STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA STATE EMPLOYEES ASSOCIATION,	)	
Charging Party,	)	Case No. SA-CE-930-S
v.	)	PERB Decision No. 1284-S
STATE OF CALIFORNIA (EMPLOYMENT DEVELOPMENT DEPARTMENT),	)	September 16, 1998
Respondent.	)	

Appearances: Howard L. Schwartz, Attorney, for California State Employees Association; State of California (Department of Personnel Administration) by Edmund K. Brehl, Labor Relations Counsel, for State of California (Employment Development Department).

Before Caffrey, Chairman; Johnson and Jackson, Members.

DECISION

JOHNSON, Member: This case comes before the Public Employment Relations Board (Board) on appeal by the California State Employees Association (CSEA) of an administrative law judge's (ALJ) proposed decision (attached). The ALJ dismissed the charge which alleged that the State of California (Employment Development Department) (State) violated section 3519(a), (b) and (c) of the Ralph C. Dills Act (Dills Act)[1] by unilaterally

[1]Dills Act is codified at Government Code section 3512 et seq. Section 3519 states, in pertinent part:

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

increasing the number of determination interviews scheduled for Employment Program Representatives to 16 per day.

The Board has reviewed the entire record, including the proposed decision, CSEA's exceptions and the State's response. The Board finds the ALJ's findings of fact and conclusions of law to be free of prejudicial error and adopts them as the decision of the Board itself.

ORDER

The unfair practice charge and complaint in Case No. SA-CE-930-S is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chairman Caffrey's dissent begins on page 3.

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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.

CAFFREY, Chairman, dissenting: The State of California (Employment Development Department) (State or EDD) violated section 3519(a), (b) and (c) of the Ralph C. Dills Act (Dills Act) by unilaterally increasing the number of daily determination (Det) interviews to be completed by Employment Program Representatives (EPR) without providing the California State Employees Association (CSEA) with notice and the opportunity to bargain.

DISCUSSION

To prevail in a unilateral change case, 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 had 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 at p. 5; Grant Joint Union High School District (1982) PERB Decision No. 196 at p. 9.)

Effective January 2, 1997, the State increased the number of Det interviews assigned to most EPRs throughout the state. It is undisputed that the subject of workload is within the scope of representation. (Davis Joint Unified School District (1984) PERB Decision No. 393 at p. 14.) It is also clear that the disputed conduct here, if determined to be a change, had a generalized and continuing impact on the terms and conditions of employment of

bargaining unit members. Additionally, the State in its response to CSEA's exceptions admits that it did not provide CSEA with notice "of any anticipated change in scheduled interviews per EPR per day" since the State maintains that the established past practice allowed for such variations.[1] Therefore, this case turns on the question of whether the change in Det interview workload implemented by the State in January 1997 was consistent with or altered the established past practice.

In his proposed decision, the Public Employment Relations Board (Board) administrative law judge (ALJ) concluded that a general workload increase of two Det interviews per day had been implemented by the State in January 1997. However, the ALJ, citing Oakland Unified School District (1983) PERB Decision No. 367 (Oakland USD), concluded that the record did not establish that the increase so deviated from the past practice as

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[1]As a result of this admission, the State's assertion that CSEA waived its right to bargain over the alleged change fails. When an employer does not provide adequate notice of a proposed change, the exclusive representative's failure to request bargaining is not considered a waiver. (Beverly Hills Unified School District (1990) PERB Decision No. 789 at pp. 9-10.) Similarly, when a request to bargain would be futile, such as when a unilateral change has already been implemented, or if the employer has already made a firm decision to implement the change, the exclusive representative does not waive its right to bargain by not requesting negotiations. (San Francisco Community College District (1979) PERB Decision No. 105 at p. 17; Arcohe Union School District (1983) PERB Decision No. 360 at p. 11; Morgan Hill Unified School District (1986) PERB Decision No. 554a at p. 6.) Additionally, the exclusive representative's failure to request bargaining in previous unilateral changes does not constitute a continuing waiver of its right to bargain over subsequent changes. (San Jacinto Unified School District (1994) PERB Decision No. 1078, proposed dec. at p. 23.)

to change its "quantity and kind." As a result, the ALJ dismissed the charge, finding that CSEA had failed to establish by a preponderance of the evidence that an unlawful unilateral change had occurred.

