**STATE OF CALIFORNIA**
**DECISION OF THE**
**PUBLIC EMPLOYMENT RELATIONS BOARD**

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| ASSOCIATION OF CALIFORNIA STATE ATTORNEYS AND ADMINISTRATIVE LAW JUDGES AND PROFESSIONAL ENGINEERS IN CALIFORNIA GOVERNMENT,<br><br>Charging Parties,<br><br>v.<br><br>STATE OF CALIFORNIA,<br><br>Respondent. | Case No. S-CE-498-S<br><br>PERB Decision No. 1067-S<br><br>November 9, 1994 |
| CALIFORNIA STATE EMPLOYEES' ASSOCIATION,<br><br>Charging Party,<br><br>v.<br><br>STATE OF CALIFORNIA (DEPARTMENT OF PERSONNEL ADMINISTRATION,<br><br>Respondent. | Case No. S-CE-503-S |
| CALIFORNIA DEPARTMENT OF FORESTRY EMPLOYEES' ASSOCIATION, LOCAL 2881, IAFF,<br><br>Charging Party,<br><br>v.<br><br>STATE OF CALIFORNIA (DEPARTMENT OF PERSONNEL ADMINISTRATION),<br><br>Respondent. | Case No. S-CE-506-S |

Appearances: Dennis F. Moss, Attorney, for Association of California State Attorneys and Administrative Law Judges and Professional Engineers in California Government; Paul M. Starkey, Labor Relations Counsel, Department of Personnel Administration for State of California.

Before Blair, Chair; Caffrey and Garcia, Members.

## DECISION

CAFFREY, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the Association of California State Attorneys and Administrative Law Judges and Professional Engineers in California Government (ACSA/PECG) of a proposed decision (attached hereto) by a PERB administrative law judge (ALJ).[1] In his decision, the ALJ concluded that the State of California (Department of Personnel Administration) (State) did not violate section 3519(a), (b) and (c) of the Ralph C. Dills Act (Dills Act)[2] by making proposals to the Legislature

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[1]The ALJ decided three consolidated cases filed by ACSA/PECG, the California State Employees' Association (CSEA) and the California Department of Forestry Employees Association (CDFEA). The parties agreed to submit the dispute to the ALJ on the basis of a factual stipulation and briefs filed by the parties. CSEA and CDFEA did not file exceptions to the proposed decision.

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

> It shall be unlawful for the state to do any of the following:
>
> (a) Impose or threaten to impose reprisals *on* employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter. For purposes of this subdivision, "employee" includes an applicant for employment or reemployment.
>
> (b) Deny 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 organization.

about bargainable subjects without giving prior notice to and meeting and conferring with various unions representing state employees. ACSA/PECG alleged that the State's actions were contrary to the provisions of Dills Act sections 3516.5 and 3517.[3]

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[3]Dills Act section 3516.5 states:

> Except in cases of emergency as provided in this section, the employer shall give reasonable written notice to each recognized employee organization affected by any law, rule, resolution, or regulation directly relating to matters within the scope of representation proposed to be adopted by the employer, and shall give such recognized employee organizations the opportunity to meet and confer with the administrative officials or their delegated representatives as may be properly designated by law.
>
> In cases of emergency when the employer determines that a law, rule, resolution, or regulation must be adopted immediately without prior notice or meeting with a recognized employee organization, the administrative officials or their delegated representatives as may be properly designated by law shall provide such notice and opportunity to meet and confer in good faith at the earliest practical time following the adoption of such law, rule, resolution, or regulation.

Dills Act section 3517 states:

> The Governor, or his representative as may be properly designated by law, shall meet and confer in good faith regarding wages, hours, and other terms and conditions of employment with representatives of recognized employee organizations, and shall consider fully such presentations as are made by the employee organization on behalf of its members prior to arriving at a determination of policy or course of action.
>
> "Meet and confer in good faith" means that the Governor of such representatives as the

The Board has reviewed the entire record in this case, including the proposed decision, ACSA/PECG's appeal, the State's response thereto, and the briefs filed by the parties. The Board finds the ALJ's decision to be free of prejudicial error and adopts it as the decision of the Board itself in accordance with the following discussion.

DISCUSSION

PERB Regulation 32300[4] provides parties the opportunity to

> Governor may designate, and representatives of recognized employee organizations, shall have the mutual obligation personally to meet and confer promptly upon request by either party and continue for a reasonable period of time in order to exchange freely information, opinions, and proposals, and to endeavor to reach agreement on matters within the scope of representation prior to the adoption by the state of its final budget for the ensuing year. The process should include adequate time for the resolution of impasses.

