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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

CALIFORNIA CORRECTIONAL PEACE OFFICERS' ASSOCIATION, **Plaintiff and Appellant,** **v.** **DAVID A. GILB, IN HIS OFFICIAL CAPACITY,** **Defendant and Respondent.**	**A128189** **(San Francisco County Super. Ct. No. CGC-08-471062)**

California Correctional Peace Officers' Association (CCPOA) appeals from a judgment entered after the trial court granted summary judgment to respondent. CCPOA had alleged that respondent violated its members' rights of free association and equal protection by offering nonunion employees access to dental benefit plans at lower employee cost. In this appeal, CCPOA contends the trial court erred in granting summary judgment, because the court applied the rational basis test rather than strict scrutiny in its review of respondent's action, and respondent's action is unnecessary to further any substantial government interest. We will affirm the judgment.

I. FACTS AND PROCEDURAL HISTORY

CCPOA is the exclusive recognized employee organization representing approximately 31,000 state employees in "State Bargaining Unit Six" (Unit 6). (See

Gov. Code, § 3512 et seq.) Unit 6 consists of correctional peace officers employed by the California Department of Corrections and Rehabilitation. As such, for collective bargaining purposes, CCPOA represents Unit 6 employees who are members of CCPOA as well as Unit 6 employees who are not CCPOA members. CCPOA brought this litigation on behalf of itself and its members.

Respondent David A. Gilb is the former director of the California Department of Personnel Administration (DPA). DPA is the state agency designated as the governor's representative for meeting and conferring with CCPOA on matters within the scope of representation for Unit 6 employees. (Gov. Code, § 3517.)

The following is based on the separate statements of material fact submitted by the parties in connection with their dueling motions for summary judgment.

A. *2001-2006 Agreement Pertaining to Dental Benefits*

DPA and CCPOA agreed to a Memorandum of Understanding covering Unit 6, effective July 1, 2001 through July 2, 2006 (MOU). In section 13.02 of the MOU, the state agreed to provide CCPOA the net sum of $44.33 per month per eligible employee to provide a dental benefit through the CCPOA Benefit Trust Fund.

The CCPOA Benefit Trust Fund is a private entity, independent of the State of California, formed with a primary purpose of providing benefits, including dental benefits, to Unit 6 employees.[1] Pursuant to section 13.02 of the MOU, the CCPOA Benefit Trust Fund (not the state) contracted with dental providers regarding the particular dental benefits that covered employees would receive.

B. *Ongoing Provision for Dental Benefits*

Although the MOU expired on July 2, 2006, the parties continued to give effect to section 13.02 pending negotiations on a successor agreement. (See Gov. Code, § 3517.8.) On September 18, 2007, when negotiations reached an impasse, the state

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[1] CCPOA contends the CCPOA Benefit Trust Fund provides such benefits to "members," which at the time included union members and "fair share members, who paid dues to CCPOA under the former agency fee agreement," and now includes only union members.

implemented certain provisions of its last, best and final offer. As a result, the state continued to offer the same dental benefits through the CCPOA Benefit Trust Fund as previously provided pursuant to the MOU, with a monthly contribution of $44.33.

In October 2007, however, the CCPOA Benefit Trust Fund terminated the dental benefits of all *non*union members of Unit 6. (From the CCPOA's view, once the agency fee agreement ended, former "fair share members" were no longer covered, leaving only actual union members to receive benefits through the CCPOA Benefit Trust Fund.) The CCPOA Benefit Trust Fund stated that "it will be the responsibility of [the] DPA to arrange for these benefits to be provided to the impacted employees through another source." The CCPOA Benefit Trust Fund continued to offer dental benefits to union members of Unit 6; both union and nonunion employees would still have access to identical dental coverage if the CCPOA Benefit Trust Fund had not eliminated dental coverage for nonunion employees.

After the CCPOA Benefit Trust Fund ceased to provide dental benefits to nonunion employees in Unit 6, DPA endeavored to provide dental benefits for them through the state's existing contracts with other dental providers. On November 5, 2007, DPA offered nonunion members of Unit 6 the same state-sponsored dental benefits already available to thousands of other state employees. These employees would have otherwise lost their dental benefits entirely.

On November 26, 2007, CCPOA notified DPA that the state was paying significantly different benefits to Unit 6 nonunion employees than to Unit 6 union members. DPA has not offered the union members the opportunity to enroll in the state-sponsored dental plans.

Respondent asserts that DPA could not have enrolled nonunion employees in Unit 6 in the dental plans previously offered by the CCPOA Benefit Trust Fund, because DPA had no contracts in place with the dental providers used by the CCPOA Benefit Trust Fund. Moreover, DPA has no control over the dental benefits, costs, or employer contribution levels established by the CCPOA Benefit Trust Fund, because those benefits

are established through contracts between the CCPOA Benefit Trust Fund and its dental providers.