I disagree. In Oakland USD, the Board concluded that a nearly tenfold increase in the amount of subcontracting done by the employer altered the established past practice and constituted a unilateral change, because the magnitude of the increase was not consistent with the quantity and kind of subcontracting previously done by the employer. In my view, the record here also supports a finding that the January 1997 increase in workload differed in quantity and kind from the established past practice with regard to Det interview workload changes made by EDD.

There are at least three clear indications in the record which lead me to this conclusion. First, the January 1997 increase in Det interview workload was statewide, affecting hundreds of EPRs in scores of EDD field offices. There is no evidence that the past practice with regard to workload changes includes any change having such a broad statewide application. Instead, previous workload changes appear to have been office-specific, made by EDD to address unique workload factors relating to individual offices. Second, Joint Exhibit 1, which documents workload in more than 20 EDD offices prior and subsequent to the January 1997 change, shows a consistent pattern of increased Det interviews. While the number of interviews scheduled varies by

office, there is little or no variation in the fact that EPRs in each office experienced a significant increase in Det interview workload subsequent to the January 1997 change. Third, the State's assertion that the increase in scheduled Det interviews was offset by various work improvements and streamlining designed to save approximately two hours per day, is itself an admission that the January 1997 workload increase was substantial enough as to require mitigating measures to be taken. As noted by the ALJ, whether this streamlining actually accomplished the goal of making time available for EPRs to handle the increased Det interview workload is disputed by the parties. It cannot be concluded from the record that any increased workload associated with the increase in Det interviews was offset by the State's streamlining and mitigation efforts.

In summary, CSEA has demonstrated by a preponderance of the evidence that the State unilaterally increased the Det interview workload of EPRs in January 1997. The change was not consistent with the past practice with regard to workload adjustments, and was made without providing CSEA with notice and the opportunity to bargain. As a result, I conclude that the State violated section 3519(a), (b) and (c) of the Dills Act by its conduct, and I would order the appropriate remedy.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA STATE EMPLOYEES ASSOCIATION, Charging Party, v. STATE OF CALIFORNIA (EMPLOYMENT DEVELOPMENT DEPARTMENT), Respondent.	)	Unfair Practice Case No. SA-CE-930-S PROPOSED DECISION (2/19/98)

Appearances: Howard Schwartz, Legal Counsel, for California State Employees Association; Edmund K. Brehl, Labor Relations Counsel, for State of California (Employment Development Department).

Before Ronald E. Blubaugh, Administrative Law Judge.

PROCEDURAL HISTORY

This case presents the question of whether the State of California (State) failed to negotiate in good faith when it implemented new production levels for employees in a large department. The exclusive representative of the affected employees asserts that the change in workload was a negotiable decision that was implemented unilaterally.

Although acknowledging that workload usually is negotiable, the State argues that in the circumstances here the change was a managerial prerogative. Alternatively, the State argues that production levels have been changed periodically over the years and that the disputed change was consistent with past practice.

The California State Employees Association (CSEA or Union) commenced this action on January 6, 1997, by filing an unfair

practice charge against the State Employment Development Department (EDD). The Office of the General Counsel of the Public Employment Relations Board (PERB or Board) followed on January 23, 1997, with a complaint against the State. The State answered the complaint on February 17, 1997.

The complaint alleges that prior to December of 1996, it was the policy of EDD that employees in the class of Employment Program Representative were expected to complete 12 determination interviews per day. During or about January of 1997, the complaint continues, the respondent changed this policy by increasing the performance requirement to 16 determination interviews per day. This action, the complaint alleges, was taken without prior notice to CSEA and without having afforded CSEA the opportunity to meet and confer over the decision and/or its effects. By making this change, the complaint alleges, the State violated Ralph C. Dills Act (Dills Act) section 3519(c) and, derivatively, (a) and (b).[1]

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[1]Unless otherwise indicated, all statutory references are to the Government Code. The Dills Act is codified at 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:
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> (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.

