STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA ATTORNEYS, ADMINISTRATIVE LAW JUDGES & HEARING OFFICERS IN STATE EMPLOYMENT, Charging Party, v. STATE OF CALIFORNIA (BOARD OF PRISON TERMS), Respondent.	Case No. SA-CE-1437-S PERB Decision No. 1758-S March 24, 2005

Appearance: Steven B. Bassoff, Attorney, for California Attorneys, Administrative Law Judges & Hearing Officers in State Employment.

Before Duncan, Chairman; Whitehead and Shek, Members.

DECISION

DUNCAN, Chairman: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the California Attorneys, Administrative Law Judges & Hearing Officers in State Employment (CASE) of a Board agent's dismissal (attached) of its unfair practice charge. The charge alleged that the State of California (Board of Prison Terms) (BPT or State) violated the Ralph C. Dills Act (Dills Act)[1] by unilaterally changing the portal-to-portal policy for Deputy Commissioners, refusing to bargain over this issue in successor negotiations, and retaliating against CASE for protected conduct. CASE alleged that this was a violation of Section 3519(a) and (c) of the Dills Act.

The Board has reviewed the entire record in this matter, including the unfair practice charge, the amended unfair practice charge, the Board agent's warning and dismissal letters,

[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.

and the appeal filed by CASE. We find the warning and dismissal letters to be without prejudicial error and adopt them as the decision of the Board itself, subject to the discussion below.

DISCUSSION

CASE has two issues. It claims retaliation and also failure to bargain in good faith by the State. CASE has indicated that the State proposal to eliminate the portal-to-portal policy is a reprisal against CASE for submitting a proposal on that subject during negotiations for a successor agreement to the memorandum of understanding (MOU) that expired July 2, 2003. It also asserts that the entire agreement clause in the MOU does not apply because Article 13, section 3.11, limits the State's ability to change working conditions for Deputy Commissioners.[2]

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[2]The entire agreement clause is at Article 4, section 4.3, of the MOU. It provides in relevant part:

> B. The parties agree that the provisions of this subsection shall apply only to matters which are not covered in this MOU.
>
> The parties recognize that during the term of this MOU, 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 CASE 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 2, when all three (3) of the following exist:
>
> 1. Where such changes would have an impact on working conditions of a significant number of employees in Unit 2;
>
> 2. Where the subject matter of the change is within the scope of representation pursuant to the Dills Act;
>
> 3. Where CASE requests to negotiate with the State.

Article 13, section 3.11, states:

> The date, time and number of hearings and cases assigned to Unit 2 Deputy Commissioners working for the Board of Prison Terms shall be determined, and may be changed from time-to-time, by the State.

BPT's Deputy Commissioners travel to prison facilities and parole offices.[3] They do this to conduct parole hearings. They travel directly from their residences. They have done so since 1977 and their residences have been designated as their employee headquarters since that time.

The designation[4] of residences as the Deputy Commissioners' headquarters has never been addressed in the MOU. On September 29, 2003, CASE proposed to include this practice in the MOU.

By letter of March 26, 2004, Bridgid Hanson (Hanson), assistant director of the Department of Youth Authority, notified CASE that the BPT intended to discontinue the allowance for portal-to-portal compensation for Deputy Commissioners. Hanson anticipated the new policy implementation occurring on June 1, 2004. The letter also stated that BPT had been delegated authority by the Department of Personnel Administration (DPA) to meet and confer with CASE over the impact of the proposed change.

CASE Executive Director, Susanne Paradis, responded that CASE had made a proposal concerning this issue at the bargaining table.[5] It was the position of CASE that because there were no provisions in the ground rules for side table bargaining, CASE considered the matter

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[3]They also travel to jails, mental institutions and other facilities where parole hearings have been scheduled.

[4]The proposal stated, in part, "Travel from a headquarters location to work places and between work places shall be counted as hours worked."

[5]This response was on April 29, 2004.

to be currently on the table in the successor contract negotiations. She also indicated CASE was awaiting a response to its proposal.

On June 15, 2004, DPA Labor Relations Officer, Tim Virga, wrote back to her. He told her that the State did not believe the main table negotiations precluded discussion of the portal-to-portal issue away from the main table. He advised that the change would go into effect in 15 days unless CASE requested to meet and confer over the impact of the change.

CASE disputed the State position but indicated it would participate in impact bargaining.

Retaliation

Under the entire agreement clause, the State had the right to change the portal-to-portal policy. Dills Act section 3517.8 states that provisions that would have expired with the contract, such as the entire agreement clause, remain operative after the MOU expires and remain active until a successor MOU is in place.