C. *Difference Between Union Dental Benefits and Nonunion Dental Benefits*

As of 2009, Unit 6 *union* members could choose from two dental benefit plans: Western Dental and Primary Dental. The total monthly cost of these dental plans was $95.93 per employee; DPA contributed $44.33 toward this amount, and union members paid the $51.60 monthly difference. Thus, in 2009 DPA paid an employer contribution of approximately 46% of the total cost of dental benefits for Unit 6 union members.

As of 2009, Unit 6 *nonunion* members could choose only from other dental benefit plans. DPA paid approximately 75% of the premium for indemnity dental plans under the state-sponsored Delta Dental programs and approximately 100% of the premium for prepaid dental plans under the state-sponsored Safeguard and DeltaCare USA programs. The contribution rate in 2007 and 2008 was nearly identical. DPA calculated this employer contribution rate for nonunion members of Unit 6 to avoid contributing different amounts for different groups of state employees receiving the same dental plans, and to avoid programming changes in the Office of State Controller's payroll system.

CCPOA contends that DPA's implementation of different dental benefit plans for nonunion Unit 6 employees – in other words, those Unit 6 employees who could no longer receive dental benefits through the CCPOA Benefit Trust Fund – has had certain interrelated monetary implications. First, the state provides those employees a higher employer contribution rate as a percentage of total dental benefit cost. Second, those employees contribute less toward their dental benefits. Third, those employees have lower out-of-pocket costs for the dental benefits.

D. *Litigation*

In April 2009, CCPOA filed its second amended complaint in this case, alleging that Gilb, in his official capacity as director of the DPA, violated CCPOA's right to free association and equal protection under the United States Constitution, in violation of 42 United States Code § 1983. CCPOA sought an injunction precluding respondent from

discriminating against CCPOA union members by providing a "higher dental benefit" to nonunion members.

1. *Summary Judgment Motions*

The parties filed cross-motions for summary judgment, accompanied by their respective statements of undisputed material facts and supporting declarations and other evidence.

The parties disagreed as to the appropriate level of judicial scrutiny to be applied to the state's action. CCPOA argued that differential treatment in the terms and conditions of public employment based on union membership is subject to strict scrutiny. Because DPA permits only nonunion members to access the state-sponsored dental benefits, and because DPA's contribution levels for union and nonunion dental benefits result in higher out-of-pocket costs for union members, CCPOA argued that DPA's actions discriminated against CCPOA union members solely on the basis of their union membership. As such, CCPOA contended that DPA's differential treatment could not stand unless it was justified by a substantial government interest achieved by the least restrictive means. Respondent countered that the state's action was permissible under the rational basis test, because there was no substantial interference with CCPOA's free association rights, and DPA's actions had no substantial impact on any fundamental interest and did not affect a protected class.

2. *Trial Court's Ruling*

In November 2009, the court issued an order granting respondent's motion for summary judgment and denying CCPOA's motion for summary judgment.

In granting respondent's motion, the court found no triable issue of material fact and ruled that the rational basis test applied. As to CCPOA's first cause of action based on the equal protection clause, the court ruled there was no evidence of discriminatory intent, because the state had no choice but to provide coverage to nonunion employees once they were denied participation by the CCPOA Benefit Trust Fund through no fault of the state. On CCPOA's second and third causes of action based on the right of free

association, the court ruled that respondent established the absence of any direct and substantial interference with an individual's ability to associate or join the union.

The court denied CCPOA's motion on the ground that CCPOA "failed to shift its burden of proof in this case."

Judgment was entered, and this appeal followed.

II. DISCUSSION

In reviewing the grant of summary judgment, we conduct an independent review to determine whether there is a triable issue of material fact and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c); *Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 860; *Buss v. Superior Court* (1997) 16 Cal.4th 35, 60; *Ochoa v. Pacific Gas & Electric Co*. (1998) 61 Cal.App.4th 1480, 1485.) We construe the moving party's evidence strictly, and the nonmoving party's evidence liberally, in determining whether there is a triable issue. (See *D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 20; *Alex R. Thomas & Co. v. Mutual Service Casualty Ins. Co*. (2002) 98 Cal.App.4th 66, 72 (*Thomas*).)

A defendant seeking summary judgment must show that at least one element of the plaintiff's cause of action cannot be established, or that there is a complete defense to the cause of action. (Code Civ. Proc. § 437c, subd. (p)(2).) The burden then shifts to the plaintiff to show there is a triable issue of material fact on that issue. (See Code Civ. Proc., § 437c, subd. (p)(2); *Thomas*, *supra*, 98 Cal.App.4th at p. 72.)

In the matter before us, CCPOA asserted three claims under 42 United States Code section 1983, alleging that a state actor deprived CCPOA and its members of the constitutional rights to freedom of association and equal protection. In its summary judgment motion, respondent contended that there was no triable issue of material fact and it was entitled to judgment as a matter of law. For clarity of our analysis, we examine the summary judgment order as to each of CCPOA's causes of action separately.

