STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA ASSOCIATION OF PROFESSIONAL SCIENTISTS,	)	
Charging Party,	)	Case No. SA-CE-806-S
v.	)	PERB Decision No. 1244-S
STATE OF CALIFORNIA (DEPARTMENT OF PERSONNEL ADMINISTRATION),	)	January 27, 1998
Respondent.	)	

Appearances; Steven B. Bassoff, Attorney, for California Association of Professional Scientists; Robert K. Roskoph, Attorney, for State of California (Department of Personnel Administration).

Before Caffrey, Chairman; Dyer and Amador, Members.

DECISION

CAFFREY, Chairman: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the State of California (Department of Personnel Administration) (State or DPA) to a proposed decision by a PERB administrative law judge (ALJ). The ALJ found that the State violated section 3519(a), (b) and (c) of the Ralph C. Dills Act (Dills Act)[1] when it unilaterally changed the vision care benefits of

[1]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

employees represented by the California Association of Professional Scientists (CAPS) without providing CAPS with notice or the opportunity to meet and confer over the change.

The Board has reviewed the entire record in this case, including the unfair practice charge and complaint, the hearing transcript, the proposed decision and the filings of the parties. The Board concludes that CAPS has failed to demonstrate that there has been a significant impact on the actual vision care benefits received by employees as a result of the State's action. The Board hereby reverses the ALJ's proposed decision and dismisses the unfair practice charge and complaint in accordance with the following discussion.

BACKGROUND

CAPS is the exclusive representative of employees within State Bargaining Unit 10. For approximately 10 years, Unit 10 employees have been provided with vision care benefits pursuant to their collective bargaining agreement (CBA) with the State. The parties' 1987-88 CBA contained a vision care provision which stated, in pertinent part:

> 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.

> The vision service plan shall be the State's plan and shall provide for an annual eye examination and frames and lenses. There will be a $10.00 employee co-payment for eye examinations and a $25.00 employee co-payment for frames and lenses.

The 1989-91 CBA vision care provision stated, in pertinent part:

> The employer agrees to provide a vision service plan to eligible employees and dependents. The vision service plan provided by the State under this Section shall contain the same benefits and services as those in effect in June 30, 1988, with the same employee co-payments ($10, $25), and the employer shall pay 100% of the premium.

The 1992-95 CBA vision care provision stated, in pertinent part:

> The employer agrees to provide a vision service plan to eligible employees and dependents. The vision service plan provided by the State under this Section shall contain the same benefits and services as those in effect on June 30, 1991, with the same employee co-payments ($10, $25) for examination and materials. The employer shall pay 100 percent of the premium.

The parties' 1992-95 CBA expired on June 30, 1995. At the time of the alleged unlawful conduct in this case, the parties were negotiating over a successor CBA but had not reached agreement. An employer must maintain certain terms and conditions of employment embodied in an expired agreement while the parties are engaged in bargaining over a successor agreement. (State of California (Department of Forestry and Fire Protection) (1993) PERB Decision No. 999-S.) It is undisputed that the State was obligated to maintain the vision care benefits embodied in the parties' 1992-95 CBA while the parties negotiated over a successor agreement.

On June 5, 1995, DPA notified CAPS that it had posted an intent to award the new contract to provide Unit 10 employees with vision care benefits to Vision Service Plan (VSP). The contract in effect at that time, which also was with VSP, was scheduled to expire on July 31, 1995. DPA advised that a contract protest had been filed, and that DPA would seek an extension of the existing VSP contract if the protest was not resolved quickly. The new contract was for VSP's Regional Network Plan (RNP), which contained some provisions different from those of the VSP plan provided under the expiring contract. DPA provided CAPS with no information concerning the RNP or any difference in the provisions of the expiring and the new VSP contracts. The new VSP contract was signed on July 20, 1995, and went into effect on August 1, 1995.

Near the end of August 1995, a Unit 10 member called Kristen Haynie (Haynie), a labor relations consultant with CAPS. Haynie testified that the employee complained about having to pay more for eyeglasses than in the past, due to an increase in the cost of frames. Haynie did not know specifically what type of frames had been purchased, but testified that the employee indicated that the frames were in the same price range as those which had been purchased in the past.