As the State has a legal right to change this policy, the fact that it chose to exercise that right does not in and of itself establish unlawful motivation. The Board agent is correct in pointing out in the warning letter that the charge does not provide the required evidence of nexus to set forth a prima facie case.

To demonstrate retaliation the union must show that: (1) the employee exercised rights under the Dills Act; (2) the employer had knowledge of the exercise of those rights; and (3) the employer imposed or threatened to impose reprisals, discriminated or threatened to discriminate, or otherwise interfered with, restrained or coerced the employees because of the exercise of those rights. (Novato Unified School District (1982) PERB Decision No. 210; Carlsbad Unified School District (1979) PERB Decision No. 89.)

Failure to Bargain in Good Faith

CASE has failed to provide facts showing what proposals were made by each side in addition to the one proposal they have singled out related to the portal-to-portal policy. The test as to whether there has been bad faith in bargaining is one of a totality of circumstances. (County of Riverside (2004) PERB Decision No. 1715-M (Riverside).)

One of the issues in Riverside was that there had been a refusal to bargain with bargaining sessions canceled by the county. The Board determined that one or two incidents do not show bad faith and that the totality of conduct by the parties in bargaining must be reviewed to determine if there is bad faith.

Without CASE including the actual facts as to what other proposals were made and by whom, there can be no correct analysis as to what the significance is of the delay is related to a response from the State on the portal-to-portal issue. In looking at the total conduct, the Board weighs the facts to determine whether the conduct at issue "indicates an intent to subvert the negotiating process or is merely a legitimate position adamantly maintained." (Oakland Unified School District (1982) PERB Decision No. 275.)

Refusal to Bargain

There was a flat refusal to bargain in Sierra Joint Community College District (1981) PERB Decision No. 179. The employer refused to bargain over a specific proposal. In contrast, the union in this case asks that the Board assume there has been a refusal where there has been no response to date. The union then argues that if there has not been a refusal then there has been a lack of promptness in response. (State of California, Department of Personnel Administration (1989) PERB Decision No. 739-S (DPA).) The rationale in DPA is that Section 3517 requires the State to "meet and confer" promptly and "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." In DPA, the charge alleged that the State did not sunshine its initial proposal until after the State budget had been adopted.

Failure to comply with Section 3517 is a violation of Dills Act section 3519(c). At the time CASE filed the charge there was no information provided indicating that the negotiation for the successor agreement was not ongoing and there was no information indicating that impasse had been reached. Since the State did not flatly refuse to bargain the State's obligation to meet and confer on the CASE proposal should have been framed within the context of the overall negotiation. The only allegation in this case was that the State had not responded to one specific proposal. That alone is insufficient to establish a violation of Dills Act section 3517.

ORDER

The unfair practice charge in Case No. SA-CE-1437-S is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Member Shek joined in this Decision.

Member Whitehead's concurrence and dissent begins on page 7.

WHITEHEAD, Member, concurring and dissenting: I agree with the majority's finding that the State of California (State) did not unilaterally change the portal-to-portal policy for Deputy Commissioners, but respectfully dissent from remaining portions of the opinion for the reasons discussed below.

BACKGROUND

The Board of Prison Terms (BPT) employs Deputy Commissioners whose duties include traveling to various prison facilities, jails, mental institutions and parole offices to conduct parole hearings. Since 1977, a period of 26 years, the residences of the Deputy Commissioners have been designated as their employee headquarters. Thus, Deputy Commissioners travel directly from their residences to the facility where their hearings are scheduled.

The California Attorneys, Administrative Law Judges & Hearing Officers in State Employment (CASE) and the State are parties to a memorandum of understanding (MOU) that expired on July 2, 2003. The parties are engaged in negotiations for a successor agreement. The designation of residences as the Deputy Commissioners' headquarters has never been addressed in the MOU. On September 29, 2003, CASE proposed to include this practice in the MOU. The proposal stated in part: "Travel from a headquarters location to work places and between work places shall be counted as hours worked." By letter dated March 26, 2004, Brigid Hanson (Hanson), assistant director of the Department of Youth Authority (DYA), notified CASE that BPT intended to discontinue the allowance for portal-to-portal compensation for Deputy Commissioners. Hanson anticipated that the new policy would be implemented on June 1, 2004 and stated that DYA has delegated the authority to BPT to meet and confer with CASE only over the impact of the proposed change.

