris' absence, verbally counseled her about work performance and/or her behavior.

Both Storms and Norris testified that Woods was rejected because of workload issues (resisting and failure to complete work assignments) and interpersonal communication problems with two different supervisors, coworkers, and other staff. According to Norris, Woods' conduct was beginning to disrupt other work units, and he did not have time at his level to personally manage her.

Both Storms and Norris testified that the October 12, 2007 union letter had nothing to do with Woods' rejection. Woods would have been rejected even if she had not complained to SEIU and they had not received the letter.

[20] Norris' October 31, 2007 response to the October 12 union letter did not mention rejection of Woods.

Post-Rejection Events

On November 27, 2007, Charging Party was personally served with the notice of rejection effective at the start of business on December 5, 2007. She was given 30 minutes to pack her things and leave.

Woods exercised her "*Skelly*" (*Skelly v. Stat Personnel Board* (1975) 15 Cal.3d 194) right to respond to the rejection before its effective date. She and Kugelmass filed written argument with the CDCR *Skelly* officer at the *Skelly* hearing conducted on December 5, 2007.[21] On December 6, the *Skelly* officer recommended withdrawal of the rejection due to lack of a probationary performance report and documentation of corrective action. On December 14, the DAPO Assistant Deputy Director rejected the recommendation of the *Skelly* officer and upheld the rejection of Charging Party.[22]

Credibility Determination

The standards for evaluating witness credibility in California Evidence Code section 780 are: demeanor; character of testimony; capacity to perceive, recollect, or communicate; bias, interest, or motive; prior consistent or inconsistent statements; attitude; admissions of untruthfulness; and existence or nonexistence of facts testified to.

Charging Party testified that before going to SEIU and afterwards, she did not receive any negative feedback, was not provided feedback on how to successfully complete probation, and was not offered any counseling or training to correct any work problems. Thus, she had no

[21] Woods and Kugelmass were present at the *Skelly* hearing. Other than the neutral *Skelly* officer, no CDCR representatives attended.

[22] In December 2007, SEIU filed a grievance for Woods, and elevated that grievance to arbitration in April 2008. In January 2008, Woods filed two complaints with CDCR over personnel transactions. In May 2008, Woods filed a Public Records Act request for documents with CDCR.

prior notice that her conduct and/or work product was unacceptable or below standard when she was rejected.

Storms testified about numerous meetings with Woods in which he verbally counseled her, although he admitted that the documentation of these discussions was not provided to Charging Party. Norris testified that he met at least three times with Woods about her workplace concerns. These three individuals are the principal witnesses for the issues presented in this case.

Using the standards of credibility set forth in Evidence Code section 780, *supra*, the testimony of Storms and Norris is credited over Charging Party's contrary testimony for the following reasons. First, Parino and Dubbs, two division and/or unit supervisors not involved in the decision to recommend rejection of Woods, testified about meeting with Charging Party and attempting to train and counsel her. Their testimony corroborates that of Storms and Norris. There is no credible reason for these independent witnesses to fabricate their testimony to Woods' detriment.

Charging Party would not even acknowledge Parino as her supervisor, despite prior notice of her appointment and the fact that Parino signed her October 2007 timesheet. Instead, Woods insisted that Norris agreed to directly supervise her as a result of their October 22, 2007 meeting, notwithstanding her subsequent October 29 memo to Norris requesting that he transfer her to a supervisor other than Storms or a supervisor reporting to Storms, i.e., Parino. Dubbs' conclusions following her meeting with Charging Party on October 15 proved to be prophetic.[23]

[23] In her memo to Norris, Dubbs stated that Charging Party was unhappy in her assignment and with her coworker, supervisor, and manager, and there was no change in the workload required for that position or at that level she would accept. There was no position in the department that would be acceptable to Woods because she wanted to function

By contrast, Charging Party has a motive to alter her testimony since she has a direct stake in the outcome of this proceeding.

Finally, Woods' strident demeanor at hearing undermined her credibility. She attempted to testify while questioning witnesses despite repeated admonitions. She mischaracterized witness testimony in formulating questions, lending credence to Storms' and Norris' testimony that she misstated their remarks during meetings. Although Charging Party represented herself in this proceeding and is a layperson not legally trained, her actions cannot be ignored.

ISSUE

Did CDCR discriminate/retaliate against Woods by rejecting her after receiving the October 12, 2007 union letter presenting her employment concerns?