The ALJ also found that the contention that the State violated the Dills Act by unilaterally changing the employee pension plan represented an unalleged violation which could not be raised by the charging parties. In its appeal, ACSA/PECG disputes that it made this allegation and does not except to the ALJ's finding.

[4]PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq. Regulation 32300 states, in pertinent part:

> (a) The statement of exceptions or brief shall:
>
> (1) State the specific issues of procedure, fact, law or rationale to which each exception is taken;
>
> (2) Identify the page or part of the decision to which each exception is taken;

appeal an ALJ's proposed decision to the Board itself. In accordance with the regulation, the appeal shall state "the specific issues of procedure, fact, law or rationale to which each exception is taken" and "the grounds for each exception."

The appeal filed by ACSA/PECG does not comply with the provisions of PERB Regulation 32300. ACSA/PECG lists nine exceptions to the proposed decision, several of which merely take issue with the wording chosen by the ALJ in framing the issues presented by the case. These exceptions do not specify issues of procedure, fact, law or rationale, and do not specify the grounds for each exception. In effect, they present no exception for the Board to consider.

ACSA/PECG excepts to the ALJ's analysis of People ex rel. Seal Beach Police Officers Assn. v. City of Seal Beach (1984) 36 Cal.3d 591 [205 Cal Rptr. 794], but this objection is not accompanied by any analysis or further discussion and fails to comply with PERB Regulation 32300.

In the remainder of the appeal, ACSA/PECG repeats in summary form arguments previously made to the ALJ, asserting that "the Dills Act precludes the Governor from making proposals on bargainable issues without first dealing with the charging parties." Further, ACSA/PECG contends that "the Constitution

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(3) Designate by page citation or exhibit number the portions of the record, if any, relied upon for each exception;

(4) State the grounds for each exception.

does not supersede the Governor's obligations under the Dills Act when it comes to the proposal of legislation other than the budget proposal itself."

While ACSA/PECG includes these broad assertions in its appeal, it does not address the specific analysis included in the ALJ's proposed decision. In his analysis, the ALJ cites specific cases in which the Board has addressed itself to questions involving the relationship of the budget process to collective bargaining. In State of California (Department of Personnel) (1986) PERB Decision No. 569-S, the Board considered the circumstances in which the state delayed negotiations on economic proposals with the exclusive representative while it pursued negotiations with the Legislature as to the amount to be included in the state budget to fund employee compensation. The Board held that:

> . . . an uncertain financial picture may pose a serious impediment to fruitful negotiations and thus present a legitimate basis for postponing the inception of negotiations with the employee organization. Awaiting final budget action from the Legislature, under such circumstances, cannot be said to contravene [the Dills Act's] mandate.

In State of California, Department of Personnel Administration (1988) PERB Decision No. 706-S, the Board considered the allegation that the Governor's submission of a budget proposal containing a specific proposal for employee compensation, without first meeting and conferring with the employee organizations, constituted a Dills Act violation. In dismissing the charge, the Board stated that:

> . . . the Governor's proposed budget is not a matter for negotiation, but is instead the performance of a constitutionally imposed duty. The Governor acts as an essential participant in the legislative process, whereby the state remains solvent and operating. . . . In doing so, he acts in a legislative capacity as part of the legislative process which is separate and apart from his responsibilities as the chief executive and employer of state employees.

In State of California. Department of Personnel Administration (1990) PERB Decision No. 823-S, the Board considered a circumstance in which the state delayed making a firm salary proposal to the exclusive representative until late August, weeks after the budget had been passed by the Legislature and signed by the Governor. The Board noted that "the state's obligation to meet and confer in good faith does not bind the collective bargaining process to the budget," and that:

> . . . it is not necessarily inappropriate for the Governor's representative, as a part of his bargaining strategy, to delay making a firm proposal until he has had an opportunity to review the final budget in good faith in order to determine the funds potentially available for salary increases.

These cases demonstrate that the Board has consistently acknowledged the Governor's responsibilities relating to the budget, such as the constitutional requirement that a budget be proposed by January 10 each year, and the inevitable, subsequent negotiations with the Legislature over the specific elements of the budget, including those directly related to employee pay and benefits. The Board has declined to find a violation of the Dills Act when the January budget proposal and the subsequent

legislative negotiations occur prior to negotiations with employee organizations, even though they involve issues which have a direct impact on terms and conditions of employment of bargaining unit members.

In his decision, the ALJ considers the question of whether the proposed legislation at issue in this case was offered as part of the budget process. The ALJ relies on Board precedent and the parties' stipulation to conclude that the disputed legislation was part of the budget process because it implemented budget assumptions, resulting in a finding of no violation. ACSA/PECG asserts that there is no support in the record or law for the ALJ's conclusion "that the legislation had to be proposed by the Governor and passed for the budget to be implemented."

