STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA UNION OF SAFETY EMPLOYEES, Charging Party, v. STATE OF CALIFORNIA (DEPARTMENT OF PARKS & RECREATION), Respondent.	Case No. SA-CE-1356-S PERB Decision No. 1562-S December 8, 2003

Appearance: Linda M. Kelly, Legal Counsel, for California Union of Safety Employees.

Before Baker, Whitehead and Neima, Members.

DECISION

BAKER, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the California Union of Safety Employees (CAUSE) of a Board agent's dismissal (attached) of its unfair practice charge. The charge alleged that the State of California (Department of Parks & Recreation) (State) violated section 3519(b) and (c) of the Ralph C. Dills Act (Dills Act)[1] by unilaterally changing the terms and conditions of employment of lifeguards through the implementation of a new aquatic safety policy.

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

> It shall be unlawful for the state to do any of the following:
>
> (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 Board has reviewed the entire record in this case, including the unfair practice charge with attachments, the warning and dismissal letters and CAUSE's appeal. The Board finds the Board agent's dismissal letter to be free from prejudicial error and adopts it as the decision of the Board itself subject to the discussion below.

DISCUSSION

In its appeal, CAUSE argues that the State's unilateral implementation of a new aquatic safety policy constitutes a separate and distinct violation from the State's refusal to negotiate the changes. There is nothing in the record indicating that this is the case. Accordingly, the Board does not agree that the alleged violations are separate and distinct. The State's unilateral implementation of the aquatic policy would only constitute a violation of Dills Act section 3519(b) and (c), if the parties' memorandum of understanding required that the State first negotiate the changes. However, this issue is precisely the one that both parties agree is properly deferred to arbitration. As this issue will be submitted to arbitration, dismissal and deferral of this charge is required. (State of California (Department of Food and Agriculture) (2002) PERB Decision No. 1473-S.)

ORDER

The unfair practice charge in Case No. SA-CE-1356-S is hereby DISMISSED AND DEFERRED TO ARBITRATION.

Members Whitehead and Neima joined in this Decision.

STATE OF CALIFORNIA GRAY DAVIS, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
1031 18th Street
Sacramento, CA 95814-4174
Telephone: (916) 327-8383
Fax: (916) 327-6377

August 16, 2002

Linda Kelly, Esquire
California Union of Safety Employees
2029 H Street
Sacramento, CA 95814

Re: California Union of Safety Employees v. State of California (Department of Parks & Recreation)
Unfair Practice Charge No. SA-CE-1356-S
NOTICE OF DISMISSAL AND DEFERRAL TO ARBITRATION

Dear Ms. Kelly:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on July 1, 2002. The California Union of Safety Employees (CAUSE) alleges that the State of California (Department of Parks & Recreation) violated the Ralph C. Dills Act (Dills Act)[1] by unilaterally changing the terms and conditions of employment of lifeguards through the implementation of a new aquatic safety policy.

I indicated in the attached letter dated July 25, 2002, that this charge was subject to deferral to arbitration. You were advised that if there were any factual inaccuracies or additional facts which would correct the deficiencies explained in that letter, the charge should be amended. You were further advised that unless the charge was amended or withdrawn prior to August 5, 2002, it would be deferred to arbitration and dismissed. Your request for an extension of time to August 16, 2002 was granted.

I have not received either an amended charge or a request for withdrawal. On August 15, 2002, you left a voice mail message for me indicating that the charge would not be amended. Therefore, I am dismissing the charge based on the facts and reasons contained in my July 25, 2002 letter.

Right to Appeal

Pursuant to PERB Regulations,[2] you may obtain a review of this dismissal of the charge by filing an appeal to the Board itself within twenty (20) calendar days after service of this dismissal. (Regulation 32635(a).) Any document filed with the Board must contain the case

[1] The Dills Act is codified at Government Code section 3512 et seq. The text of the Dills Act and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

[2] PERB's Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

name and number, and the original and five (5) copies of all documents must be provided to the Board.

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 mailed by certified or Express United States mail, as shown on the postal receipt or postmark, or delivered to a common carrier promising overnight delivery, as shown on the carrier's receipt, not later than the last day set for filing. (Regulations 32135(a) and 32130.)

A document is also considered "filed" when received by facsimile transmission before the close of business on the last day for filing together with a Facsimile Transmission Cover Sheet which meets the requirements of Regulation 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Regulations 32135(b), (c) and (d); see also Regulations 32090 and 32130.)