CONCLUSIONS OF LAW

Discrimination/Retaliation

To demonstrate a violation of the Ralph C. Dills Act (Dills Act) section 3519(a), the Charging Party must show that: (1) the employee exercised rights under the Dills Act; (2) the employer had knowledge of the exercise of those rights; and (3) the employer imposed or threatened to impose reprisals, discriminated or threatened to discriminate, or otherwise interfered with, restrained, or coerced the employees because of the exercise of those rights. (*Novato Unified School District* (1982) PERB Decision No. 210 (*Novato*); *Carlsbad Unified School District* (1979) PERB Decision No. 89; *State of California (Department of Corrections)* (2006) PERB Decision No. 1826-S.)

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independently, but also required frequent contacts with supervision and was unhappy when supervisors were not immediately available or provided direction she disagreed with.

Although the timing of the employer's adverse action in close temporal proximity to the employee's protected conduct is an important factor (*North Sacramento School District* (1982) PERB Decision No. 264 (*North Sacramento SD*), it does not, without more, demonstrate the necessary connection or "nexus" between the adverse action and the protected activity. (*State of California (Department of Youth Authority)* (2000) PERB Decision No. 1403-S; *Moreland Elementary School District* (1982) PERB Decision No. 227.) Facts establishing one or more of the following additional factors must also be present: (1) the employer's disparate treatment of the employee (*State of California (Department of Transportation)* (1984) PERB Decision No. 459-S); (2) the employer's departure from established procedures and standards when dealing with the employee (*State of California (Department of Corrections)* (2001) PERB Decision No. 1435-S; *Santa Clara Unified School District* (1979) PERB Decision No. 104); (3) the employer's inconsistent or contradictory justifications for its actions (*State of California (Department of Parks and Recreation)* (1983) PERB Decision No. 328-S); (4) the employer's cursory investigation of the employee's misconduct (*Trustees of the California State University* (1990) PERB Decision No. 805-H); (5) the employer's failure to offer the employee justification at the time it took action or the offering of exaggerated, vague, or ambiguous reasons (*McFarland Unified School District* (1990) PERB Decision No. 786); (6) employer animosity toward union activists (*Cupertino Union Elementary School District* (1986) PERB Decision No. 572); or (7) any other facts which might demonstrate the employer's unlawful motive (*Novato*, *supra*, PERB Decision No. 210; *North Sacramento SD*, *supra*, PERB Decision No. 264).

Evidence of adverse action is also required to support a claim of discrimination or retaliation under the *Novato* standard. (*Novato*, *supra*, PERB Decision No. 210; *Palo Verde Unified School District* (1988) PERB Decision No. 689.) In determining whether such

evidence is established, the Board uses an objective test and will not rely upon the subjective reactions of the employee. (*Ibid.*) In *Newark Unified School District* (1991) PERB Decision No. 864, the Board further explained:

> 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.

(Emphasis added; footnote omitted.)

Protected activity by an employee is broadly defined. (*Novato*, *supra*, PERB Decision No. 210.) Individual employee efforts to enforce labor agreements, with or without the assistance of the exclusive representative, are considered to be protected participation in organizational activities. (*North Sacramento SD*, *supra*, PERB Decision No. 264.)

Woods' Claim

It is undisputed that on November 27, 2007, Respondent CDCR took adverse action against Charging Party by rejecting her during probation effective December 5. It is uncontroverted that Woods, and SEIU on her behalf, raised employment concerns about her job duties and supervision in writing on October 12 and 29, and in meetings with Norris on October 22, and November 9 and 16, and CDCR management knew about these actions. Charging Party has failed to meet her burden of proof that the employer took adverse action because of her protected activity, however. Woods attempted to demonstrate nexus under three theories: timing, disparate treatment/departure from established procedures/standards, and anti-union animus.

Timing

Charging Party was rejected in late November 2007, after CDCR agents Storms and Dubbs received the October 12 union letter on October 15, and Norris received it on

October 22; after Norris met with Woods on October 22, and November 9 and 16; and after Norris received Woods' October 29 request to transfer from Storms' direct or indirect supervision. Timing is present.

Disparate Treatment/Departure from Established Procedures/Standards

Charging Party argued that the failure to provide her with a probationary performance report and any written documentation of work deficiencies violated state standards and demonstrated that she was singled out.[24] The evidence showed that performance evaluations during the probationary period and annually were issued sporadically within CDCR, DAPO and/or CPU. Some staff received performance reports and others did not. No evidence was presented whether other division or unit AGPAs were issued probationary performance reports, however. Furthermore, Storms' and Norris' testimony that the CDCR Employee Discipline Unit advised them not to give the first probation performance report to Woods was unchallenged.