The parties' stipulation clearly indicates the State's position "that the proposals to the Legislature were part of the annual budget process." ACSA/PECG offers no evidence or argument to rebut the State's assertions, nor is any analysis or argument offered with regard to the ALJ's analysis of the Board cases cited in the proposed decision. The fact that the Board in these cases has acknowledged the Governor's responsibilities with regard to the budget, including the pursuit of discussions and negotiations with the Legislature over pay and benefit levels prior to meeting and conferring with employee organizations on these subjects, is not referenced in any way by ACSA/PECG.

In sum, ACSA/PECG has presented an appeal in summary fashion which does not comply with the requirements of PERB

Regulation 32300, failing to adequately address the law or rationale cited by the ALJ in his proposed decision. The Board finds ACSA/PECG's exceptions to be without merit and rejects them.

## ORDER

The complaints and unfair practice charges in Case Nos. S-CE-498-S, S-CE-503-S and S-CE-506-S are hereby DISMISSED.

Chair Blair joined in this Decision.

Member Garcia's concurrence begins on page 10.

GARCIA, Member, concurring: The question in this case is whether the Governor was legally obligated under the Ralph C. Dills Act (Dills Act) sections 3516.5[1] and 3517[2] to notice a

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[1]Dills Act section 3516.5 provides that:

> Except in cases of emergency as provided in this section, the employer shall give reasonable written notice to each recognized employee organization affected by any law, rule, resolution, or regulation directly relating to matters within the scope of representation proposed to be adopted by the employer, and shall give such recognized employee organizations the opportunity to meet and confer with the administrative officials or their delegated representatives as may be properly designated by law.
>
> In cases of emergency when the employer determines that a law, rule, resolution, or regulation must be adopted immediately without prior notice or meeting with a recognized employee organization, the administrative officials or their delegated representatives as may be properly designated by law shall provide such notice and opportunity to meet and confer in good faith at the earliest practical time following the adoption of such law, rule, resolution, or regulation. [Emphasis added.]

[2]Dills Act section 3517 provides that:

> The Governor, or his representative as may be properly designated by law, shall meet and confer in good faith regarding wages, hours, and other terms and conditions of employment with representatives of recognized employee organizations, and shall consider fully such presentations as are made by the employee organization on behalf of its members prior to arriving at a determination of policy or course of action.
>
> "Meet and confer in good faith" means that the Governor or such representatives as the Governor may designate, and representatives of recognized employee organizations, shall

recognized employee organization on matters within scope prior to making recommendations to the Legislature to further budget objectives. The Dills Act sections cited could be interpreted to conflict with the California Constitution, Article 4, section 12(c), which provides:

> The budget shall be accompanied by a budget bill itemizing recommended expenditures. The bill shall be introduced immediately in each house by the persons chairing the committees that consider appropriations. The Legislature shall pass the budget bill by midnight on June 15 of each year. Until the budget bill has been enacted, the Legislature shall not send to the Governor for consideration any bill appropriating funds for expenditure during the fiscal year for which the budget bill is to be enacted, except emergency bills recommended by the Governor or appropriations for the salaries and expenses of the Legislature.

Likewise, the Dills Act poses a potential conflict with the following constitutional provision:

> Within the first 10 days of each calendar year, the Governor shall submit to the Legislature, with an explanatory message, a budget for the ensuing fiscal year containing itemized statements for recommended state expenditures and estimated state revenues. If recommended expenditures exceed estimated revenues, the Governor shall recommend the sources from which the additional revenues

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> have the mutual obligation personally to meet and confer promptly upon request by either party and continue for a reasonable period of time in order to exchange freely information, opinions; and proposals, and to endeavor to reach agreement on matters within the scope of representation prior to the adoption by the state of its final budget for the ensuing year. The process should include adequate time for the resolution of impasses. (Emphasis added.)

should be provided. [Id., Art. 4, sec. 12(a).]

It is a fundamental rule of statutory construction that a statute should be construed, if possible, to preserve its constitutionality,[3] and construed so that it may be given effect rather than invalidated.[4] A court seeking to interpret a statute should ascertain the intent of the Legislature so as to effectuate the purpose of the law; moreover, every statute should be construed with reference to the whole system of law of which it is a part so that all may be harmonized and have effect.[5]

Using these rules of construction to interpret the Dills Act sections so as to avoid conflict with the Constitution, it is apparent from the face of the statutes that they do not contain requirements of prior notice in this context, nor do they pertain to budget proposals to the Legislature. Therefore, the statute cannot be read to require meeting and conferring before the adoption of a law, since the Governor cannot unilaterally adopt a law.

