

PERB Affirms Test For Determining When A Public Employer May Discipline Employees Acting As Union Representatives

In a recent decision, the Public Employment Relations Board (PERB) affirmed its test for what it considers to be protected activity when employees are acting as union representatives.

In *Service Employees International Union, Local 1000 (SEIU) v. State of California (Department of Corrections & Rehabilitation)* (Department) (2012) PERB Decision No. 2282-S, PERB concluded that the Department committed an unfair labor practice when it disciplined a union representative for her allegedly "insubordinate, discourteous, unprofessional, and disrespectful" behavior while representing union members during meetings with their supervisors. The Department issued a Letter of Instruction to SEIU's job steward following an employee meeting in which the job steward asked the employee's supervisor to answer questions, and then gestured with her hand to indicate that the supervisor who responded was not the one to whom she was speaking. The Letter instructed the job steward to conduct herself courteously, professionally, and with respect to supervisors in the future and threatened to replace her as job steward in future employee disciplinary meetings if her improper behavior continued. The Letter also stated that a copy of the Letter would be placed in her personnel file for one year.

SEIU filed an unfair practice charge against the Department claiming that it had violated section 3519(b) of the Dills Act by punishing the job steward based on protected activities. Like the Educational Employment Relations Act (EERA), the Dills Act prohibits State employers from discriminating or retaliating against employees because of their exercise of the rights afforded by the Dills Act, including the right to participate in union activities and the right of unions to represent members in their employment relations with the state. PERB determined that the job steward's actions on behalf of SEIU were protected, and the Department's issuance of an adverse disciplinary letter based on the job steward's protected activity was an unfair labor practice.

In reaching its ruling, PERB noted that union representatives are afforded significant latitude in their representational speech and conduct and must be free to speak and act for the union without interference, restraint or coercion by the employer. This right of union representatives to engage in protected activities includes occasional impulsive behavior which will be balanced against the employer's right to maintain order and respect.

Ultimately, relying in its prior decisions, PERB affirmed that a union representative's speech and conduct will only lose statutory protection if it is "sufficiently opprobrious, flagrant, insulting, defamatory, insubordinate, or fraught with malice as to cause substantial disruption of or material interference in the workplace." PERB will make this assessment using an objective, not subjective, standard. Therefore, the fact that a supervisor feels personally offended by an employee's speech or actions will be insufficient to demonstrate that the speech, taken in a representational capacity on behalf of a union member, is outside the bounds of statutory protection. Rather, a union representative's speech will only lose its protected status if it is so disrespectful of the

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employer that it seriously impairs the employer's ability to maintain discipline.

In this case, PERB concluded that the job steward's behavior did not meet the standard for justification of discipline by the Department. PERB determined that the steward's hand gesture signifying her request for one of the supervisors not to speak was impulsive and not so egregious as to interfere with the Department's discipline and operations. The job steward only minimally interrupted one of the supervisors during the meeting to ask questions, and her behavior was witnessed by only three employees. PERB concluded that these actions were not sufficiently disruptive so as to lose their status as protective activity.

This decision does not limit a public employer's ability to discipline union representatives for violating established policies, even when the violations occur during protected union activities. However, in order to avoid an unfair labor practice charge, public employers should carefully evaluate the employee's allegedly improper behavior before pursuing discipline in light of the high degree of statutory protection afforded to employees when acting as union representatives.

If you have any questions regarding this decision or employee discipline issues in general, please feel free to contact one of our [eight offices](#) located statewide. You can also visit our [website](#), follow us on [Facebook](#), or download our [Client News Brief App](#).

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