The State filed an answer to the complaint on February 17, 1997, admitting the jurisdictional allegations but denying all other allegations. The answer also set out various affirmative defenses that will be dealt with herein as necessary. A hearing was conducted in Sacramento over four non-consecutive days in August and September. With the filing of briefs, the case was submitted for decision on January 21, 1998.

FINDINGS OF FACT

The respondent is the State employer under the Dills Act. EDD is a department of the State. CSEA is the exclusive representative of nine State employee bargaining units, including unit 1, administrative, financial and staff services, where the events at issue took place.

The collective bargaining agreement covering unit 1 expired on June 30, 1995. Although the parties have been in negotiations continuously since that date, they had not entered a successor agreement as of the completion of the hearing in the present case. All events at issue occurred after the expiration of the agreement.

EDD is the State agency that administers the federal unemployment insurance program in California. The department handles more than three million claims for unemployment benefits

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(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.

each year. EDD conducts its operations through field offices and telephone call centers located throughout the State. The number of EDD field offices varies between 140 and 160, depending upon the rate of unemployment. Individuals seeking unemployment benefits may file their claims in person or, increasingly, by telephone at the EDD field offices.

The unemployment insurance program is financed by employer taxes paid to the federal government. Subject to the annual authorization of the United States Congress, the federal Department of Labor provides funds for worker benefits and reimburses each state for the cost of the operation of the program.

Although the federal budget projects state-by-state expenditure levels, the states do not receive flat grants. Rather, they are compensated according to a count of specific tasks which must be completed in the operation of the program. The Department of Labor identifies the activities that will qualify in the workload count and instructs the states on how the tasks are to be completed. The states periodically report their workload counts to the Department of Labor.

Once each fiscal quarter, the Department of Labor conducts a validation study of each state's counting procedure to determine an error rate. Based upon the error rate, a portion of a state's workload count may be disallowed and not reimbursed. The federal reimbursement for performance of the specifically counted tasks

is intended to cover the administrative cost of the entire program.

Among the reimbursable tasks is the determination of whether a particular applicant is eligible for unemployment benefits. Determinations are made on the basis of an interview conducted by an EDD employee with an applicant and the former employer. The interview involves asking the applicant and former employer to respond to certain questions in order to determine eligibility.

When a worker makes a claim for unemployment benefits, the former employer has 10 days in which to file a protest of the claim. If the employer does not oppose the claim and there is no eligibility issue, the benefits will be paid without a determination interview. There are about 700,000 other cases each year where there is an eligibility issue that is discovered at the time the claim is filed. These cases are scheduled for determination interviews directly from the initial claim filing point. Determinations of eligibility usually are completed within eight to 14 days from the date the claim is filed.

The 600 to 650 employees who conduct benefit determination interviews are EDD employment program representatives. In EDD colloquialism, they are known as "Det" interviewers. They are members of bargaining unit 1 and it is their workload that is at issue here.

Each morning, a Det interviewer calls up on his or her personal computer the list of interviews that are to be conducted

that day. The interviews are conducted by telephone. Applicants have been notified in writing that an interviewer will call them on a specific day, within a specific two-hour period. The interviews are conducted within eight to 14 days of the filing of an application for unemployment benefits.

The Det interviewer asks questions designed to establish whether the applicant is eligible for unemployment benefits. These include questions about the circumstances of the applicant's severance from his/her prior job, whether the applicant was separated for cause or quit voluntarily. The Det interviewer also will seek to determine whether the applicant is able and available for work, whether the applicant has wages from another source and whether the applicant is seeking work. If the Det interviewer is unable to contact the applicant at the scheduled time or is unable to contact the employer, the case will be carried over to the next day as backlog.

Ultimately, the Det interviewer issues either a notice of disqualification or a determination of eligibility. If a determination of eligibility is made, the applicant will receive benefits. Benefits will continue for the number of weeks prescribed by law if the applicant maintains eligibility throughout. Persons receiving benefits must make regular, periodic certifications of continued eligibility by completing an EDD questionnaire.

In 1996, the Department of Labor notified EDD that it would implement a change effective January 2, 1997, in the

activities that could be counted for purposes of reimbursement. Among the changes, was a decision to count for reimbursement the resolution of questions raised by a benefit recipient's "off-pattern" answers to questions on the eligibility questionnaire. "Off-pattern" answers are responses that raise the possibility that the recipient is no longer eligible for unemployment benefits.