The meet and confer process identified in section 3517 reflects the legislative intent to instill prompt and flexible timelines; however, to read that section as requiring prior notice and meet and confer sessions in advance of budget

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[3]Hooper v. Deukmejian (1981) 122 Cal.App.3d 987 [176 Cal.Rptr. 569].

[4]San Bernardino Fire & Police Protective League v. City of San Bernardino (1962) 199 Cal.App.2d 401 [18 Cal.Rptr. 757].

[5]In re Ruben M. (1979) 96 Cal.App.3d 690 [158 Cal.Rptr. 197].

proposals would erect a hurdle to be cleared before the Governor can proceed to meet the constitutional mandate. There is no clear statement in the statute that reflects such an intent, so we adopt the interpretation that is in harmony with the Constitution.

Furthermore, the realities of the budget process allow for adequate notice and opportunities for interested parties to negotiate with the Governor and the Legislature prior to the adoption of laws connected with the passage of a budget.

**STATE OF CALIFORNIA**
**PUBLIC EMPLOYMENT RELATIONS BOARD**

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| ASSOCIATION OF CALIFORNIA STATE ATTORNEYS AND ADMINISTRATIVE LAW JUDGES and PROFESSIONAL ENGINEERS IN CALIFORNIA GOVERNMENT,<br><br>Charging Parties,<br><br>v.<br><br>STATE OF CALIFORNIA,<br><br>Respondent. | Unfair Practice Case No. S-CE-498-S |
| CALIFORNIA STATE EMPLOYEES' ASSOCIATION,<br><br>Charging Party,<br><br>v.<br><br>STATE OF CALIFORNIA (DEPARTMENT OF PERSONNEL ADMINISTRATION),<br><br>Respondent. | Unfair Practice Case No. S-CE-503-S |
| CALIFORNIA DEPARTMENT OF FORESTRY EMPLOYEES' ASSOCIATION, LOCAL 2881, IAFF,<br><br>Charging Party,<br><br>v.<br><br>STATE OF CALIFORNIA (DEPARTMENT OF PERSONNEL ADMINISTRATION),<br><br>Respondent. | Unfair Practice Case No. S-CE-506-S<br><br>PROPOSED DECISION (3/11/94) |

Appearances; Dennis F. Moss, Esq., for Association of California State Attorneys and Administrative Law Judges and Professional Engineers in California Government; Howard Schwartz, Esq., Assistant Chief Counsel, for California State Employees' Association; Carroll, Burdick & McDonough by Ronald Yank, Esq.,for California Department of Forestry Employees' Association, Local 288,1, IAFF.

Before Ronald E. Blubaugh, Administrative Law Judge.

PROCEDURAL HISTORY

These consolidated cases raise the novel question of whether the Dills Act bars the Governor from making pre-negotiations proposals to the Legislature about bargainable subjects. The four unions that brought these actions contend that the law has just such an effect. The State of California (State) replies that such a reading of the law would run counter to the rules of statutory construction and interfere with constitutional powers of the Governor and Legislature.

These cases were born in a contentious round of bargaining that took place in 1991 and 1992 between the State and the unions that represent the State's organized workers. The earliest of the charges at issue, S-CE-498-S, was filed on June 24, 1991, by the Association of California State Attorneys and Administrative Law Judges (ACSA) and the Professional Engineers in California Government (PECG). There followed S-CE-503-S, filed on July 10, 1991, by the California State Employees' Association (CSEA), and S-CE-506-S, filed on July 16, 1991, by the California Department of Forestry Employees' Association, Local 2881, IAFF (CDFEA).

The general counsel of the Public Employment Relations Board (PERB or Board) issued complaints against the State in each case. The complaint in S-CE-498-S was issued on June 27, 1991, followed by the complaint in case S-CE-503-S, issued on July 16, and the complaint in case S-CE-508-S, issued on August 23.

The three complaints are closely parallel. Each alleges that the State was in violation of Ralph C. Dills Act section 3519(c) and, derivatively, (a) and (b)[1] by proposing changes in laws before giving notice to and meeting and conferring with the unions. Specifically, the complaints in cases S-CE-498-S and S-CE-506-S allege that:

> During May and June 1991 Respondent proposed laws to the Legislature concerning matters within the scope of representation defined in Government Code section 3516, including but not limited to reduced pay, furlough of Respondent's employees, and elimination of one tier of the retirement system.