A. *Equal Protection*

In its first cause of action, CCPOA alleged that "the State has created unequal dental benefits while asserting it is free to impose any benefit inequity it sees fit based

solely on union membership," and is thereby "denying Plaintiff equal protection of the laws by imposing a significant financial cost upon state employees represented by Plaintiff relative to similarly situated employees based solely on their participation in a constitutionally protected activity." In short, CCPOA claims that its equal protection rights (and the equal protection rights of its members) are violated because union members in Unit 6 pay more for the dental benefits they receive through the CCPOA Benefit Trust Fund than nonunion Unit 6 employees pay for the dental benefits they receive through state-sponsored plans.

For purposes of respondent's summary judgment motion, there is no material issue concerning the fact that union employees in Unit 6, who receive benefits through the CCPOA Benefit Trust Fund, now pay more for their dental benefits than nonunion employees in Unit 6, who no longer receive benefits through the CCPOA Benefit Trust Fund. Respondent disputes the extent of the difference and objected to some of CCPOA's evidence in the trial court, but respondent neither argues its evidentiary objections in this appeal nor disputes that there exists at least *some* difference. We therefore assume there is no triable issue of material fact and turn to whether, under the appropriate constitutional analysis, respondent is entitled to judgment as a matter of law.[2]

1. *Standard for Judicial Scrutiny*

The Fourteenth Amendment of the United States Constitution provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." (U.S. Const., 14th Amend., § 1.) In essence, an equal protection claim may arise where the state treats one class of persons differently than other similarly-situated persons. Here, CCPOA contends that union members in Unit 6 are treated differently than other (nonunion) Unit 6 employees.

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[2] As the trial court recognized, a plaintiff asserting an equal protection claim under 42 United States Code section 1983 must show an intent to discriminate based on the plaintiff's membership in a class. The trial court found no discriminatory intent. Even if there were a triable issue as to this element of intent, it would not be material: whether or not respondent had an intent to treat the class differently, CCPOA has no equal protection claim as a matter of law for reasons explained *post*.

The appropriate level of judicial scrutiny turns on the nature of the class that is the subject of the disparate treatment and the nature of the activity being regulated. Generally, strict scrutiny applies to the disparate treatment of a suspect class and to disparate treatment in the regulation of a fundamental right; otherwise, the rational basis test will typically apply. (See, e.g., *Lyng v. Automobile Workers* (1988) 485 U.S. 360, 370 (*Lyng*); *Hoke Co. v. Tennessee Valley Authority* (6th Cir. 1988) 854 F.2d 820, 828 (*Hoke*).)

As to the nature of the class, we disagree with CCPOA's definition of the class of persons affected by the state action. The individuals that are the subject of the disparate treatment are best defined not as employees within Unit 6 who are CCPOA members per se (as CCPOA contends), but as employees within Unit 6 who receive benefits through the CCPOA Benefit Trust Fund. Since at least July 2001, and continuing throughout the period identified in CCPOA's second amended complaint, the state contributed $44.33 toward the dental benefits of every Unit 6 employee receiving dental benefits through the CCPOA Benefit Trust Fund, *whether or not* the employee belonged to the CCPOA. The reason the state now provides a different contribution toward nonunion employees is not because those individuals do not belong to CCPOA, but because they no longer receive benefits through the CCPOA Benefit Trust Fund. CCPOA does not contend that Unit 6 employees receiving benefits through the CCPOA Benefit Trust Fund constitute a suspect class, and we have no reason to believe they would.[3]

Even if we were to accept CCPOA's contention that the affected class should be defined as Unit 6 employees who are CCPOA members, union members do not constitute a protected class for purposes of heightened scrutiny in equal protection claims. (*Henry*

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[3] Furthermore, CCPOA members in Unit 6 are not *similarly situated* with nonunion employees in Unit 6, because CCPOA members receive benefits through the CCPOA Benefit Trust Fund, while other Unit 6 employees do not. Therefore, even if CCPOA members in Unit 6 did constitute the affected class, their different treatment would not constitute an equal protection violation.

v. Metropolitan Sewer Dist. (6th Cir. 1990) 922 F.2d 332, 341.) In short, however the class is defined, it does not trigger strict scrutiny.[4]

Nor is strict scrutiny compelled by the nature of the state's action in this case. CCPOA's challenge is to the state's contribution to the dental plans of Unit 6 employees. Unit 6 employees do not have a constitutional right, much less a fundamental right, to state contributions toward a dental benefit plan or even a dental plan at all. Indeed, CCPOA does not make such an argument.

Instead, CCPOA contends that strict scrutiny applies because, in its view, the state's payment of a higher amount for nonunion Unit 6 employees affects the *incentive* to join or remain in the union, and this implicates the First Amendment because there is a right to associate in a labor union. CCPOA fails to distinguish between state regulation *of* a constitutional right, and state regulation of nonprotected activity that is claimed to have an effect on the exercise of a constitutional right.