Haynie contacted DPA and requested copies of the prior and new VSP contracts. After further contact with DPA, Haynie was provided a copy of a one-page document which described components of the prior and new VSP plans covering Unit 10 employees. This

document, introduced into evidence as charging party exhibit number 5 (CP 5), is entitled "State of California Plan Design." The document indicates that the amount of the employee deductible, the coverage for examinations and lenses, including contact lenses, and the covered options component are identical in the prior and new VSP plans. The document also presents several apparent differences in the plans, including:

- A reduction in the premium paid by the State from $11.94 to $8.98;
- a reduction in the number of California providers participating in the plan from 4,200 to "about 75-85%" of that number;
- a change in the benefit for frames from "$30 wholesale, control on extras" to "$30 wholesale or $75 retail allowance";
- a change in the benefit for cosmetic extras from "Dispensed at a controlled cost" to "Usual and customary charged";
- a change in the "Frame Coverage" from "Wholesale Difference x 2" to U and C [usual and customary] minus $75";
- a change in "Doctor Fees" from "Standard Discounted Fee for Service" to "RNP fixed fees in California";
- a change in "Doctor Fees for Covered Options" from "Discounted" to "No service fee, only for material";
- a change in the "Lab Agreement" from "65 labs in California" to "Limited number of CA Labs."

On November 8, 1995, Haynie met with DPA and followed up with a November 22 letter which states, in part:

> A major concern with the 1995-1998 VSP contract is that the state no longer guarantees a mark up rate cap for frames.

> Previously, the VSP contract limited the mark up rate at 250% of the wholesale value. This rate is no longer guaranteed, enabling vision care providers to charge inflated rates for frames.

The "mark up rate cap for frames" is a cap on the retail price providers can charge for frames. Haynie specifically requested that DPA amend the VSP contract "to incorporate the 250% mark up rate cap."

In a December 21, 1995, letter, DPA responded that the prior agreement between VSP and the State contained no requirement that VSP include a cap on frame retail prices. Therefore, DPA asserted that it was unable to amend the new VSP contract to include such a requirement.

The parties' expired CBA indicates that "the same benefits and services" in effect under the previous CBA will be provided, but there is no specific reference to matters such as frame retail prices, numbers of providers available, or numbers of laboratories participating in the vision care program. Under the new contract with VSP, the State continues to provide a vision care plan which includes an annual eye examination and frames and lenses, with employee co-payments of $10 for eye examinations and $25 for frames and lenses. These are the components of the vision care benefit which are specifically referenced in the expired CBA.

On February 6, 1996, CAPS filed an unfair practice charge alleging that the State violated the Dills Act on August 1, 1995, by unilaterally changing the vision care benefits provided to

Unit 10 employees. Among other changes, CAPS alleges that the vision care provided under the new contract with VSP offers fewer providers and laboratories at lower reimbursement levels, and eliminates the retail price cap on frames, both of which result in higher costs to employees. On May 2, 1996, the PERB Office of the General Counsel issued a complaint alleging that the State violated Dills Act section 3519(a), (b) and (c) when it entered into the new VSP contract without providing CAPS with notice or the opportunity to bargain.

A PERB-conducted informal settlement conference did not resolve the dispute. A formal hearing before an ALJ was held on December 16, 1996. On May 27, 1997, the ALJ issued a proposed decision finding that the State violated the Dills Act by unilaterally changing the vision care benefits of Unit 10 employees by eliminating the cap on the retail price of frames which was a feature of the prior VSP plan.

DISCUSSION

Statute of Limitations Issue

Under Dills Act section 3514.5,[2] PERB may not issue a complaint based on alleged conduct which occurred more than six

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[2]Dills Act section 3514.5 states, in pertinent part:

> (a) Any employee, employee organization, or employer shall have the right to file an unfair practice charge, except that the board shall not do either of the following: (1) issue a complaint in respect of any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge;

months prior to the filing of the unfair practice charge. CAPS filed the instant charge on February 6, 1996. To be timely, therefore, the alleged unlawful conduct must have occurred on or after August 6, 1996.

In a unilateral change case, the statute of limitations contained in section 3514.5 begins to run when the charging party has actual or constructive notice of the respondent's clear intent to implement the alleged change. (The Regents of the University of California (1990) PERB Decision No. 826-H.) Actual or constructive notice occurs when the exclusive representative has been clearly informed of the proposed change. (Marin Community College District (1995) PERB Decision No. 1092.)

DPA asserts that CAPS' February 6, 1996, charge is untimely. DPA notes that the PERB complaint in this case specifically references August 1, 1995, as the date the change in vision care benefits occurred. Further, DPA argues that CAPS had notice of the impending change on June 5, 1995, when DPA advised CAPS that it had posted notice of intent to award the new VSP contract.

DPA's advisory to CAPS on June 5, 1995, of its intent to award the new VSP contract did not provide CAPS with actual or constructive notice of the alleged change in vision care benefits. DPA provided CAPS with no information concerning the specific aspects of the new VSP plan, or any information comparing the prior and new VSP plans. It was not possible for CAPS to discern from the June 5 notification that the new VSP plan involved the changes which form the basis of the instant

unfair practice charge. It was not until after August 6, when an employee complained in late August, that CAPS first became aware of the possibility that vision care benefits had been changed under the new VSP contract. After requesting further information and discussing the matter with DPA,. CAPS filed its unfair practice charge on February 6, 1996, less than six months after it became aware of the alleged change. Therefore, CAPS' unfair practice charge was timely filed.