The complaint in case S-CE-503-S lists "merit salary adjustments and furlough of Respondent's employees" as the subjects discussed with the Legislature before bargaining.

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[1]Unless otherwise indicated, all statutory references are to the Government Code. The Ralph C. Dills Act (Dills Act) is codified at Government Code section 3512 et seq. In relevant part, section 3519 provides as follows:

> It shall be unlawful for the state to do any of the following:
>
> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter. For purposes of this subdivision, "employee" includes an applicant for employment or reemployment.
>
> (b) Deny 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 organization.

A hearing in case S-CE-498-S was commenced on August 8, 1991, before Administrative Law Judge Fred D'Orazio. At the hearing, the State refused to comply with subpoenas for records and witnesses. ALJ D'Orazio concluded that the subpoenas should be enforced and adjourned the hearing so that the general counsel of the PERB might seek enforcement. The Sacramento Superior Court denied enforcement but the PERB took the matter to the Court of Appeal where a writ of mandate was issued directing the trial court to enforce the subpoenas.[2]

Following the decision of the Court of Appeal, the three cases were consolidated and the parties agreed to submit the dispute on the basis of a factual stipulation. With the filing of briefs, the matter was submitted for decision on March 8, 1994.[3]

## FINDINGS OF FACT

The joint stipulation, which reads as follows, comprises the findings of fact:

Charging Parties Association of California State Attorneys and Administrative Law Judges, Professional Engineers in California Government, California Department of Forestry Employees' Association, Local 2881, IAFF, and California State

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[2]Public Employment Relations Board v. The Superior Court of Sacramento County (1993) 13 Cal.App.4th 1816 [17 Cal.Rptr.2d 323].

[3]Prior to the completion of briefing, ALJ D'Orazio announced his resignation from employment with the PERB. The matter was reassigned to the undersigned pursuant to California Code of Regulations, title 8, section 32168(b).

Employees' Association, and Respondent State Employer State of California, jointly stipulate and agree that the above-entitled cases, S-CE-498-S, S-CE-503-S, and S-CE-506-S, have common issues of fact and law, such that the following factual stipulations are made for and concerning each of these cases. This stipulation derives from the allegations of the complaints on file herein, except as to paragraph 6, which is a matter of judicial notice.

1. Charging Parties are recognized employee organizations within the meaning of Government Code section 3513(b) of appropriate units of employees.

2. Respondent is the state employer within the meaning of Government Code section 3513 (j).

3. S-CE-498-S, S-CE-503-S, S-CE-506-S: During May and June 1991, Respondent proposed legislation to the Legislature concerning matters affecting terms and conditions of employment of employees in the bargaining units represented by Charging Parties, including but not limited to reduced pay, furlough of Respondent's employees and elimination of one tier of the retirement system. Respondent participated in discussions with representatives of the Legislature that resulted in a basis for proposed legislation for repeal of pre-funded IDDA [Investment Dividend Disbursement Account] and EPDA [Extraordinary Performance Dividend Account] benefits and, direction of IDDA and EPDA reserves to be used to reduce employer pension contributions, and transfer of PERS [Public Employees' Retirement System] actuarial responsibilities.

4. Respondent did not give Charging Parties written notice or an opportunity to meet and confer with Respondent's officials or their delegated representatives prior to taking the action described in paragraph 3.

5. If called to testify, representatives of the Respondent would testify that the proposals to the Legislature were part of the annual budget process.

6. Assembly Bill 702 (AB 702) (Stats. 1991, Chap. 83) was enacted, effective June 30, 1991. The Bill encompassed certain of the proposals referenced in paragraph 3 above.

## LEGAL ISSUES

1) Did the State fail to meet and confer in good faith in violation of section 3519(c) and derivatively (a) and (b) by making pre-negotiations proposals to the Legislature about bargainable subjects?

2) Did the State fail to meet and confer in good faith in violation of section 3519(c) and, derivatively, (a) and (b) by making a unilateral change in the employee pension program?

## CONCLUSIONS OF LAW

### Pre-negotiations Proposals

Under the Dills Act, the State is required to give exclusive representatives notice and the opportunity to meet and confer before adopting any change in a negotiable matter.[4] The Governor

[4]Dills Act section 3516.5 provides as follows:

> Except in cases of emergency as provided in this section, the employer shall give reasonable written notice to each recognized

is obligated, furthermore, to "consider fully" any presentations made by representatives of employee organizations "prior to arriving at a determination of policy or course of action."[5]

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> employee organization affected by any law, rule, resolution, or regulation directly relating to matters within the scope of representation proposed to be adopted by the employer, and shall give such recognized employee organizations the opportunity to meet and confer with the administrative officials or their delegated representatives as may be properly designated by law.
>
> In cases of emergency when the employer determines that a law, rule, resolution, or regulation must be adopted immediately without prior notice or meeting with a recognized employee organization, the administrative officials or their delegated representatives as may be properly designated by law shall provide such notice and opportunity to meet and confer in good faith at the earliest practical time following the adoption of such law, rule, resolution, or regulation.