The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95814-4174
FAX: (916) 327-7960

If you file a timely appeal of the refusal to issue a complaint, any other party may file with the Board an original and five copies of a statement in opposition within twenty (20) calendar days following the date of service of the appeal. (Regulation 32635(b).)

Service

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding, and a "proof of service" must accompany each copy of a document served upon a party or filed with the Board itself. (See Regulation 32140 for the required contents and a sample form.) The document will be considered properly "served" when personally delivered or deposited in the first-class mail, postage paid and properly addressed. A document filed by facsimile transmission may be concurrently served via facsimile transmission on all parties to the proceeding. (Regulation 32135(c).)

Extension of Time

A request for an extension of time, in which to file a document with the Board itself, must be in writing and filed with the Board at the previously noted address. A request for an extension must be filed at least three (3) calendar days before the expiration of the time required for filing the document. The request must indicate good cause for and, if known, the position of each other party regarding the extension, and shall be accompanied by proof of service of the request upon each party. (Regulation 32132.)

Final Date

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

Sincerely,

ROBERT THOMPSON
General Counsel

By _____
Les Chisholm
Regional Director

Attachment

cc: K. William Curtis

STATE OF CALIFORNIA GRAY DAVIS, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
1031 18th Street
Sacramento, CA 95814-4174
Telephone: (916) 327-8383
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July 25, 2002

Linda Kelly, Esquire
California Union of Safety Employees
2029 H Street
Sacramento, CA 95814

Re: California Union of Safety Employees v. State of California (Department of Parks & Recreation)
Unfair Practice Charge No. SA-CE-1356-S
WARNING LETTER (DEFERRAL TO ARBITRATION)

Dear Ms. Kelly:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on July 1, 2002. The California Union of Safety Employees (CAUSE) alleges that the State of California (Department of Parks & Recreation) (State or DPR) violated the Ralph C. Dills Act (Dills Act)[1] by unilaterally changing the terms and conditions of employment of lifeguards through the implementation of a new aquatic safety policy.

Investigation of the charge revealed the following information.[2] CAUSE is the exclusive representative of State Bargaining Unit 7 – Protective Services and Public Safety, including lifeguards. CAUSE and the State are parties to a memorandum of understanding (MOU) that is effective July 1, 2001 through July 2, 2003. The MOU includes a grievance procedure that ends in binding arbitration. The MOU also provides, in Section 13.3, for a Physical Fitness Incentive Program.

The "Entire Agreement" provision of the MOU, found at Section 20.1, reads as follows:

> A. This Contract sets forth the full and entire understanding of the parties regarding the matters contained herein, and any other prior or existing understanding or agreement by the parties, whether formal or informal, regarding any such matters are hereby superseded. Except as provided in this Contract, it is agreed and understood that each party to this Contract voluntarily waives its right to negotiate with respect to any matter raised in negotiations or covered in this Contract, for the duration of the Contract.

[1] The Dills Act is codified at Government Code section 3512 et seq. The text of the Dills Act and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

[2] I discussed these charge allegations with Labor Relations Representative Jimmy Southard and with you by telephone on July 18, 2002 and July 19, 2002, respectively.

> With respect to other matters within the scope of negotiations, negotiations may be required during the term of this Contract as provided in Subsection (B) below.
>
> B. The parties agree that the provisions of this Subsection shall apply only to matters which are not covered in this Contract.
>
> The parties recognize that during the term of this Contract it may be necessary for the State to make changes in areas within the scope of negotiations. Where the State finds it necessary to make such changes, the State shall notify CAUSE of the proposed change thirty (30) days prior to its proposed implementation.
>
> The parties shall undertake negotiations regarding the impact of such changes on the employees in Unit 7, when all three (3) of the following exists:
>
> 1. Where such changes would affect the working conditions of a majority of Unit 7 employees by classification in a department.
>
> 2. Where the subject matter of the change is within the scope of representation pursuant to the Ralph C. Dills Act.
>
> 3. Where CAUSE requests to negotiate with the State.
>
> Any agreement resulting from such negotiations shall be executed in writing and shall become an addendum to this Contract. If the parties are in disagreement as to whether a proposed change is subject to this Subsection, such disagreement may be submitted to the arbitration procedure for resolution. The arbitrator's decision shall be binding. In the event negotiations on the proposed change are undertaken, any impasse which arises may be submitted to mediation pursuant to Section 3518 of the Ralph C. Dills Act.