CCPOA's reliance on *SEIU* and *Harwin* exemplifies its misunderstanding. (*Service Emp. Intern. v. Fair Political Pract. Com'n* (9th Cir. 1992) 955 F.2d 1312 (*SEIU*); *Harwin v. Goleta Water Dist.* (9th Cir. 1991) 953 F.2d 488.) Citing *SEIU*, for example, CCPOA insists: "Where the government's differential treatment of similarly situated groups implicates free association rights, strict scrutiny applies regardless of the magnitude of the burden on the First Amendment." As we shall explain at greater length *post*, however, *SEIU* and *Harwin* concerned the regulation of campaign contributions, which is activity *itself* protected by the First Amendment. Here, by contrast, the state is not regulating First Amendment activity, such as the right to join the union or participate in union activity; it merely makes contributions to employees' dental benefits. Although we will address the significance of the affect of those contributions on the inclination to join or stay in CCPOA *post*, at this point it suffices to say that *SEIU* and *Harwin* do not compel strict scrutiny in CCPOA's cause of action based on equal protection.

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[4] Accordingly, any factual issue concerning the definition of the class, or the reason that nonunion Unit 6 employees do not receive benefits through the CCPOA Benefit Trust Fund, is immaterial and not an impediment to summary judgment.

In its reply brief, CCPOA refers us to *Brown v. Alexander* (6th Cir. 1983) 718 F.2d 1417. There, a union and its members challenged the constitutionality of a statute that required a union to meet certain requirements before it could attain the government benefit of having its union dues deducted from employees' state salaries. (*Id*. at pp. 1419-1420.) The court *rejected* their First Amendment claim, since neither on its face nor in its effect did the statute deprive them of the First Amendment protections of free speech, advocacy, or association. (*Brown*, at p. 1423.) On their equal protection challenge, the court noted that there was no fundamental right to a "dues checkoff" and the state needed only a rational basis for distinguishing among employee organizations in this regard. (*Id*. at pp. 1423-1424.) As to one of the statutory requirements for dues checkoff, however, the court employed strict scrutiny: the requirement that the union not be affiliated with another organization. Because this requirement could limit the freedom of association for the union and its members, the court explained, strict scrutiny applied. (*Id*. at p. 1425.)

Brown does not compel strict scrutiny in this case. Conditioning a government benefit (dues deductions from state paychecks) on whether or not a union is affiliated with another organization may indeed impinge upon the rights of the union and its members to associate with other unions and their members. But no such implication arises from the state's action in this case: the state is not precluding CCPOA or its members from associating with other unions in order to obtain dental benefits.

The lesson of *Brown*, for our purposes, is that the rational basis test applies to a state's decision to condition a union's access to a government benefit, unless the condition limits the union's exercise of the very expressive activity for which it was formed – that is, the condition regulates First Amendment activity. In the matter before us, the state is not regulating First Amendment activity, and the rational basis test applies.

2. *Application of the Rational Basis Test*

Under the rational basis test, a violation of the equal protection clause exists "only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. . . . A statutory discrimination will not be set aside if any state of facts

reasonably may be conceived to justify it." (*McGowan v. Maryland* (1961) 366 U.S. 420, 425-426.)

Here, respondent contends that its contribution to the dental benefits of union employees in Unit 6 is based on its prior agreement with CCPOA (and its last best and final offer to the union), while its contribution to the dental benefits of nonunion employees in Unit 6 is based on its contribution to the dental benefits of other state employees having the same state-sponsored plans. Respondent further asserts that the reason for the difference in these contributions is the state's desire to maintain parity among all state employees enrolled in the relevant state-sponsored plans, and to avoid programming changes in the Office of State Controller's payroll system. There is thus a rational basis for the amount the state contributes toward the dental benefits respectively afforded to union and nonunion employees in Unit 6, for the difference in those amounts, and for the classification drawn by the state.

CCPOA urges that there is no rational basis for the state's decision to preclude union employees in Unit 6 from enrolling in the state-sponsored plans offered to nonunion employees in Unit 6. This theory, however, was not alleged in the second amended complaint. CCPOA based its equal protection claim on the higher cost union members have as a result of the amounts contributed by the state toward their dental benefits, not as a result of their inability to enroll in state-sponsored plans provided for other employees.

In any event, there is a rational basis for the state not to give CCPOA members access to the other state-sponsored plans. Union employees in Unit 6 already have dental benefits through the CCPOA Benefit Trust Fund. Providing union members access to the state-sponsored plans would require the state to incur additional expenses in the midst of difficult economic times. It would also require the time and expense of making programming changes in the state's payroll system. While this type of expenditure might have been necessary to provide dental benefits for Unit 6 employees who could no longer receive benefits through the CCPOA Benefit Trust Fund, it is not irrational for the state to

decline to spend even more to accommodate union employees in Unit 6 who *already* have benefits through the CCPOA Benefit Trust Fund.

Summary judgment was properly granted with respect to CCPOA's equal protection claim.

B. *Freedom of Association Based on Retaliation*

In its third cause of action, CCPOA alleges that respondent retaliated against CCPOA and its members' constitutional rights to freedom of association and protected union activity by "imposing unequal benefits based solely on union membership and refusing to respond to the Union's attempts to address these significant inequalities between union members and nonmembers and continuing both practices for more than a year," resulting in a "financial penalty on members of CCPOA because of their union membership." In other words, CCPOA contends that respondent's contribution of $44.33 toward the dental benefits for union employees in Unit 6, and a higher amount toward the dental benefits for nonunion employees in Unit 6, was in retaliation for the union members' exercise of their constitutional rights.