[5]Dills Act section 3517 provides as follows:

> The Governor, or his representative as may be properly designated by law, shall meet and confer in good faith regarding wages, hours, and other terms and conditions of employment with representatives of recognized employee organizations, and shall consider fully such presentations as are made by the employee organization on behalf of its members prior to arriving at a determination of policy or course of action.
>
> "Meet and confer in good faith" means that the Governor or such representatives as the Governor may designate, and representatives of recognized employee organizations, shall have the mutual obligation personally to meet and confer promptly upon request by either party and continue for a reasonable period of time in order to exchange freely information, opinions, and proposals, and to endeavor to

Such meeting and conferring as may be undertaken by the Governor and representatives of employee organizations shall be in "good faith."

The unions find "an undeniable violation" of sections 3516,5 and 3517. "The conduct of going to the Legislature with the subject ideas and proposals, without meeting and conferring with the Charging Parties first, is violative of the express language of both provisions," ACSA, PECG, CSEA and CDFEA argue in a joint brief. The unions observe that the wages, furloughs, pensions, pension fund administration and elimination of one tier of the retirement plan are all subjects within the scope of representation.[6] Since the State admits that it discussed these subjects with the Legislature before bargaining, the unions continue, a violation is "undeniable."

The State sets out a lengthy argument based upon statutory interpretation and constitutional analysis. The State argues that the section 3516.5 requirement of advance notice applies

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> reach agreement on matters within the scope of representation prior to the adoption by the state of its final budget for the ensuing year. The process should include adequate time for the resolution of impasses.

[6]The Dills Act scope of representation is set out in section 3516. It provides as follows:

> The scope of representation shall be limited to wages, hours, and other terms and conditions of employment, except, however, that the scope of representation shall not include consideration of the merits, necessity, or organization of any service or activity provided by law or executive order.

only to actions which the Governor can take without legislative concurrence. Thus, on its face, the State contends, the Dills Act does not apply to a Governor's proposals to enact or change a law because the Governor, alone, cannot enact or change a law. Legislative cooperation is required. In addition, the State continues, the Dills Act cannot be read to interfere with the plenary power of the Legislature to enact laws. The interpretation the unions would give to the statute, the State contends, would interfere with the constitutional powers of the Legislature, an absurd result in the State's view.

While novel, the contentions made by the unions here are not entirely unfamiliar. Similar arguments have been advanced by ACSA and CSEA in a series of cases testing the relationship between bargaining and the State budgetary process. The PERB has held in these cases that collective bargaining has no necessary linkage with the State budgetary process. The two activities can take place at the same time and no resolution of collective bargaining is required before introduction or approval of the budget.

Thus the Board has recognized that "[n]egotiations [by the Governor] with the employees' representatives and with the Legislature may and often do occur simultaneously." (State of California (Department of Personnel Administration) (1986) PERB Decision No. 569-S.) The measurement of whether the Governor negotiated fairly is not the sequence of the State's proposals, but whether the State's conduct "runs afoul of traditional

standards used to determine whether a party has acted in bad faith." (Ibid.) That is, whether the negotiations were "conducted in such a manner that, based on the totality of circumstances, it is apparent that the party possessed the subjective intent to reach an agreement." (Ibid.)

Similarly, the Governor does not fail to meet and confer in good faith through the act of submitting a budget to the Legislature prior to meeting and conferring with State employee unions. The submission of a proposed budget "is not a matter for negotiations, but is instead the performance of a constitutionally imposed duty."[7] (State of California (Department of Personnel Administration) (1988) PERB Decision No. 706-S.) Nor does the State commit a per se violation of its duty to meet and confer in good faith by delaying a firm salary

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[7]Article IV, section 12 of the California Constitution provides in relevant part as follows:

> (a) Within the first 10 days of each calendar year, the Governor shall submit to the Legislature, with an explanatory message, a budget for the ensuing fiscal year containing itemized statements for recommended state expenditures and estimated state revenues. If recommended expenditures exceed estimated revenues, the Governor shall recommend the sources from which the additional revenues should be provided.
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> . . . . . .
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> (c) The budget shall be accompanied by a budget bill itemizing recommended expenditures. The bill shall be introduced immediately in each house by the persons chairing the committees that consider appropriations. . . .

proposal until after the adoption of the State budget. (State of California (Department of Personnel Administration) (1990) PERB Decision No. 823-S.) The measurement of good faith, the Board again observed, is the totality of the circumstances and not the timing of the salary proposal.

