

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



CALIFORNIA DEPARTMENT OF FORESTRY)
EMPLOYEES' ASSOCIATION, LOCAL 2881,)
IAFF,)
)
Charging Party,) Case No. S-CE-505-S
)
v.) PERB Decision No. 921-S
)
STATE OF CALIFORNIA (DEPARTMENT OF) January 22, 1992
PERSONNEL ADMINISTRATION),)
)
Respondent.)
_____)

Appearances: Carroll, Burdick & McDonough by Kathleen M. Hansen, Attorney, for California Department of Forestry Employees' Association, Local 2881, IAFF; Christopher W. Waddell, Chief Counsel, and M. Jeffrey Fine, Deputy Chief Counsel, for State of California (Department of Personnel Administration).

Before Shank, Camilli and Carlyle, Members.

DECISION

CARLYLE, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the California Department of Forestry Employees' Association, Local 2881, IAFF (CDFEA) of a Board agent's dismissal (attached hereto) of its charge that the State of California (Department of Personnel Administration) (DPA) violated section 3519(b) and (c) and section 3523 of the Ralph C. Dills Act (Dills Act).¹ The Board

¹The Dills Act is codified at Government Code section 3512 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code. Section 3519 states, in pertinent part:

It shall be unlawful for the state to do any of the following:

has reviewed the dismissal and, finding it to be free of prejudicial error, adopts it as the decision of the Board itself,

FACTUAL BACKGROUND

In March 1991, CDFEA submitted its initial bargaining

(b) Denying to employee organizations rights guaranteed to them by this chapter.

(c) Refuse or fail to meet and confer in good faith with a recognized employee organized.

Section 3523 states, in pertinent part:

(a) All initial meet and confer proposals of recognized employee organizations shall be presented to the employer at a public meeting, and such proposals thereafter shall be a public record.

All initial meet and confer proposals or counterproposals of the employer shall be presented to the recognized employee organization at a public meeting, and such proposals or counterproposals thereafter shall be a public record.

(b) Except in cases of emergency as provided in subdivision (d), no meeting and conferring shall take place on any proposal subject to subdivision (a) until not less than seven consecutive days have elapsed to enable the public to become informed, and to publicly express itself regarding the proposals, as well as regarding other possible subjects of meeting and conferring and thereafter, the employer shall, in open meeting, hear public comment on all matters related to the meet and confer proposals.

(c) Forty-eight hours after any proposal which includes any substantive subject which has not first been presented as proposals for public reaction pursuant to this section is offered during any meeting and conferring session, such proposals and the position, if any, taken thereon by the representatives of the employer, shall be a public record.

proposals for state response and public comment in accordance with section 3523 of the Dills Act. DPA's response was also processed under section 3523. Two months later DPA, under a new representative, presented "dozens of proposals." CDFEA claims that these proposals were blatant take-aways with respect to monetary and other rights and that the counterproposals had never been presented at any public meeting or publicly announced presentation within the meaning of section 3523.

The Board agent, in his dismissal, concluded that section 3523 does not require that a proposal, except for "initial meet and confer proposals," be announced at a public meeting or publicly announced presentation. Further, the Board agent concluded that, although the failure to sunshine a proposal may be indicia of an intent not to bargain under the "totality of conduct" test (California State University (CSU) (1990) PERB Decision No. 799-H), a violation of the employer's obligation under section 3523(c) was not shown. Therefore, no indicia of a violation of the obligation to bargain had been established.

CDFEA'S APPEAL OF DISMISSAL

CDFEA argues that section 3523, which provides that "all initial meet and confer proposals" should be presented to the employer at a public meeting, should include all new proposals. Therefore, any time the state employer introduces a new, nonrelated subject, the public must be informed of such subject and given the opportunity to respond. To do otherwise, CDFEA contends, DPA could intentionally limit its "initial" proposals,

and once negotiations had commenced, DPA could introduce new proposals it actually intended to negotiate and thereby evade the need to comply with the "sunshine" requirement.

CDFEA also argues that the meaning of "all initial meet and confer proposals," in light of the public interest, should be that the public be informed of all new proposals.

DPA'S RESPONSE TO CDFEA'S APPEAL

DPA filed a late response to CDFEA's appeal.² DPA contends that this is a public notice complaint and cannot be adjudicated in the context of unfair practice proceedings. (California State University (CFA), supra. PERB Decision No. 799-H.)