A claim based on retaliation obviously requires proof of retaliation, so we begin our analysis with this element. We note there was no allegation in the second amended complaint as to what union activity purportedly precipitated the alleged retaliation. Nor was there any evidence of retaliation submitted in connection with respondent's motion for summary judgment.

In its separate statement of undisputed material facts, supported by admissible evidence, respondent contended that it contributes more to the dental benefits of nonunion Unit 6 employees because (1) nonunion Unit 6 employees are no longer able to receive dental benefits through the CCPOA Trust Benefit Fund, (2) to offer these nonunion Unit 6 employees dental benefits, the state turned to providers with whom the state already had contracts for other state employees, and (3) the state chose the contribution level for nonunion Unit 6 employees by making it the same as the contribution level for other state employees enrolled in the same state-sponsored plans. From this evidence, a trier of fact could conclude that respondent's action was not in

retaliation for any protected activity engaged in by CCPOA or its members, but simply because it was a logical means of dealing with the circumstances brought about by CCPOA's decision to permit only union members to receive dental benefits through the CCPOA Benefit Trust Fund. The burden therefore shifted to CCPOA to create a triable issue of material fact.

In its opposition to respondent's summary judgment motion, the CCPOA disputed respondent's assertion that it lacked discriminatory intent, on the ground that respondent maintained its position notwithstanding CCPOA's protests. Even if this was evidence of discriminatory intent, however, it certainly is not evidence of retaliation. There is no evidence that respondent kept state contributions to union members' dental benefits the same, decided to contribute more to nonunion employees' dental benefits, or declined to permit union members access to state-sponsored plans rather than plans through the CCPOA Benefit Trust Fund, in retaliation for any protected activity by CCPOA or its members.[5] CCPOA failed to create a triable issue of material fact.

CCPOA acknowledges in its reply brief that "case law and common sense may dictate that an Equal Protection/First Amendment retaliation claim requires proof of unlawful intent." Claims based on government retaliation for the exercise of First Amendment rights require the plaintiff to show that its protected activity was a substantial or motivating factor for the alleged retaliatory conduct. (E.g., *Board of Comm'rs, Wabaunsee Cnty. v. Umbehr* (1996) 518 U.S. 668, 675; *CarePartners, LLC v. Lashway* (9th Cir. 2008) 545 F.3d 867, 877.) CCPOA presented no evidence that protected union activity was a substantial or motivating factor for maintaining the state's contribution to union members of Unit 6 and providing the usual state contribution to nonunion members of Unit 6.

For this reason – as well as the constitutional reasons discussed next – the trial court did not err in granting summary judgment as to CCPOA's third cause of action.

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[5] Nor did the CCPOA contend in its statement of undisputed material facts supporting its own summary judgment motion that the respondent's action was in retaliation for the protected activity of CCPOA or its members.

C. *Freedom of Association Based on Discrimination*

In its second cause of action, CCPOA alleges that respondent discriminates against CCPOA and its members' constitutional rights to freedom of association and protected union activity by "imposing an added cost to union membership in the form of union members receiving significantly inferior dental benefits compared to non-members; CCPOA members are required to pay more for dental benefits – and receive a lesser contribution from the state for their benefits – based solely on their union membership." In connection with the summary judgment motions, no evidence was presented – and really no argument is made now – that union members receive "significantly inferior dental benefits" in terms of the *type* of dental plan or its coverage; the contention, actually, is that respondent burdens union members' freedom of association by requiring them to pay more for the dental benefits they receive through the CCPOA Benefit Trust Fund, as compared to what nonunion employees in Unit 6 must pay for the dental benefits they receive through state-sponsored programs.

As mentioned *ante*, there is no triable issue as to the fact that the state currently contributes less to the dental plans of union employees in Unit 6, and thus union members pay more for their plans, as compared to nonunion employees in Unit 6. We therefore turn to whether this differential treatment violates the right of free association, looking first to the appropriate standard of judicial review.

The First Amendment to the United States Constitution, incorporated to the states by the Fourteenth Amendment, provides a public employee the right of association, including the right to join a labor union. (*Elrod v. Burns* (1976) 427 U.S. 347, 357 [political party affiliation] (*Elrod*); *Chico Police Officers' Assn. v. City of Chico* (1991) 232 Cal.App.3d 635, 642, 646 [labor union].)

Limitations on the freedom of association – such as limitations on the extent to which individuals may join unions or the extent to which union members may engage in union activities – are generally subject to strict scrutiny. (*Roberts v. United States Jaycees* (1984) 468 U.S. 609, 623 [infringement on right to associate by intrusion in organization's membership policy and internal structure must be justified by a

compelling state interest effected by least restrictive means]; *Bates v. Little Rock* (1960) 361 U.S. 516, 523-524 [compulsory disclosure of membership lists of NAACP branches must be supported by compelling state interest]; but see *Smith v. Arkansas State Highway Employees* (1979) 441 U.S. 463, 465 [no claim of retaliation or discrimination proscribed by the First Amendment, where state agency did not prohibit its employees from joining together in a union, from persuading others to do so, or from advocating any particular ideas, but merely refused to consider employee grievance when filed by the union rather than directly by the employee].)