In its present posture, however, this case is not premised on the totality of the circumstances. The totality of the circumstances surrounding the 1991 round of bargaining between the State and its unions was reviewed and resolved long ago.[8] The complaint and stipulation base the present dispute solely on per se theories which require no showing of subjective bad faith. Thus, the question here is whether the Governor failed to meet and confer in good faith solely by taking to the Legislature pre-negotiations proposals about negotiable subjects.

The Board already has concluded that the Governor does not fail to meet and confer in good faith by preparing a State budget prior to negotiations with State employee unions. Yet it is obvious that a Governor's budget is based upon a set of estimates, calculations and decisions about revenue and spending. A Governor could not assemble a budget without including an amount for the pay and benefits of State employees. Such an estimate implicitly includes a preliminary decision about whether State employee pay and benefits will change in the budgetary year and, if so, by what amount. Although pay and benefits are

[8]See administrative law judge decisions, H0-U-495-S, HO-U-497-S, HO-U-500-S and HO-U-505-S.

plainly negotiable subjects, the Board has held that the Governor's initial determination may be made for budgetary purposes prior to negotiations.

It is but a short step from that conclusion to the further conclusion that as part of the budgetary process the Governor also may seek introduction of legislation to implement budget assumptions. If the budget assumes a change in State employee benefits, proposing legislation to implement that change is inherently a part of the budgetary process. Since only members of the legislative branch can introduce legislation, the Governor or the Governor's representative plainly will have to have discussions with members of the Legislature as part of the budgetary process.

Nor is there anything untoward about the pre-negotiations timing of such legislative proposals. Legislation to enact the Governor's budget decisions simply becomes part of the simultaneous negotiations which the Governor conducts with the unions and the Legislature. (See generally, State of California (Department of Personnel Administration), supra, PERB Decision No. 569-S.) Language in the proposed legislation can be modified later to encompass any agreements that are reached in the simultaneous negotiations.

In their reply brief, the unions argue that the timing of the disputed legislation was such that it could not have been a part of the Governor's budgetary preparation. The unions note that although the budget must be presented in January it was not

until May and June that the Governor discussed the contested legislation with members of the Legislature. Legislation proposed in May and June, the unions reason, could not have been part of the January budget preparation.

This argument is defeated by the factual stipulation. The unions joined in the stipulation that, if called as witnesses, representatives of the Governor would testify that the proposals were made to the Legislature as part of the budget process. There is nothing else in the record to rebut this stipulated testimony. The stipulation therefore leads to a finding that the disputed legislation, despite its timing, was intended to implement budget proposals.

Accordingly, I conclude that no per se violation can be found in the Governor's pre-negotiations discussions with members of the Legislature about reduced pay and furlough of State employees, elimination of one tier of the retirement system, proposed legislation for repeal of the pre-funded IDDA and EPDA benefits, use of IDDA and EPDA reserves to reduce employer pension contributions, and transfer of PERS actuarial responsibilities. Evidence of such discussions might, under some circumstances, be appropriate to evaluate the totality of the circumstances. But since there is no surface bargaining allegation here and the contentions are insufficient to establish a per se violation, no violation can be found.

A contrary result is not dictated by the Supreme Court's decision in People ex rel. Seal Beach Police Officers Association

et al. v. City of Seal Beach (1984) 36 Cal.3d 591 [205 Cal.Rptr. 794]. There, the Supreme Court held that a city council was required to meet and confer with a union representing police officers prior to placing on the ballot certain changes in the city's charter. The changes affected matters within the scope of bargaining under the Meyers-Milias-Brown Act (Government Code section 3500 et seq.). The court held that the bargaining requirement did not abridge the city council's ultimate authority under California Constitution Article XI, section 3(b) to propose charter amendments. This is because the council retained the ultimate authority to go to the people after an impasse in bargaining.

But unlike the constitutional provisions affecting changes in local government charters, the constitutional provisions concerning the State budget set specific time lines. The Governor must go forward with a budget proposal "within the first 10 days of each calendar year." (Cal. Const. Art. IV, sec. 12(a).) The constitutional budget proposal date occurs prior to the commencement of bargaining between the State and its unions. Thus, under the Constitution the Governor, unlike a city council, cannot wait until the completion of negotiations prior to making the initial decisions that comprise a budget proposal.