Telephone contacts to resolve questions raised by off-pattern answers previously were considered clarifications and were not counted as reimbursable workload. Beginning in 1997, such contacts were counted as determination interviews. This single change resulted in a 996,000 increase in the number of countable, reimbursable determination interviews conducted in a year. Although this was workload that previously had to be accomplished, the clarification calls previously were not considered to be determination interviews and did not appear on the daily schedule of Det interviewers. Without this change, EDD employees would have made approximately 1.2 million countable, reimbursable eligibility determinations in 1997. With the change, the department anticipated that it would make nearly 2.2 million eligibility determinations.

The increased number of eligibility determinations did not mean that California would receive more funds from the federal Department of Labor. The principal impact was that the State was required to complete the higher number of determination

interviews in order to continue receiving the same amount of funding.

By letter of November 25, 1996, EDD labor relations chief Jeff Schrader notified CSEA that effective January 1, 1997, the State was suspending existing performance standards for Det interviewers. Mr. Schrader's letter explained that the suspension of the performance standard was related to new Department of Labor reporting requirements. His letter pledged that any changes to the performance standard or any subsequent reinstatement of the standard would be made in accord with language in the expired memorandum of understanding. The letter is silent regarding any prospective change in the number of determination interviews that Det interviewers would be expected to complete in a day.

The performance standard that was suspended required Det interviewers to complete 1.5 to 1.79 determinations per hour. The standard was adopted following a 1988 pilot study conducted in 13 EDD offices. Employees who completed more than the standard range were considered outstanding and those who completed fewer were considered below standard. Below standard employees were given assistance and training to bring their production levels up to standard. Probationary employees who failed to meet the standard were subject to termination.

Deborah Bronow, chief of the EDD Unemployment Insurance Division, testified that the performance standard was suspended in 1997 because it would have no meaning under the new federal

rules. She said that under the new definition of countable activities, there would be a 25 percent increase in determination counts from an unchanged workload. Therefore, production at the rate set out in the old standard would be inadequate to meet the new level of eligibility determinations.

Upon receipt of Mr. Schrader's November 25 letter, CSEA immediately requested that the State meet and confer regarding the suspension of the workload standard. By letter of December 4, Rosemarie Duffy, the CSEA staff member assigned to unit 1, asked "to meet and confer over these changes and to discuss the overall direction the Department of Labor will be taking in the future regarding determinations." Ms. Duffy testified that at the time she wrote the letter, she had heard rumors about a possible increase in the number of interviews that would be assigned each day to Det interviewers but nothing was certain.

It was not long until the rumors were confirmed. Managers at various EDD offices began advising employees in late November and early December of 1996 of an imminent increase in the number of interviews they would be assigned each day. Then, the department conducted training classes at the various EDD offices to explain the forthcoming changes to Det interviewers. The employees were told that in order to meet the new Department of Labor standards, each interviewer would have to complete 16 determination interviews per day.

Ms. Bronow testified that the number 16 was arrived at by an arithmetic calculation. She divided the Department's budgeted number of Det interviewers into the anticipated number of interviews that would be required under the new method of counting. This produced an average of 16 interviews per interviewer per day. She testified that she anticipated that about seven of these would be quick determinations of 5 to 7 minutes each involving matters that formerly would not have been counted as determination interviews. In any event, she testified, the number 16 was entirely "budget driven."

The State acknowledges that it provided CSEA with no notice of its intent to increase the number of determination interviews that would be assigned each day. Department administrators gave no notice because they did not believe they were making a negotiable change. From the first time CSEA raised the issue, EDD took the position that the assignment of interviews was a scheduling matter. Mr. Schrader testified that he did not advise CSEA of the impending change because scheduling always had been handled as a managerial prerogative by the various field offices. He said schedules have varied from office to office and there never has been any uniform practice on the number of interviews assigned to interviewers each day.

Effective January 2, 1997, EDD increased the number of determination interviews assigned to most interviewers throughout the State. Although the increase was general, it was not the uniform change from 12 to 16 that is alleged in the complaint.