In February 2002, DPR gave CAUSE notice of its intent to implement a new aquatic safety policy and offered, in accordance with Section 20.1.B of the MOU, to meet and confer over the impact of the changes that new policy would institute. CAUSE declined to agree to negotiate only as to impact, contending that the new policy made changes to the existing provisions of Section 13.3 and arguing that the new policy could only be implemented if agreed to by CAUSE.[3]

CAUSE and the State agreed that the dispute should be submitted to arbitration under the provisions of Section 20.1.B for a determination "as to whether [the] proposed change is subject to [that] Subsection." CAUSE filed a grievance accordingly, the State accepted the grievance, and the matter is scheduled for hearing by an arbitrator later this year. CAUSE also

[3] This argument also relies on the language of Section 20.1.A.

requested that the aquatic safety policy at issue not be implemented pending resolution of the grievance, but DPR implemented the new policy on May 1, 2002.

The instant charge focuses on the May 1 implementation, the new policy's alleged departure from the terms and conditions set forth in Section 13.3 of the MOU, and the contention that the State's conduct interferes with CAUSE's right to represent employees in Unit 7.

Discussion

Based on these facts and Dills Act section 3514.5, this charge must be deferred to arbitration under the MOU and dismissed in accordance with PERB Regulation 32620(b)(5).

Section 3514.5(a) of the Dills Act states, in pertinent part, that PERB shall not:

> Issue a complaint against conduct also prohibited by the provisions of the [collective bargaining] agreement between the parties until the grievance machinery of the agreement, if it exists and covers the matter at issue, has been exhausted, either by settlement or binding arbitration.

In Dry Creek Joint Elementary School District (1980) PERB Order No. Ad-81a, the Board explained that:

> While there is no statutory deferral requirement imposed on the National Labor Relations Board (hereafter NLRB), that agency has voluntarily adopted such a policy both with regard to post-arbitral and pre-arbitral award situations.[2] EERA section 3541.5(a) essentially codifies the policy developed by the NLRB regarding deferral to arbitration proceedings and awards. It is appropriate, therefore, to look for guidance to the private sector.[3] [Fn. 2 omitted; fn. 3 to Fire Fighters Union v. City of Vallejo (1974) 12 Cal.3d 608.]

Although Dry Creek was decided under the Educational Employment Relations Act[4] the NLRB deferral standard has also been applied to the Dills Act. (State of California (Department of Food and Agriculture) (2002) PERB Decision No. 1473-S.)

In Collyer Insulated Wire (1971) 192 NLRB 837 [77 LRRM 1931] and subsequent cases, the National Labor Relations Board articulated standards under which deferral to the contractual grievance procedure is appropriate in prearbitral situations. These requirements are: (1) the dispute must arise within a stable collective bargaining relationship where there is no enmity by the respondent toward the charging party; (2) the respondent must be ready and willing to

[4] The Educational Employment Relations Act is codified at Government Code section 3540 et seq.

proceed to arbitration and must waive contract-based procedural defenses; and (3) the contract and its meaning must lie at the center of the dispute.

These standards are met with respect to this case. First, no evidence has been produced to indicate that the parties are not operating within a stable collective bargaining relationship. Second, by the attached letter from its representative, Labor Relations Counsel K. William Curtis, dated July 24, 2002, the Respondent has indicated its willingness to proceed to arbitration and to waive all procedural defenses. Finally, the issue raised by this charge that DPR changed terms and conditions of employment of lifeguards through the implementation of an aquatic safety policy without negotiating such changes with CAUSE directly involves an interpretation of Sections 13.3 and 20.1 of the MOU.

Accordingly, this charge must be deferred to arbitration and will be dismissed. Following the arbitration of this matter, the Charging Party may seek a repugnancy review by PERB of the arbitrator's decision under the Dry Creek criteria. (See Regulation 32661; Los Angeles Unified School District (1982) PERB Decision No. 218; Dry Creek Joint Elementary School District, supra.)[5]

If there are any factual inaccuracies in this letter or additional facts that would correct the deficiencies explained above, please amend the charge. The amended charge should be prepared on a standard PERB unfair practice charge form, clearly labeled First Amended Charge, contain all the facts and allegations you wish to make, and be signed under penalty of perjury by the charging party. The amended charge must have the case number written on the top right hand corner of the charge form. The amended charge must be served on the respondent's representative and the original proof of service must be filed with PERB. If I do not receive an amended charge or withdrawal from you before August 5, 2002, I shall dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Les Chisholm
Regional Director

Attachment

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[5] Pursuant to Government Code section 3514.5(a), the six-month limitation on the filing of a charge is tolled during the time required to exhaust the grievance machinery where that procedure ends in binding arbitration.