Unilateral Change Issue

In order to prevail on a unilateral change charge, the charging party must establish that the employer, without providing the exclusive representative with notice or the opportunity to bargain, breached or altered the parties' written agreement or established past practice concerning a matter within the scope of representation, and that the change has a generalized effect or continuing impact on the terms and conditions of employment of bargaining unit members. (Pajaro Valley Unified School District (1978) PERB Decision No. 51 (Pajaro Valley); Grant Joint Union High School District (1982) PERB Decision No. 196.)

Cases involving changes in health benefit plans and health benefit plan administrators present a unique type of unilateral change allegation for several reasons. While health benefits are fundamental elements of the terms and conditions of employment, the actual benefits employees receive are typically provided under a contract between the employer and a health benefit plan.

Health benefit plans are dynamic creatures, and minor adjustments in the nature and variety of services and benefits provided to employees under a health plan are a normal, if not constant, occurrence. Also, while different health benefit plans often provide similar arrays of actual services and benefits, they also typically include some variations since no two plans are likely to be identical. In recognition of this, health benefit provisions of CBAs rarely, if ever, contain a comprehensive list of the benefits employees are to receive, and often do not specify a particular health benefit plan to be provided.

In considering alleged unilateral changes in this area, the Board has attempted to balance the bargaining rights and obligations of parties who have entered into general health benefit CBA provisions with the need to avoid the disruption which would result from requiring negotiations over each and every adjustment in services or benefits offered under a health benefit plan. As a result, the Board has held that a change in health benefit plans or administrators is negotiable only if the change has a material or significant effect or impact on the actual benefits received by employees. (Oakland Unified School District (1980) PERB Decision No. 126; affd. Oakland Unified School Dist, v. Public Employment Relations Bd. (1981) 120 Cal.App.3d 1007, 1012 [175 Cal.Rptr. 105]; Palo Verde Unified School District (1983) PERB Decision No. 321; Trinidad Union Elementary School District/Peninsula Union School District (1987) PERB Decision No. 629 (Trinidad/Peninsula); Savanna School

District (1988) PERB Decision No. 671.) It is not enough to theorize or speculate that a change could impact employees. The actual effect on employees, caused by the health benefit-related change, must be shown. (Trinidad/Peninsula.)

In a recent case, Oakland Unified School District (1994) PERB Decision No. 1045, the Board considered the employer's alleged unilateral change resulting from the decision to contract with a different health plan to provide health benefits to employees. The Board determined that a comparison of the benefits available under the old and new plans demonstrated that, while employees continued to receive the same basic benefits, the costs of those benefits had changed significantly under the new plan. For example, the employee cost of prescription drugs had changed from $1 to $5 - $7; the cost of emergency care visits had changed from no employee co-payment to a $35 co-payment; and the employee co-payment for a series of other health care benefits had changed from 10 to 20 percent to no co-payment. Since it was clear that the change in health plan providers had resulted in a material and significant impact on the cost of the actual health benefits received by employees, the Board concluded that an unlawful unilateral change had occurred.

Here, the parties' expired 1992-95 CBA requires the State to provide vision care benefits within certain parameters, while listing few details of the specific benefits to be provided. The contractual language references the benefits and services

provided under the previous contract, which contained a similar reference to an earlier agreement.

The State points to Yuba Community College District (1990) PERB Decision No. 855 (Yuba CCD) in arguing that the status quo is defined by the negotiated language of the expired CBA, which clearly lists specific vision care benefits to be received by employees. Since these benefits continue to be provided under the new VSP plan, the State asserts that the status quo has been maintained and no unilateral change has occurred.

Yuba CCD is clearly distinguishable from the case at bar. In that case, the parties' contract specified that health benefit coverage would be provided through a specific Blue Cross insurance plan. During the time that the plan had been specified in the contract, several uncontested changes in benefits and plan provisions had been implemented by Blue Cross. The Board concluded that the status quo, therefore, included a regular and consistent pattern of changes in the specified Blue Cross health plan. (Pajaro Valley.) In this case, there is no evidence suggesting that there had been a regular and consistent pattern of changes to the benefits provided to employees pursuant to the vision care provision of the parties' CBA.

As is typical with health benefit provisions, the actual vision care benefits received by employees pursuant to the contract include services and benefits not specifically listed in the current or former CBAs. This array of actual benefits received by employees represents the status quo which the State

is bound to maintain. Any unilateral change resulting in a significant impact on these actual benefits, or their cost to employees, may violate the Dills Act, even though the benefits impacted have never been specifically listed in any of the parties' CBAs.