It is absolutely clear that there was no uniform standard of 12 interviews per day before January of 1997 and there was no uniform standard of 16 interviews per day after January of 1997. There were variations among employees in a single office and there were variations among offices. There also were scheduling variations according to the day of the week, both before and after January of 1997. Documents entered into the record as a joint exhibit demonstrate the wide range of determination schedules that EDD interviewers worked before and after January of 1997. Schedules at several of the offices are set out below.

At the San Bernardino Adjudication Center, determination schedules of journey level employees contained 14 interviews per day in June of 1996. During the period from July 15 through August 23, 1996, determination schedules contained 16 interviews. From August 26 through February 7, 1997, determination schedules contained 15 interviews per day. From February 10, 1997, through May 30, 1997, determination schedules contained 16 interviews per day.

At the Salinas field office, 12 to 13 determinations were scheduled per day for each interviewer during 1996. In 1997, 16 to 20 determinations were scheduled per day for each interviewer.

At the San Diego Adjudication Center, during June of 1996, 23 interviewers were assigned to conduct 14 interviews per day for four days a week and four interviewers were assigned to conduct 13 interviews for four days a week. All employees worked the fifth day as a "write-up" day. From July through December of

1996, most staff members were assigned to 16 interviews four days a week with the fifth day being a "write-up" day. In January and February of 1997, most employees were assigned 20 interviews per day for four days with a write-up day. Most of the remaining employees were assigned 16 interviews per day, five days per week.

At the Redding field office, Det interviewers were assigned to conduct 14 interviews per day from June through December of 1996. In January of 1997, they were assigned 16 per day.

At the Pleasant Hill field office, Det interviewers who worked an eight-hour day were assigned to conduct 14 interviews per day in the period from June through December of 1996. In January of 1997, they were assigned 16 per day.

At the Hanford field office, journey level interviewers were assigned 12 interviews per day in 1996 and 16 interviews per day in 1997.

At the Canoga Park field office, the schedules of Det interviewers were unchanged for the period from June 1, 1996, through March 30, 1997. Although the schedules varied according to the day of the week, the interviewers were assigned a daily average of 13.2 to 13.6 interviews per day throughout the period.

At the Fresno field office, during the period of August through November of 1996, interviewers were assigned 14 interviews per day four days a week and seven on the fifth day. In January of 1997, the number was increased to 16 per day four days a week and eight on the fifth day.

At the Vallejo field office, Det interviewers were assigned 12 interviews per day in June and July of 1996, 14 per day in August of 1996 through January of 1997, and 16 per day from February through April of 1997.

At the Oroville field office, Det interviewers were assigned differing amounts of determinations on different days of the week. During the period from June 1 through December 31, 1996, employees on a standard 40-hour work week conducted 63 interviews per week. In January and February of 1997, they conducted 80 interviews per week. From March 1 through April 10 of 1997, they conducted 70 interviews per week. And from April 10 through April 30, 1997, they conducted 61 interviews per week.

CSEA witnesses described various negative impacts which they attributed to workload-induced stress. Adrian Suffin, CSEA chief job steward at the EDD office in San Francisco, testified that after the change she constantly heard about employees with head aches and stomach aches. She said some employees were almost on the verge of tears and were upset because of the increased workload. She identified one employee who filed a worker's compensation claim which she attributed to the workload increase. She also testified that employees were arriving early and working late and through their breaks and lunch periods in order to keep up with the work.

Other CSEA witnesses described increased sick leave in the San Diego and San Bernardino field offices. Adia Canonizado, a CSEA job steward at the EDD adjudication center in San Diego,

testified that sick leave usage practically doubled after the increase in the workload. She identified employees who she said had such increased levels of absence that they used up their sick leave and were docked in pay. Blanca Rodriguez, CSEA steward and labor council president, told a similar story regarding the EDD office in San Bernardino.

But State witnesses challenged the assertions about increased worker's compensation claims and sick leave usage. Stan Okasaki, the workload coordinator at the EDD primary adjudication center in San Francisco, testified that the employee who had filed a worker's compensation claim in his office had complained of tendinitis, not stress. He said he had seen no increase in employees attempting to work additional, uncompensated hours, before or after work shifts or through lunch. He said whenever he sees employees working late, he tells them to go home.