On April 24, 2004, CASE Executive Director, Susanne Paradis responded that CASE had earlier made a proposal at the bargaining table, considered the matter still on the table, and awaited a response from the State. She believed that the parties' ground rules did not contemplate negotiations outside of the bargaining table.

By letter dated June 15, 2004, Department of Personnel Administration Labor Relations Officer, Tim Virga (Virga) replied that the parties' ground rules did not preclude discussions of this issue outside the bargaining table. Virga stated that the new policy would be implemented in 15 days unless CASE requested to meet and confer over the impact of the change. CASE continued to dispute the State's position but indicated it would negotiate the impact.

MOU Article 4, section 4.3, the Entire Agreement clause provides, in pertinent part:

> B. The parties agree that the provisions of this subsection shall apply only to matters which are not covered in this MOU.
>
> The parties recognize that during the term of this MOU, 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 CASE 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 2, when all three (3) of the following exist:
>
> 1. Where such changes would have an impact on working conditions of a significant number of employees in Unit 2;
>
> 2. Where the subject matter of the change is within the scope of representation pursuant to the Dills Act;
>
> 3. Where CASE requests to negotiate with the State.

CASE alleges that by proposing to eliminate the portal-to-portal policy, the State imposed reprisals against CASE for submitting its portal-to-portal proposal on September 29, 2003. CASE also asserts that the Entire Agreement clause does not apply because Article 13,

section 13.11 limits the State's ability to change working conditions for Deputy Commissioners. Article 13, section 3.11 states:

> The date, time and number of hearing and cases assigned to Unit 2 Deputy Commissioners working for the Board of Prison Terms shall be determined, and may be changed from time-to-time, by the State.

CASE finally alleges that the State has refused to negotiate this issue at the bargaining table and plans to implement the change after discussing only its impact with CASE.

DISCUSSION

Refusal to Bargain Allegation

Regardless of the provisions of the Ralph C. Dills Act (Dills Act) section 3517.8[1], once a contract has expired, both parties are obligated to bargain proposals within the scope of representation. Under Dills Act section 3517, the State is obligated "to meet and confer promptly upon request by either party . . . 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 requirement to meet and confer promptly is absolute. (Dublin Professional Fire Fighters, Local 1885 v. Valley Community Services Dist. (1975) 45 Cal. App. 3d 116, 118-119 [119 Cal. Rptr. 182] interpreting the Meyers Milias Brown Act (MMBA) section 3505,[2] whose language is identical to section 3517.)

Failure to comply with Section 3517 constitutes a violation of Dills Act section 3519(c). In determining whether a party has violated Dills Act section 3519(c), PERB utilizes either the "per se" or "totality of the conduct" test, depending on the specific conduct involved

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[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.

[2]The MMBA is codified at Government Code section 3500, et seq.

and the effect of such conduct on the negotiating process. (Stockton Unified School District (1980) PERB Decision No. 143.) The distinction between the two tests was explained in Pajaro Valley Unified School District (1978) PERB Decision No. 51 (Pajaro Valley). In Pajaro Valley, the Board stated:

> The National Labor Relations Board (hereafter NLRB) has long held that [a duty to bargain in good faith] requires that the employer negotiate with a bona fide intent to reach an agreement. In re Atlas Mills, Inc. (1937) 3 NLRB 10 [1 LRRM 60]. The standard generally applied to determine whether good faith bargaining has occurred has been called the 'totality of conduct' test. See NLRB v. Stevenson Brick and Block Co. (4th Cir. 1968) 393 F. 2d 234 [68 LRRM 2086], modifying (1966) 160 NLRB 198 [62 LRRM 1605]. This test looks to the entire course of negotiations to determine whether the employer has negotiated with the requisite subjective intention of reaching an agreement.
>
> There are certain acts, however, which have such a potential to frustrate negotiations and to undermine the exclusivity of the bargaining agent that they are held unlawful without any determination of subjective bad faith on the part of the employer. (Pajaro Valley, at pp. 4-5.)

Examples of acts that constitute per se violations include an outright refusal to bargain Sierra Joint Community College District (1981) PERB Decision No. 179 (Sierra) or employer unilateral changes in terms and conditions of employment (California State Employees Assn. v. Public Employment Relations Board (1996) 51 Cal.App.4th 923, 934-935 [59 Cal.Rptr.2d 488]). This list, however, has never been held to be exclusive. Per se violations entail conduct which "generally involves an absence of bargaining, frequently selective as to subjects; thus it is the *failure to negotiate*, rather than the absence of good faith, that lies at the heart of any violation involving this type of conduct." (Hardin & Higgins, The Developing Labor Law, 4th ed., vol. 1 (2001), p. 773; emphasis in text.)