Here, the state is not barring Unit 6 employees from joining the CCPOA, limiting their ability to do so, or regulating their right to engage in union activity. Rather, CCPOA's argument is that the state is merely discouraging Unit 6 employees from exercising their free association rights (being in the CCPOA union), because CCPOA members have to pay more for the dental benefits they receive through the CCPOA Benefit Trust Fund than nonunion members have to pay for the dental benefits they receive through state-sponsored plans.

CCPOA argues that strict scrutiny should be applied to this action, based on political patronage cases such as *Elrod*, *supra*, 427 U.S. 347. In *Elrod*, a county sheriff fired or threatened to fire employees solely because they did not pledge their political allegiance to the sheriff's political party, work for the party, contribute wages to the party, or obtain sponsorship from a party member. (*Id*. at pp. 351, 355, 362.) The court held that the government's condition of employment (or other government benefit) solely on the basis of political party affiliation required "exacting scrutiny." (*Id*. at p. 362; see also *Rutan v. Republican Party of Illinois* (1990) 497 U.S. 62, 74-75 [promotions, transfers and recalls based on political affiliation or support must be narrowly tailored to serve vital government interest].)

Elrod is factually distinguishable from the matter at hand. In the first place, the matter before us does not involve the deprivation of a government benefit based on affiliation with a political party. More significantly, we are concerned in this case with a much less invasive government action than was at issue in *Elrod*. Unit 6 employees are

not fired if they join the CCPOA; they keep their jobs and receive the same compensation as their non-union counterparts, including dental benefits; they merely pay $20 to $50 per month more for their dental benefits, if they choose them, than nonunion employees pay for their dental benefits.

CCPOA does little to answer whether the dramatically different disincentive alleged here constitutes a burden on freedom of association sufficient to trigger strict scrutiny. CCPOA offers us this footnote in *Elrod*: "Protection of First Amendment interests has not been limited to invalidation of conditions on government employment requiring allegiance to a particular political party. This Court's decisions have prohibited conditions on public benefits, in the form of jobs or otherwise, which dampen the exercise generally of First Amendment rights, however slight the inducement to the individual to forsake those rights." (*Elrod*, *supra*, 427 U.S. at p. 358, fn. 11.) However, the cases cited in that footnote pertain to the refusal of public office for failure to declare belief in God, dismissal of a high school teacher for criticizing the board of education's allocation of school funds, withholding unemployment compensation on the condition that the recipient accept employment contrary to the recipient's religious faith, and a tax exemption limited to those who affirmed their loyalty to the state. (*Ibid*.) None of these cases are remotely on point.

CCPOA argues that strict scrutiny should be applied based on *Teachers v. Hudson* (1986) 475 U.S. 292. There, nonunion members of a teacher's union challenged the imposition of a fee (amounting to 95% of union dues) on the ground it impermissibly forced them to fund ideological activities with which they disagreed. (*Id*. at pp. 294-297.) Although this effected only a "limited infringement on nonunion employees' constitutional rights," the fact that the rights were protected by the First Amendment required that the procedure be carefully tailored to minimize the infringement. (*Teachers,* at p. 303.) *Teachers* is distinguishable from the matter at hand, because the state is not requiring any employee of Unit 6 to fund any particular ideological activity.

Next we return to CCPOA's reliance on *Harwin* and *SEIU*. In *Harwin*, a water district ordinance provided that a water service applicant's application could not be

considered by a water board member to whom the applicant made a campaign contribution of $250 or more. (*Harwin, supra*, 953 F.2d at p. 489.) The ordinance was challenged on the ground that the ordinance effectively limited the campaign contributions of applicants for water service, but not the campaign contributions of opponents of an application. (*Id*. at pp. 489-490.) Noting that limits on campaign contributions infringe on the rights of political expression and association, the court concluded that the ordinance was subject to strict scrutiny; under this test, the statute was unconstitutional because the water district's interest in preventing corruption was not furthered by limiting contributions of applicants for water service but not opponents of water service applications. (*Id*. at pp. 489-492 & fn.6.)

Harwin lumped its First Amendment and equal protection analysis together, which it could do given the nature of the ordinance being challenged. (*Harwin, supra*, 953 F.2d at p. 490.) From a First Amendment perspective, the ordinance burdened the exercise of the right of free association by penalizing persons who made a campaign contribution to the candidate of their choice in the amount of $250 or more; this triggered strict scrutiny, which the ordinance could not survive because the interest in curbing corruption was not furthered by penalizing only water applicants and not opponents. From an equal protection perspective, the ordinance limited the exercise of a First Amendment right (campaign contributions) for some individuals (those who file a water application) but not others; this disparate treatment as to the right to make campaign contributions triggered strict scrutiny, which the ordinance could not survive because the differentiation between water applicants and opponents did not further the government interest in curbing corruption. Under either analysis, the point was that the government was *regulating the exercise of a First Amendment right*.