Margaret Robinson, an EDD supervisor in San Diego, produced the sick leave records of each of the employees identified by Ms. Canonizado as having increased sick leave usage. The records showed no change in sick leave usage for any of the employees. Ms. Bronow testified that EDD has detected no increase in sick leave usage on a department-wide basis. She testified that for the EDD operations branch, which includes more employees than Det interviewers, employees averaged 6.4 hours of sick leave per month in July of 1996 compared to 5.9 hours in July of 1997.

Mr. Schrader produced statistics similarly showing no statewide increase in workers' compensation claims. For the first four months of 1996, there were 192 workers' compensation claims filed by operations branch employees. For the same period in 1997, there were 148 workers' compensation claims filed by operations branch employees. The number of claims based on stress decreased from 16 to 14 for the same periods.

Each of the EDD managers called as witnesses denied seeing employees working through lunch or breaks or voluntarily extending their work shifts. Ms. Robinson said that while some employees do arrive for work early, they spend the pre-shift time in the coffee room or outside, smoking. She said employees are paid to work eight hours. "You do what you can do in eight hours, and you're out of there," she said.

Simultaneous with the increased number of determinations, EDD management implemented certain changes intended to simplify the determination process. These changes, described as "streamlining" by EDD, were intended to reduce by as much as two hours the amount of time required to complete the quantity of work assigned daily in 1996.

The changes included the creation of various forms and standardized lists of questions that could be called onto computer screens by Det interviewers. Another change involved the transfer of certain clerical duties including filing and mailing letters to secretaries.

The most significant change was a reduction in the number of telephone calls which Det interviewers would be required to make to applicants and their former employers. Formerly, interviewers were expected to make a minimum of two attempts to reach applicants and former employers. This meant that if there was no answer to a telephone call or a call was not returned, a Det interviewer would have to call at least one more time before he/she could make a determination.

Beginning in January of 1997, interviewers were required to make only one telephone call to an applicant and one to the former employer. Initially, Det interviewers were directed that they could make a determination immediately if an applicant failed to answer a telephone call during a scheduled interview. A determination made in this circumstance would be a disqualification from benefits. Immediate determinations soon proved impractical, however, because applicants often had legitimate reasons for not being present to answer a scheduled telephone call. If an applicant later called back and established eligibility, the disqualification would be rescinded. Later in 1997, the "one call" rule was modified to wait until the end of the next workday before making a determination that disqualified a non-responding applicant.

Whether these changes actually simplified the work of Det interviewers is much disputed. CSEA witnesses described at length how the changes failed to reduce the workload. Some of the changes, CSEA witnesses asserted, in fact increased the

workload. In particular, CSEA witnesses agreed, the conversion to computer forms with standardized questions lengthened the time to complete a determination for experienced Det interviewers.

Throughout the history of this dispute, the State has been willing to negotiate with CSEA about the workload of Det interviewers. From CSEA's first demand to bargain, EDD administrators offered to bargain with CSEA over the workload question. The State was willing to meet with CSEA at ad hoc meetings scheduled solely to meet and confer over the workload question at EDD.

CSEA, however, refused to bargain about the issue in any forum other than at the main table where negotiations have been on-going for more than two years for a new unit 1 contract. By letters of December 24, 1996, and January 31, 1997, CSEA demanded that the State rescind the increase in workload for Det interviewers and refer the matter to the unit 1 main table. CSEA insisted that the State reinstate the previous workload assignment until the unit 1 negotiations were complete.

Subsequently, in the context of attempts to settle the present case, CSEA has met with the State in ad hoc negotiations about the workload of Det interviewers.

LEGAL ISSUE

Did the State unilaterally increase from 12 to 16 the number of daily determination interviews EDD employment program representatives were expected to complete and thereby fail to

meet and confer in good faith in violation of section 3519(c) and derivatively (a) and (b)?