It is clear that the State entered into a new contract with VSP to provide vision care benefits, a subject within the scope of representation. It is also clear that the State did so without providing CAPS with notice or the opportunity to negotiate. The issue presented by this case is whether the change to the new VSP plan had a significant impact on the actual vision care benefits received by employees, or the cost of those benefits to employees.

An examination of the record reveals that CAPS has failed to meet its burden of demonstrating by a preponderance of the evidence[3] that a significant impact on actual vision care benefits, or their cost to employees, resulted from the change to the new VSP plan.

According to CP 5, the new VSP plan was different from the prior plan in several ways. Among the differences were a reduction in the premium paid by the State, a reduction in the number of participating providers, a change in "Doctor Fees," and a reduction in the number of laboratories participating in the

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[3]PERB Regulation 32178 provides that:

> The charging party shall prove the complaint by a preponderance of the evidence in order to prevail.

plan. CAPS suggests that these changes have an impact on the cost of actual benefits received by employees, but fails to provide any evidence of impact. Speculation that a change in the cost of actual vision care benefits resulted from these features of the new VSP plan is insufficient to establish that a unilateral change has occurred. (Trinidad/Peninsula.)

CAPS focuses its attention in demonstrating actual benefit impact on the cost of eyeglass frames under the new VSP plan. CAPS asserts that the new contract between the State and VSP eliminated the frame retail price cap of 250 percent of wholesale value. As a result, CAPS asserts that new VSP plan providers are free to charge retail frame prices without limit, resulting in higher prices to employees, a significant impact on their actual vision care benefits.

Neither the prior or new contract between the State and VSP was introduced into the record, so it is not possible to review their specific provisions pertaining to the retail pricing of frames. However, charging party exhibit number 8, a brochure describing the new VSP plan, indicates that "Participating member doctors are required to maintain a selection of frames which are fully covered under the your [sic] VSP plan." It is clear, therefore, that the new VSP plan provides for some cap on the retail price of frames, at least with respect to "a selection of frames." Assuming that CAPS' description of the price cap within the prior VSP contract is correct, the Board further notes that there are many factors which affect retail pricing, including

supply and demand, level of competition and general economic conditions. Additionally, wholesale price changes may or may not result in corresponding changes in retail pricing. Essentially, the record contains no evidence concerning the actual retail pricing of frames under the prior and new VSP plans. Based on the evidence presented, it cannot be concluded that the new VSP contract contains no control on the retail pricing of frames, or that the elimination of a retail price cap of 250 percent of wholesale had a significant impact on the retail price of frames paid by employees.

CP 5, the comparison of features of the prior and new VSP plans, addresses frames in two areas. Frame benefits under the prior plan are described as "$30 wholesale, control on extras," and as "$30 wholesale or $75 retail allowance" under the new VSP plan. Obviously, the description of the frame benefit is somewhat different under the new VSP plan, but CAPS offers no explanation or evidence concerning the effect of this difference, so no finding of a significant impact on actual employee benefits can be made.

CP 5 also indicates a change in frame coverage from "Wholesale Difference X 2" under the prior plan, to "U and C minus $75" under the new VSP plan. It does not appear that this provision refers to the cap on frame retail prices discussed above, because that cap was asserted to be 250 percent of the wholesale price. Additionally, the relationship of frame benefits to frame coverage, both of which are included in CP 5,

is unexplained, as is the meaning of "wholesale difference" referred to under the prior VSP plan. CAPS offers no evidence concerning the effect of the change in frame coverage noted in CP 5, so no finding of a significant impact on actual benefits received by employees can be made.

Finally, Haynie's testimony concerning the employee complaint about the increased cost of frames is unhelpful to CAPS. Haynie was unable to provide any details concerning the employee's purchase, but the suggestion that the employee purchased frames in the same price range as previously certainly does not support the claim that there has been an increase in retail prices under the new VSP plan. Further, the record indicates that frames in the same price range would likely carry the same employee cost under both the prior and new VSP plans, since the $25 employee co-payment for frames has not changed. It appears likely that factors other than frame cost increases led to the higher cost experienced by the complaining employee.

Summary

To prevail in this case, CAPS must present evidence of the impact on actual vision care benefits, or their cost to employees, which resulted from the State's action. The evidence CAPS presents is either speculative,

developed or unhelpful in demonstrating this impact. Therefore, CAPS has failed to meet its burden of showing that there has been a significant impact on the actual vision care benefits received by

employees, or the employee cost of those benefits, resulting from the change to the new VSP plan.

ORDER

The unfair practice charge and complaint in Case No. SA-CE-806-S are DISMISSED WITHOUT LEAVE TO AMEND.

Members Dyer and Amador joined in this Decision.