The Supreme Court in NLRB v. Katz (1962) 369 U.S. 736, 742-743 [50 LRRM 2177], further explained this concept:

> The duty 'to bargain collectively' enjoined by section 8(a)(5) is defined by section 8(d) as the duty to 'meet . . . and confer in good faith with respect to wages, hours, and other terms and conditions of employment.' Clearly, the duty thus defined may be violated without a general failure of subjective good faith; for there is no occasion to consider the issue of good faith if a party has refused even to negotiate in fact-- 'to meet . . . and confer'-- about any of the mandatory subjects. A refusal to negotiate in fact as to any subject which is within section 8(d), and about which the union seeks to negotiate, violates section 8(a)(5) though the employer has every desire to reach agreement with the union upon an over-all collective agreement and earnestly and in all good faith bargains to that end.

CASE argues that the findings in State of California, Department of Personnel Administration (1989) PERB Decision No. 739-S (DPA) are dispositive. In DPA, the union alleged that DPA failed to respond to its salary proposal until five months after it made its opening proposal, three months after the union made a detailed salary proposal, and nearly two months after adoption of the budget by the Legislature and the Governor. A complaint issued in that case. DPA filed a motion to dismiss, arguing that a delay in negotiations, in and of itself, is not a refusal to negotiate in good faith. The administrative law judge (ALJ) dismissed the complaint concluding that the single allegation was insufficient to state a prima facie case. The Board reversed the ALJ's ruling holding that the allegations in that case were sufficient to state a prima facie case, and that the issue of refusal to bargain "is a factual question to be determined after a hearing on the merits." (DPA, at p. 5.)

In DPA, the union alleged communication of a detailed salary proposal two months after submitting its initial proposal. Thus, there were continued communications regarding this proposal. In contrast, in this case, the facts before the Board are spare: CASE sought to

include the portal-to-portal policy during successor negotiations for the MOU; the State was aware that the issue was on the table from correspondence between the parties after Hanson informed CASE that the State intended to eliminate the policy; and, as of the date of CASE's appeal (September 2004), the State had still not responded to CASE's September 2003 proposal.

From these facts, I see two possible scenarios. First, CASE has proposed inclusion of the portal-to-portal policy within the MOU and has repeatedly requested to negotiate the policy but the State has ignored its request. In these circumstances, I would find that the State has refused to bargain, a per se violation of Section 3519(c).

Second, CASE proposes the portal-to-portal policy in September 2003 as one of many proposals on the table. The proposal is never again mentioned by either party, "falls through the cracks," and is forgotten until this charge is filed. In this situation, there would be no violation.

However, we have little information regarding what took place at the table, the relevant substance of communications between the parties during bargaining, the status of negotiations, the interrelationship between this issue and other items on the table, or whether the policy was actually eliminated.

The warning letter is used to advise the charging party of the deficiencies in its charge.[3] However, citing Sierra, the warning letter merely stated that the facts did not demonstrate that the State had absolutely refused to negotiate the matter at the bargaining table. As stated above, the Sierra case represents only one example of circumstances supporting a per se

[3]See PERB Regulation 32620(d). PERB regulations are codified at California Code of Regulations, title 8, section 31001, et seq.

violation of the refusal to bargain. The warning letter did not otherwise identify the pertinent law or provide specifics as to how to cure these deficiencies. (Id.) We therefore would remand this allegation to the office of the General Counsel for further investigation consistent with this discussion.

Retaliation Allegation

CASE alleges that the State retaliated against CASE by eliminating the 26-year old portal-to-portal policy six months after tendering a proposal during negotiations to include the policy in the successor MOU. To demonstrate a violation of Dills Act section 3519(a), the charging party must show that: (1) the employee exercised rights under the Dills Act; (2) the employer had knowledge of the exercise of those rights; and (3) the employer imposed or threatened to impose reprisals, discriminated or threatened to discriminate, or otherwise interfered with, restrained or coerced the employees because of the exercise of those rights. (Novato Unified School District (1982) PERB Decision No. 210 (Novato); Carlsbad Unified School District (1979) PERB Decision No. 89.)