Unilateral Change

For the first time, the unions here set out an allegation that the State failed to meet and confer in good faith by making unilateral changes in the employee pension plan. This contention

is based upon paragraph 6 of the stipulation, that Assembly-Bill 702 was enacted effective June 30, 1991. There is no allegation of unilateral change in any of the three unfair practice charges or complaints that gave rise to this action.

Nevertheless, the unions urge that "a clear fait accompli [was] presented to the Charging Parties in regards to the elimination of one tier of the retirement plan, and the elimination of IDDA-EPDA benefits." Citing People ex rel. Seal Beach Police Officers Association et al. v. City of Seal Beach, supra, 36 Cal.3d 591, the unions argue that since the Governor did not meet and confer before enactment of the legislation, the legislation is invalid. They ask that it therefore be set aside and the prior pension program be reinstated.

"[U]nalleged violations may be entertained . . . only when adequate notice and the opportunity to defend has been provided [to] the respondent, and where such acts are intimately related to the subject matter of the complaint, are part of the same course of conduct, have been fully litigated, and the parties have had the opportunity to examine and be cross-examined on the issue." (Tahoe-Truckee Unified School District (1988) PERB Decision No. 668.) "The failure to meet any of the above-listed requirements will prevent the Board from considering unalleged conduct as violative of the Act." (Ibid.)

Two of the three unfair practice charges at issue here were filed after the enactment of Assembly Bill 702 on June 30, 1991. Yet the enactment of the law was not challenged in either of

those charges. Nor at any time during the six months following the enactment of the law did any of the charging parties move to amend their charges or the complaints to reflect the final legislative action. The first mention of the legislative action came more than two years later in the factual stipulation. Plainly, unilateral change is a new theory and the State was not given previous notice and opportunity to defend against it. Nor did any of the parties have an opportunity to examine and be cross-examined on the question.

It is clear, moreover, that although enactment of Assembly Bill 702 was part of the same course of conduct set out in the complaint, the legality of the legislative action has not been fully litigated. In a unilateral change case, the challenged act of the employer must be measured against the past practice or status quo.[9] But the record here is devoid of information about the past practice on changes in the pension plan. It is unknown whether the 1991 legislation was the first time the State has revised the pension plan or whether there is a history of unilateral revisions of the pension plan. If the State has a history of unilateral revisions, there is no evidence about whether the changes set out in Assembly Bill 702 amounted to a

[9]"[T]he 'status quo' against which an employer's conduct is evaluated must take into account the regular and consistent past patterns of changes in the conditions of employment." (Pajaro Valley Unified School District (1978) PERB Decision No. 51.) Where an employer's action is consistent with the past practice, no violation will be found in a change that does not alter the status quo. (Oak Grove School District (1985) PERB Decision No. 503.)

change in "quantity and kind" from the prior changes. (Oakland Unified School District (1983) PERB Decision No. 367.)

In the absence of evidence about the past practice, there is no way on this record to determine whether enactment of Assembly Bill 702 constituted a change in the status quo. The stipulation thus does not approach the factual showing required in a "fully litigated" unilateral change case.

Accordingly, I find that the contention that the State failed to meet and confer in good faith when it unilaterally changed the pension plan is an unalleged violation which may not be raised here.

## PROPOSED ORDER

Based upon the foregoing findings of fact and conclusions of law and the entire record in this matter, unfair practice charges S-CE-498-S, Association of California State Attorneys and Administrative Law Judges et al. v. State of California (Department of Personnel Administration); S-CE-503-S, California State Employees' Association v. State of California (Department of Personnel Administration); and S-CE-506-S, California Department of Forestry Employees' Association, Local 2881. IAFF v. State of California (Department of Personnel Administration) and their companion PERB complaints are hereby DISMISSED.[10]

[10]Since this dispute can be resolved under existing PERB precedent, I find it unnecessary to consider the statutory interpretation and constitutional arguments advanced by the State. I defer the State's arguments to consideration in a case where they are unavoidable, should such a case ever arise.

Pursuant to California Code of Regulations, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the Board itself at the headquarters office in Sacramento within 20 days of service of this Decision. In accordance with PERB Regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. (See Cal. Code of Regs., tit. 8, sec. 32300.) A document is considered "filed" when actually received before the close of business (5:00 p.m.) on the last day set for filing ". . .or when sent by telegraph or certified or Express United States mail, postmarked not later than the last day set for filing . . ." (See Cal. Code of Regs., tit. 8, sec. 32135; Code Civ. Proc, sec. 1013 shall apply.) Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or filed with the Board itself. (See Cal. Code of Regs., tit. 8, secs. 32300, 32305 and 32140.)

Ronald E. Blubaugh
Administrative Law Judge