Here, by contrast, the state is not regulating the exercise of a First Amendment right. It is not regulating the exercise of the right to unionize or to participate in union activities; nor is it depriving some Unit 6 employees of the right to unionize but not others. The state is merely regulating the extent to which it contributes monetarily to the

dental benefits of state employees. *Harwin* does not compel application of strict scrutiny in the matter before us.

In *SEIU*, the Ninth Circuit considered the constitutionality of certain provisions of Proposition 73, a campaign financing reform measure that limited the amount of money individuals and groups could contribute to candidates for state and local office. (*SEIU, supra*, 955 F.2d at p. 1314.) Because Proposition 73 limited the amount a contributor could give during each fiscal year, as opposed to each election cycle, the plaintiffs argued that the measure discriminated in favor of incumbents and against challengers for political office. (*SEIU,* at pp. 1314-1315.) Specifically, it limited the contributions of individuals who chose to support non-incumbents to $1000 in each of two fiscal years, while individuals who supported incumbents could contribute $1000 in each of four years. (*Id*. at p. 1315.)

The question in *SEIU* was whether a viewpoint and content-neutral limitation on campaign contributions on a fiscal year basis "unconstitutionally discriminates in favor of incumbents and against challengers." (*SEIU*, *supra*, 955 F.2d at p. 1316.) In other words, the issue was whether a limitation on First Amendment activity disproportionately affected one group's exercise of its First Amendment rights. The court applied the strict scrutiny test and found that the differential treatment resulting from the limitation's discriminatory formula was not sufficiently in furtherance of an appropriate government interest. (*SEIU,* at p. 1321.)[6]

SEIU is distinguishable for the same reason *Harwin* is distinguishable: the state action in those cases directly regulated a First Amendment right (campaign contributions) in a manner that limited one group's ability to exercise that First Amendment right to a

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[6] Other cases have held that a limitation on campaign contributions, even though involving a significant interference with associational rights, may survive if the regulation was closely drawn to a sufficiently important interest. (*Nixon v. Shrink Missouri Gov't PAC* (2000) 528 U.S. 377, 387-388; *Buckley v. Valeo* (1976) 424 U.S. 1, 25; see *Montana Right to Life Ass'n v. Eddleman* (9th Cir. 2003) 343 F.3d 1085, 1091.) While this standard may not be precisely the same as strict scrutiny, it is more stringent than the rational basis test.

greater extent than others. Here, by contrast, the state is not regulating expressive activity or limiting one group's enjoyment of a First Amendment right to a different degree than others enjoy. Like *Harwin*, *SEIU* does not compel strict scrutiny in the matter at hand.

Although not discussed to any substantial extent by CCPOA, cases along the lines of *Minneapolis Star v. Minnesota Comm'r of Revenue* (1983) 460 U.S. 575 may be somewhat closer to the matter before us. In *Minneapolis Star*, the court ruled that singling out the press for a special use tax, and singling out some members within the press for the tax, burdened the freedom of expression and required a counterbalancing state interest of compelling importance. (*Id*. at pp. 585, 591-592.)

Minneapolis Star is distinguishable, however, in a number of important ways. First, the state here is not singling out the press, unions, or even CCPOA members, for the imposition of a *tax*. To the contrary, it is paying CCPOA members an amount (which was effected initially by the collective bargaining process) toward an employment benefit. Second, although one group may get less of a benefit than another, the state is not targeting persons for their *exercise* of First Amendment rights. The difference in the amount contributed by the state to the dental plans of Unit 6 employees is traced to whether the employees receive benefits through the CCPOA Benefit Trust Fund, not to whether the employees are members of a union or participating in union activities. Third, while a special tax on a particular group plainly *burdens* that group more than others, it is much less clear that the state contribution of $44.33 for dental benefits through the CCPOA Benefit Trust Fund puts those recipients in a worse position than employees who enjoy a higher state contribution for dental benefits through state-sponsored plans. Although CCPOA members pay more toward their premiums, they do not have the same *plans*, and there may be offsetting advantages in the form of lower co-pays, lower deductibles, broader coverage, narrower exclusions, or higher benefit levels in the plans offered through the CCPOA Benefit Trust Fund. In short, CCPOA fails to establish that the state action in this case requires strict scrutiny.

We turn, therefore, to the cases cited by respondent, who urges application of the rational basis test. In *Lyng, supra,* 485 U.S. 360, unions and union members raised association and equal protection challenges to a 1981 amendment to the Food Stamp Act. The amendment provided that no household could become eligible for food stamps during the time a member of the household was on strike, or receive a higher allotment of food stamps on the ground that the income of a striking family member had decreased. (*Lyng*, at p. 362.) In limiting the food stamp benefits of those engaged in a strike, the amendment placed pressure on individuals to leave the union; nonetheless, the court held, the statute did not "directly and substantially" interfere with the employees' ability to associate. (*Id*. at pp. 365-366, 368.) The court explained that the statute "requires no exaction from any individual; it does not 'coerce' belief; and it does not require appellees to participate in political activities or support political views with which they disagree." (*Id*. at p. 369.) The court applied the rational basis test and found the statute rationally related to the government's stated rationale. (*Id*. at pp. 372-373.)