Although the timing of the employer's adverse action in close temporal proximity to the employee's protected conduct is an important factor (North Sacramento School District (1982) PERB Decision No. 264 (No. Sacramento)), it does not, without more, demonstrate the necessary connection or "nexus" between the adverse action and the protected conduct. (Moreland Elementary School District (1982) PERB Decision No. 227.) Facts establishing one or more of the following additional factors must also be present: (1) the employer's disparate treatment of the employee (State of California (Department of Transportation) (1984) PERB Decision No. 459-S); (2) the employer's departure from established procedures and standards when dealing with the employee (Santa Clara Unified School District (1979) PERB Decision

No. 104); (3) the employer's inconsistent or contradictory justifications for its actions (State of California (Department of Parks and Recreation) (1983) PERB Decision No. 328-S; (4) the employer's cursory investigation of the employee's misconduct; (5) the employer's failure to offer the employee justification at the time it took action or the offering of exaggerated, vague, or ambiguous reasons; (6) employer animosity towards union activists (Cupertino Union Elementary School District) (1986) PERB Decision No. 572); or (7) any other facts which might demonstrate the employer's unlawful motive. (Novato; No. Sacramento.)

Evidence of adverse action is also required to support a claim of discrimination or reprisal under the Novato standard. (Palo Verde Unified School District (1988) PERB Decision No. 689.) In determining whether such evidence is established, the Board uses an objective test and will not rely upon the subjective reactions of the employee. (Ibid.) In a later decision, the Board further explained that:

> The test which must be satisfied is not whether the employee found the employer's action to be adverse, but whether a reasonable person under the same circumstances would consider the action to have an adverse impact on the employee's employment. [Newark Unified School District (1991) PERB Decision No. 864; emphasis added; fn. omitted.]

The Board agent found that CASE had not demonstrated "nexus," reasoning that under Dills Act section 3517.8, the State acted in conformance with the MOU Entire Agreement clause when providing notice and opportunity to bargain only the impact of its proposal to eliminate the portal-to-portal policy. In its charge, CASE uses the same facts as those alleged for refusal to bargain to support a prima facie case of retaliation. Since these claims are so closely interrelated, I would withhold judgment on this issue and remand this allegation for further investigation as well. I would suggest that on remand, the Board agent elicit specific

factors addressing nexus, e.g., information concerning the parties' communications during negotiations.

STATE OF CALIFORNIA ARNOLD SCHWARZENEGGER, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD

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Sacramento, CA 95814-4174
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September 14, 2004

Steven B. Bassoff, Attorney
Law Office of Steven Bassoff
2000 "O" Street, Suite 250
Sacramento, CA 95814

Re: California Attorneys, Administrative Law Judges & Hearing Officers in State Employment v. State of California (Board of Prison Terms)
Unfair Practice Charge No. SA-CE-1437-S
DISMISSAL LETTER

Dear Mr. Bassoff:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on June 28, 2004. The California Attorneys, Administrative Law Judges & Hearing Officers in State Employment (CASE) alleges that the State of California (Board of Prison Terms) violated the Ralph C. Dills Act (Dills Act)[1] by unilaterally changing the portal-to-portal policy for Deputy Commissioners and refusing to bargain over this matter in successor contract negotiations.

I indicated in the attached letter dated August 19, 2004, that the above-referenced charge did not state a prima facie case. You were advised that if there were any factual inaccuracies or additional facts which would correct the deficiencies explained in that letter, you should amend the charge. You were further advised that unless you amended the charge to state a prima facie case or withdrew it prior to August 30, 2004, the charge would be dismissed. An amended charge was filed on August 27, 2004.

We discussed the warning letter and amended charge on September 7, 2004. At that time, you stated that you would provide additional information by September 10, 2004. Since I have not received any further information, I will address the charge as filed.

CASE and the State are parties to a MOU which expired on July 2, 2003. The parties are currently in negotiations for a successor agreement.

Deputy Commissioners employed by the Board of Prison Terms (BPT) are required to travel to prison facilities, jails, mental institutions and parole offices to conduct parole hearings. Since 1977, the residences of Deputy Commissioners have been designated as their employee

[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.

headquarters and their travel begins from their residence. However, this designation has never been included in the MOU. On September 29, 2003, CASE submitted a proposal to include this practice in the contract.

On March 26, 2004, the State notified CASE that it intended to discontinue the allowance of portal-to-portal for Deputy Commissioners. The State notified CASE that it would implement the change unless the Union requested to bargain the impact of the proposed change.

CASE disputed the State's right to conduct side table negotiations on this matter, indicating that it was waiting a response from the State to its proposal at the main bargaining table. CASE reluctantly agreed to participate in impact bargaining but continued to dispute the State's authority to negotiate this matter away from the main bargaining table.