CONCLUSIONS OF LAW

If an employer makes a pre-impasse unilateral change in an established, negotiable practice that employer violates its duty to meet and negotiate in good faith. (NLRB v. Katz (1962) 369 U.S. 736 [50 LRRM 2177].) Such unilateral changes are inherently destructive of employee rights and are a failure per se of the duty to negotiate in good faith. (Davis Unified School District, et al. (1980) PERB Decision No. 116; State of California (Department of Transportation) (1983) PERB Decision No. 361-S.)

To prevail on a complaint of unilateral change, the exclusive representative must establish by a preponderance of the evidence that (1) the employer breached or altered the parties' written agreement or own established past practice; (2) such action was taken without giving the exclusive representative notice or an opportunity to bargain over the change; (3) the change was not merely an isolated breach of the contract, but amounts to a change of policy (i.e., has a generalized effect or continuing impact upon the terms and conditions of employment of bargaining unit members); and (4) the change in policy concerns a matter within the scope of representation. (Grant Joint Union High School District (1982) PERB Decision No. 196 (Grant); (State of California (Department of Forestry and Fire Protection) (1993) PERB Decision No. 999-S.

At issue here, CSEA argues, is a unilateral change in the workload of Det interviewers. The change, CSEA contends, was an increase of two interviews per interviewer per day, boosting the workload from 12 to 14 interviews per day for some and from 14 to 16 interviews per day for others. It is well established, CSEA continues, that workload is a subject within the scope of representation under all collective bargaining laws. In support of this proposition, CSEA cites cases decided under the Educational Employment Relations Act[2] (EERA), the Meyers-Milias-Brown Act[3] and the National Labor Relations Act.[4] Since the increase was made unilaterally, CSEA contends, it constituted a failure to negotiate in good faith.

Anticipating arguments of the State, CSEA discounted any contention that the workload increase was offset by EDD efforts to streamline the interview process. First, CSEA argues, the supposed streamlining did not reduce job tasks but actually made the work more difficult. Moreover, CSEA continues, an employer's efforts to streamline job procedures is itself negotiable. Finally, CSEA rejects any effort by the State to argue that CSEA has waived its right to bargain. The State cannot assert waiver as a defense, CSEA argues, because the State did not timely raise that defense in its answer. Furthermore, CSEA contends, the State cannot assert waiver because the State never provided CSEA

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[2]Section 3540 et seq.

[3]Section 3500 et seq.

[4]Chapter 7, 29 U.S. Code section 141 et seq.

with timely notice of its plan to change workload prior to reaching a firm decision to do so.

The State acknowledges that workload generally is a negotiable subject under the EERA and in federal cases involving the private sector. However, the State continues, PERB has held that employers have the authority to make unilateral changes in negotiable subjects if the purpose is to change the level of service.[5] Here, the State argues, the purpose of the change was "to fully capture the state's share of the federal unemployment insurance program," clearly a management prerogative. Only the effects of the decision were negotiable, the State argues.

Insofar as the number of determination interviews scheduled in a day is an effect, the State continues, there is no firm past practice. The number of interviews scheduled in a day has varied widely, both before and after January of 1997, the State argues. The number of scheduled interviews always has been set according to the needs of the individual offices. Finally, the State asserts, even if there was an obligation to negotiate, CSEA waived its right to bargain by refusing to meet anywhere except at the main negotiating table.[6]

The first question, therefore, is whether a change in the number of determination interviews scheduled each day constituted

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[5]In support of this proposition, the State cites Arcata Elementary School District (1996) PERB Decision No. 1163 (Arcata).

[6]The State cites State of California (Board of Equalization) (1997) PERB Decision No. 1235-S.

a matter within the State's bargaining obligation. Under Dills Act section 3516, 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.

As the parties have observed, it is well settled in both public and private sector cases that workload is negotiable. PERB has found workload to be a subject contained within "hours." The rationale for this conclusion is set out in Davis Joint Unified School District (1984) PERB Decision No. 393 (Davis). There, the Board described the employment relationship as "an agreement to the exchange of a specified amount of labor for a specified amount of compensation." The Board observed that the statutory term "hours" measures not only the amount of time but also "the intensity of efforts expended."