DISCUSSION

It is well-established that public notice complaints shall not be adjudicated in the context of unfair practice proceedings, but must be filed in accordance with regulations governing public notice complaints. (PERB Regulations 32900-32960; Los Angeles Community College District (1983) PERB Decision No. 309, pp. 4-5; Los Angeles Community College District (1981) PERB Decision No. 167.) However, this case is unique as it concerns a violation of the Dills Act. The public notice regulations provide that, under the Educational Employment Relations Act

²PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq. PERB Regulation 32635 provides that a party may file a statement of opposition to an appeal within 20 days following the date of service of the appeal. Although DPA filed its statement of opposition seven days late, CDFEA responded to DPA's statement. The Board finds that neither party is prejudiced in the Board's consideration of all the materials submitted.

(EERA) and the Higher Education Employer-Employee Relations Act (HEERA)³ public notice complaints are distinguished from unfair practice complaints. Neither the regulation, nor statutes, provide a separate procedure for resolving public notice complaints under the Dills Act.

PERB Regulation 32602 provides:

Complaints alleging violations of EERA, Ralph C. Dills Act or HEERA shall be processed as unfair practice charges except as otherwise provided in these regulations.

As the statutes and regulations are silent concerning a procedure for processing Dills Act public notice complaints, **the Board** finds that a public notice complaint under the Dills Act should be processed as an unfair practice complaint.

We also reject CDFEA's argument that any proposals made **after** the initial proposal, which are unrelated to the prior **proposals**, need to be sunshined in a public meeting. Section 3523 uses the word "initial." The section requires simply that **a party's** initial (marking the commencement; beginning; first. Webster's New Internat. Diet. (3d ed. 1971) p. 1163) proposal on a given subject be sunshined. In this case, DPA's April 4, 1991 letter to CDFEA, which contained the employer's original **proposal**, was the only set of proposals that needed to be sunshined.

³EERA is codified at Government Code section 3540 et seq. HEERA is codified at Government Code section 3560 et seq.

The charge in Case No. S-CE-505-S is hereby DISMISSED
WITHOUT LEAVE TO AMEND.

Member Shank joined in this Decision.

Member Camilli's concurrence begins on page 7.

Camilli, Member, concurring: Having reviewed the Board agent's dismissal and, finding it to be free of prejudicial error, I would adopt it as the decision of the Board itself.

I further agree with the majority decision that a public notice complaint may be processed in the same manner as an unfair practice charge under the Ralph C. Dills Act.

PUBLIC EMPLOYMENT RELATIONS BOARD



Headquarters Office
1031 18th Street
Sacramento, CA 95814-4174
(916) 322-3088



August 30, 1991

Ron Yank
44 Montgomery Street, Suite 400
San Francisco, CA 94014

RE: California Department of Forestry Employees' Association,
Local 2881, IAFF v. State of California (DPA)
Unfair Practice Charge No. S-CE-505-S
DISMISSAL LETTER

Dear Mr. Yank:

On July 16, 1991, the California Department of Forestry Employees' Association (CDFEA) filed the above-referenced charge alleging violations of Government Code sections 3519(b) and (c). Specifically, CDFEA alleged that "the state employer has violated the Dills Act by not complying with section 3523 and has violated section 3519 by insisting on negotiating about said state employer proposals even though they have not been sunshined."

I indicated to you in my attached letter dated August 19, 1991 that the above-referenced charge did not state a prima facie case. You were advised that if there were any factual inaccuracies or additional facts that would correct the deficiencies explained in that letter, you should amend the charge accordingly. You were further advised that unless you amended the charge to state a prima facie case, or withdrew it prior to August 26, 1991, the charge would be dismissed.

I received your letter of August 26 which memorialized the arguments which you had presented prior to my warning letter. The warning letter addressed most of those arguments. You also state that, rather than utilize the "totality of conduct" test, your charge should have been considered as a per se violation based upon insisting upon bargaining on illegal subjects. However, for the reasons given in the warning letter, you have not shown the subjects of the proposals to be illegal based on failure to sunshfne.

Right to Appeal

Pursuant to Public Employment Relations Board regulations, you may obtain a review of this dismissal of the charge by filing an appeal to the Board itself within twenty (20) calendar days after service of this dismissal (California Code of Regs., tit. 8, sec. 32635(a)). To be timely filed, the original and five copies of such appeal must be actually received by the Board itself before the close of business (5:00 p.m.) or sent by telegraph, certified or Express United States mail postmarked no later than the last date set for filing (California Code of Regs., tit. 8, sec. 32135). Code of Civil Procedure section 1013 shall apply. The Board's address is:

Public Employment Relations Board
1031 18th Street
Sacramento, CA 95814

If you file a timely appeal of the refusal to issue a complaint, any other party may file with the Board an original and five copies of a statement in opposition within twenty calendar days following the date of service of the appeal (California Code of Regs., tit. 8, sec. 32635(b)).