Here, the state action – contributing $44.33 toward the dental benefits of CCPOA members of Unit 6 and a higher amount toward the dental benefits of other Unit 6 employees – certainly does not "require [CCPOA or its members] to participate in political activities or support political views with which they disagree." (*Lyng, supra,* 485 U.S. at p. 369.) Nor does it require any "exaction from any individual." (*Ibid*.) It does not require CCPOA or any of its members to pay the state anything. While it may mean that CCPOA members receive less of a monetary contribution from the state for their dental benefits than other Unit 6 employees, *Lyng* teaches that receiving less of a benefit from the government – in *Lyng*, food stamps – is not an "exaction" for these purposes.

CCPOA attempts to distinguish *Lyng* on several grounds, all of which stem from its primary distinction, which is as follows: the statute in *Lyng* penalized activity in which union members were likely to engage, rather than penalizing union membership itself. More specifically, the statute in *Lyng* denied food stamps because someone was striking and only for the duration of the strike, not because someone was a union

member. Here, CCPOA argues, the state pays less toward dental benefits not because someone is engaging in a certain activity, but because the person is a union member.

The distinction CCPOA draws is immaterial, however, since its factual predicate is erroneous. As discussed *ante*, the state is not paying less toward the dental benefits of a CCPOA member because he or she is a member of the union, but because he or she receives dental benefits through the CCPOA Benefit Trust Fund. The state is not penalizing union membership.

In any event, the distinction CCPOA draws is unpersuasive. CCPOA bases its argument on footnote 5 of the *Lyng* opinion, which explains that statutes "[e]xposing the members of an association to physical and economic reprisals or to civil liability merely because of their membership in that group poses a much greater danger to the exercise of associational freedoms than does the withdrawal of a government benefit based not on membership in an organization but merely for the duration of one activity that may be undertaken by that organization." (*Lyng*, *supra*, 485 U.S. p. 367, fn. 5.) The "economic reprisals" to which the court referred pertained to third-party reprisals against individuals whose identity in an organization became known through compulsory disclosure of the organization's membership list. (*Ibid*.) By no means does the DPA expose CCPOA members to physical or economic reprisals at the hands of third parties, or otherwise affect in any significant manner their ability to carry out their union activities. CCPOA fails to demonstrate that *Lyng* compels application of the strict scrutiny test. (See *Minnesota Bd. for Community Colleges v. Knight* (1984) 465 U.S. 271, 278, 290-292 [applying rational basis test to statute designating labor union as exclusive representative for purposes of communicating with employer, since it did not create an unconstitutional inhibition on associational freedom even if it put pressure to join the union]; *Plumbers Union Local No. 16 v. Omaha* (8th Cir. 1991) 946 F.2d 599, 600-601 [rational basis test applied to city ordinance, because requiring half of the plumbers sitting on a plumbing board to be nonunion members did not directly and substantially interfere with the union members' ability to associate]; *Hoke*, *supra*, 854 F.2d at pp. 822-823, 828 [rational basis test applied to TVA's rejection of nonunion contractor's bid solely for the reason that the

contractor was not unionized, because the decision to award one particular contract to a union contractor did not require an exaction from any individual, coerce any belief, or require the nonunion employees to become unionized and thus did not directly and substantially interfere with the nonunion contractor's employees' right not to associate in a union].)

Lastly, CCPOA argues that the only way for the CCPOA member in Unit 6 to pay less for dental benefits is to quit the union. CCPOA misses the point, however. CCPOA members have no constitutional entitlement to the employer contribution or dental plans afforded nonunion employees under the state-sponsored plans. Furthermore, CCPOA members of Unit 6 *do* receive a monthly government benefit of $44.33 toward the dental benefits they are provided through the CCPOA Benefit Trust Fund; the fact that Unit 6 employees who can no longer receive benefits through the CCPOA Benefit Trust Fund now have access to state-sponsored plans does not diminish the government benefit CCPOA members still receive. Nor is any difference in the plans or benefits attributable to differential treatment on the basis of union membership; it is instead traced to whether the Unit 6 employee has access to benefits under the CCPOA Benefit Trust Fund.

Because the challenged state action in this case does not "directly and substantially" interfere with the ability of a Unit 6 employee to join CCPOA or participate in union activities, we apply the rational basis test. For reasons stated *ante* in regard to the equal protection claim, the state's contribution of $44.33 for employees receiving dental benefits through the CCPOA Benefit Trust Fund, its contribution of a higher amount for employees receiving dental benefits through state-sponsored plans, and its decision to offer the state-sponsored plans only to those in Unit 6 who are precluded from plans through the CCPOA Benefit Trust Fund, are rationally related to the stated government interests.

The court did not err in granting summary judgment to respondent.

III. DISPOSITION

The judgment is affirmed.

NEEDHAM, J.

We concur.

SIMONS, Acting P. J.

BRUINIERS, J.