The Board cited with approval federal cases that recognize the term "hours" as authorizing the negotiability of "the amount of labor, however quantified, which will be provided to the employer." (Emphasis in the original.) The measurement of the amount of labor, the Board wrote, is the subject of "workload." The Board adopted the federal rule and found that under the EERA the caseload of counselors was negotiable as reasonably and logically related to "hours."[7] California courts have

[7]See also, Fullerton Union High School District (1978) PERB Decision No. 53; Mount Diablo Unified School District (1983) PERB Decision No. 373.

reached the same conclusion for cases decided under the Meyers-Milias-Brown Act.[8]

Contrary to the rationale of the State, I do not believe that the Board's decision in Arcata modifies this rule. The holding in Arcata is quite narrow and is applicable only to an employer's modification of the hours of a vacant position. The Board held that a decision to change hours in a vacant position is not negotiable if taken for the purpose of changing the nature, direction or level of service. By contrast, the Board has never held that an employer can change the hours in an occupied position, without negotiating, even if the purpose is to change the nature, direction or level of service. Since the present case does not involve changes in vacant positions, I conclude that insofar as the disputed action constitutes an increase in workload it remains a negotiable subject under Davis.

The fundamental question in this case is whether the State's action at EDD amounted to a change in the past practice. While it is clear that the State made a change in January of 1997, not all employer changes in working conditions constitute a change in past practice. Unless an employer's action alters the status quo, it does not constitute a unilateral change and failure to negotiate in good faith.

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[8]See Fire Fighters Union v. City of Vallejo (1974) 12 Cal.3d 608, 619-620 [116 Cal.Rptr. 507]; Los Angeles County Employees Association, Local 660 v. County of Los Angeles (1973) 33 Cal.App.3d 1, 5 [108 Cal.Rptr. 625].

"[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.)[9] Only changes that so deviate from the past practice as to change its "quantity and kind" are inconsistent with the status quo and a failure to negotiate in good faith. (Oakland Unified School District (1983) PERB Decision No. 367 (Oakland).) In short, to mark a change in the status quo an employer's action must constitute a departure from how things were done in the past.

I note, initially, that it is absolutely clear that EDD had no uniform practice of assigning 12 determination interviews per day to each employment program representative. The evidence completely fails to establish this allegation that is set out in the complaint. What the evidence establishes is that the number of Det interviews scheduled per day varied widely from employee to employee, from office to office and from day to day. These variations existed before January 2, 1997, and they existed after that date.

It is clear that on January 2, 1997, EDD implemented a general increase in the number of Det interviews assigned each day to each interviewer. For most interviewers, the change amounted to two additional interviews scheduled each day. The

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[9]Thus, where an employer's action was consistent with the past practice, no violation was found in a change that was not a change in the status quo. (Oak Grove School District (1985) PERB Decision No. 503.)

question here is whether this increase was inconsistent with previous employer-directed changes in employee work schedules. On this record, I cannot conclude that the action so deviated from the past practice as to change its "quantity and kind." (Oakland.)

EDD management had a history of changing the number of interviews to be conducted by employment program representatives. The record is replete with evidence of a wide variation in the number of interviews which employees were scheduled to make in a day. It also is clear that the number of scheduled interviews was fluid. This number was changed, varying according to the situation within individual offices and from office to office. EDD witnesses testified to a practice of changing the number of interviews. CSEA did not rebut this testimony. Indeed, the joint exhibit entered by the parties showed variations in the number of interviews to be common.

I conclude, therefore, that CSEA has failed to establish by a preponderance of the evidence that the State's action in January of 1997 constituted a change in the status quo. Accordingly, the unfair practice charge and complaint must be dismissed. This conclusion is dispositive of all the allegations at issue and it is unnecessary to consider the waiver defense asserted by the State.

PROPOSED ORDER

Based upon the foregoing findings of fact and conclusions of law and the entire record in this matter, unfair practice charge

SA-CE-930-S, California State Employees Association v. State of California (Employment Development Department) and companion PERB complaint are hereby DISMISSED.

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 Regs., tit. 8, sec. 32300.) A document is considered "filed" when actually received before the close of business (5 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 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 Regs., tit. 8, secs. 32300, 32305 and 32140.)

Ronald E. Blubaugh
Administrative Law Judge