Service

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding, and a "proof of service" must accompany each copy of a document served upon a party or filed with the Board itself. (See California Code of Regs., tit. 8, sec. 32140 for the required contents and a sample form.) The document will be considered properly "served" when personally delivered or deposited in the first-class mail postage paid and properly addressed.

Extension of Time

A request for an extension of time in which to file a document with the Board itself must be in writing and filed with the Board at the previously noted address. A request for an extension must be filed at least three calendar days before the expiration of the time required for filing the document. The request must indicate good cause for and, if known, the position of each other party regarding the extension, and shall be accompanied by proof of service of the request upon each party (California Code of Regs., tit. 8, sec. 32132).

Final Date

If no appeal is filed within the specified time limits, the dismissal will become final when the time limits have expired.

Sincerely,

JOHN W. SPITTLER
General Counsel

By
Bernard McMonigle
Regional Attorney

Attachment

PUBLIC EMPLOYMENT RELATIONS BOARD



Headquarters Office
1031 18th Street
Sacramento, CA 95814-4174
(916) 322-3088



August 19, 1991

Ron Yank
44 Montgomery Street
Suite 400
San Francisco, CA 94104

RE: California Department of Forestry Employees' Association
Local 2881, IAFF v. State of California (DPA)
Unfair Practice Charge No. S-CE-505-S
WARNING LETTER

Dear Mr. Yank:

On July 16, 1991, the California Department of Forestry Employees' Association (CDFEA) filed the above-referenced charge alleging violations of Government Code sections 3519(b) and (c). Specifically, CDFEA alleged that "the state employer has violated the Dills Act by not complying with section 3523 and has violated section 3519 by insisting on negotiating about said state employer proposals even though they have not been sunshined."

Your charge states the following: On or about March 20, 1991, CDFEA submitted its initial bargaining proposals for state response and public comment in accordance with Government Code section 3523. The employer's response was also processed in accordance with Government Code section 3523. The employer's original proposals were attached to a letter dated April 4, 1991. On June 18, 1991, the employer presented "dozens of proposals, many of which were blatant takeaways with respect to monetary and other rights and benefits existing both under the memorandum of understanding then in existence and in existing as customs and practices as well." Your charge goes on to state "those counterproposals could in no fair sense be considered to have been identified in any prior documents submitted by the State of California with reference to bargaining unit 8 at any public meeting or publicly announced presentation, within the meeting of Government Code section 3523."

Government Code section 3523 states in relevant part:

(a) All initial meet and confer proposals of recognized employee organizations shall be presented to the employer at a public meeting, and such proposals thereafter shall be a public record.

Ron Yank
August 19, 1991
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All initial meet and confer proposals or counterproposals of the employer shall be presented to the recognized employee organization at a public meeting, and such proposals or counterproposals thereafter shall be a public record.

(c) Forty-eight hours after any proposal which includes any substantive subject which has not first been presented as proposals for public reaction pursuant to this section is offered during any meeting and conferring session, such proposals and the position, if any, taken thereon by the representatives of the employer, shall be a public record.

Government Code section 3523(c), cited above, appears to provide for a free exchange of proposals during negotiations, including "any substantive subject which has not first been presented as proposals for public reaction." Under section 3523, there does not appear to be a requirement that a proposal, except for "initial meet and confer proposals", must be announced only at a public meeting or publicly announced presentation. Subsection (c) merely permits proposals on subjects not originally sunshined and provides the proposals be made a public record after 48 hours. Because you have not provided any factual data indicating that this was not done, there does not appear to be any violation of Government Code section 3523(c).

The failure to sunshine a proposal may be indicia of an intent not to bargain under the "totality of conduct" test. (California State University (1990) PERB Decision No. 799-H.) In this case, you have not shown a violation of the employer's objection under section 3523(c). Accordingly, no indicia of a violation of the obligation to bargain has been established.

For these reasons, the charge as presently written does not state a prima facie case. If there are any factual inaccuracies in this letter or any additional facts that would correct the deficiencies explained above, please amend the charge accordingly. The amended charge should be prepared on a standard PERB unfair practice charge form clearly labeled First Amended Charge. contain all the facts and allegations you wish to make, and must be signed under penalty of perjury by the charging party. The amended charge must be served on the respondent and the original proof of service must be filed with PERB. If I do not receive an amended charge or withdrawal from you before

Ron Yank
August 19, 1991
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August 26, 1991, I shall dismiss your charge. If you have any questions, please call me at (916) 322-3198.

Sincerely,

Bernard McMonigle
Regional Attorney

BM:lmg