Charging Party also cites the *Skelly* officer's recommendation to withdraw her rejection for lack of documentation/progressive discipline as demonstrating CDCR's departure from established procedures/standards. The DAPO Assistant Deputy Director rejected the *Skelly* officer's recommendation. A *Skelly* officer's authority may be limited to recommending, with final decision-making residing in another departmental official. (*Gary Blakeley* (1993) SPB Decision No. 93-20; *Titus v. Civil Service Commission* (1982) 130 Cal.App.3d 357; *Coleman v. Regents of the University of California* (1979) 93 Cal.App.3d 521.) Whether CDCR properly rejected the *Skelly* officer's recommendation and/or provided Woods with sufficient documentation of her work performance during the probationary period are issues better

[24] Charging Party attempted to introduce an expert witness to testify about general statewide standards for probation periods and performance evaluations. The witness was not qualified as an expert and did not testify.

directed to the SPB in Woods' appeal from rejection. Disparate treatment and departure from established procedures/standards are not established by the record.

Anti-Union Animus

Charging Party asserts that CDCR animosity toward SEIU, and animus toward her for seeking the union's assistance, is shown by Norris' statement that he "resented" Woods going to the union, the lack of response to the October 12, 2007 union letter, and the failure to meet with Kugelmass or other SEIU representative over her employment issues. None of these contentions is supported by the evidence.

First, it is found that Norris did not make the "resentment" remark attributed to him. Charging Party testified in response to questions she drafted that Norris made this statement during their October 22, 2007 meeting. Both in examination as an adverse witness by Woods and on direct examination during Respondent's defense case, Norris testified that he made no comments to Woods that were critical of her involvement of the union in her workplace issues. Norris' testimony is credited.

Next, Norris did respond to SEIU by letter dated October 31, 2007. That correspondence was not sent because Norris intended to meet with Kugelmass and discuss the response in person. The parties' representatives failed to make contact with each other.

Norris also responded to Charging Party directly about her employment concerns.[25] The October 12, 2007 union letter requested Norris to meet with Woods. Norris met with her on October 22, his first day back to work, and twice more on November 9 and 16. The union letter also asked Norris to relocate Woods from her current supervisor, identified in the letter as Storms. This request was also granted as Parino had been hired and now served as Woods'

[25] Dubbs also met with Charging Party on October 15, 2007 in response to her request for an informal meeting on October 5, the date Norris went on medical leave.

first-line supervisor. Finally, the letter asked Norris to "work with" Woods to relocate her to a comparable position in the unit, division, or department. Norris became Woods' supervisor in early November 2007 after her October 29 request to be transferred to his supervision or a supervisor other than Storms or one reporting to Storms. Norris also gave Charging Party time off during work to interview for other positions and take civil service exams before and after he became her supervisor.

The October 12, 2007 union letter did not specifically request a meeting between SEIU, Charging Party, and Norris. Instead, it asked that Norris resolve the matter, and included Kugelmass' direct phone number if Norris or his staff needed to reach her. Norris phoned Kugelmass to discuss a response to her letter but they did not connect.

Finally, Norris "worked with" Charging Party to relocate her to another position in the department or another state department by giving her time off to interview and take exams. Norris relocated Woods from two supervisors, first Storms and later Parino, and thereafter supervised her directly. Norris did not find or place Woods in another position but the union letter did not request such action. Norris did all that the union letter asked him to do. Anti-union animus is not established.[26]

For all of the foregoing reasons, nexus is not established. Charging Party has failed to establish a prima facie case of discrimination/retaliation by the preponderance of the evidence.

Even assuming Charging Party had demonstrated a prima facie case of discrimination/retaliation, CDCR established non-discriminatory reasons that it would have rejected Woods even in the absence of her, and the union's, protected activities. These reasons are set forth in the notice of rejection. Although Charging Party did not receive written

[26] There is no evidence that Charging Party held an elected or appointed position in SEIU.

documentation of meetings and discussions, she was verbally counseled by two supervisors, Storms and Parino, and she met with a supervisor and manager, Dubbs and Norris, at least four times about her employment concerns. Respondent CDCR established by the credited testimony of Storms and Norris that it would have rejected Woods notwithstanding her and SEIU's protected activity, and/or in the absence of her and the union's protected conduct, and the October 12, 2007 union letter had nothing to do with the rejection. Accordingly, the unfair practice charge and unfair practice complaint are dismissed.

PROPOSED ORDER

Based upon the foregoing findings of fact and conclusions of law and the entire record in this matter, the unfair practice complaint and underlying unfair practice charge in Case No. SA-CE-1640-S, *Patricia L. Woods v. State of California (Department of Corrections & Rehabilitation)*, 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 Public Employment Relations Board (PERB or 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(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).)

Christine A. Bologna
Administrative Law Judge