Article 4, section 4.3, of the parties' MOU contains an entire agreement clause which permits the State to make certain changes in matters within the scope of representation after providing notice and an opportunity to negotiate any impact.

Dills Act section 3517.8 states, in part:

> (a) If a memorandum of understanding has expired, and the Governor and the recognized employee organization have not agreed to a new memorandum of understanding and have not reached an impasse in negotiations, subject to subdivision (b), the parties to the agreement shall continue to give effect to the provisions of the expired memorandum of understanding, including, but not limited to, all provisions that supersede existing law, any arbitration provisions, any no strike provisions, any agreements regarding matters covered in the Fair Labor Standards Act of 1938 (Chapter 8 (commencing with Section 201) of Title 29 of the United States Code), and any provisions covering fair share fee deduction consistent with Section 3515.7.

The amended charge alleges that by notifying CASE of its intention to discontinue the portal-to-portal policy, the State imposed reprisals on CASE for submitting its portal-to-portal proposal on September 29, 2003. The amended charge also alleges that the entire agreement clause is not applicable because, Article 13, section 13.11, "contains the parameters of the State's authority to change the working conditions of the Deputy Commissioners during the term of the MOU."[2] Finally, the amended charge alleges that "the BPT and DPA have refused

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[2] Article 13, section 13.11, states:

> The date, time and number of hearings and cases assigned to Unit 2 Deputy Commissioners working for the Board of Prison Terms shall be determined, and may be changed from time-to-time, by the State.

to negotiate this issue at the bargaining table, and will implement the change after the discussion over the impact with CASE."

To demonstrate that the State retaliated against bargaining unit employees for submitting a portal-to-portal proposal at the bargaining table, the Union must show that: (1) the employee exercised rights under the Dills Act; (2) the employer had knowledge of the exercise of those rights; and (3) the employer imposed or threatened to impose reprisals, discriminated or threatened to discriminate, or otherwise interfered with, restrained or coerced the employees because of the exercise of those rights. (Novato Unified School District (1982) PERB Decision No. 210 (Novato); Carlsbad Unified School District (1979) PERB Decision No. 89.)

The charge does not provide evidence of the nexus necessary to demonstrate unlawful motivation. As discussed in the attached letter, Dills Act section 3517.8 provides that the entire agreement clause survives expiration of the MOU. The State acted in conformance with the entire agreement clause when it provided CASE with notice and an opportunity to bargaining any impact of its decision to discontinue the portal-to-portal policy.

The claim that Article 13, section 13.11, precludes application of the entire agreement clause is also rejected. This provision addresses the scheduling of hearings assigned to Deputy Commissioners. It does not cover the designation of the residences of Deputy Commissioners as their headquarters for travel purposes.

Finally, I explained in the attached letter that an absolute refusal to bargain a matter within the scope of representation is a per se violation of the duty to bargain in good faith. (Sierra Joint Community College District (1981) PERB Decision No. 179.) I indicated that the original charge did not provide facts which demonstrated that the State had made an absolute refusal to negotiate this matter at the main bargaining table. The charge stated that CASE was waiting for the State to respond to its proposal. I requested specific information which demonstrated that the State had affirmatively refused to bargain this proposal at any time during main bargaining table negotiations. The amended charge states, "the BPT and DPA have refused to negotiate this issue at the bargaining table, and will implement the change after the discussion over the impact with CASE." However, documents attached to the charge state that the Union is waiting for a response to its proposal from the State. The charge does not provide sufficient evidence to establish that State negotiators clearly refused to negotiate the union's proposal at the main bargaining table. Accordingly, the charge does not state a prima facie case and is dismissed.

Right to Appeal

Pursuant to PERB Regulations,[3] 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

[3] 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. (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
Robin W. Wesley
Regional Attorney

Attachment

cc: Robert Allen

STATE OF CALIFORNIA — ARNOLD SCHWARZENEGGER, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD

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August 19, 2004

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Re: California Attorneys, Administrative Law Judges & Hearing Officers in State Employment v. State of California (Board of Prison Terms)
Unfair Practice Charge No. SA-CE-1437-S
WARNING LETTER

Dear Mr. Bassoff:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on June 28, 2004. The California Attorneys, Administrative Law Judges & Hearing Officers in State Employment (CASE) alleges that the State of California (Board of Prison Terms) violated the Ralph C. Dills Act (Dills Act)[1] by unilaterally changing the portal-to-portal policy for Deputy Commissioners and refusing to bargain over this matter in successor contract negotiations.

The duties of Deputy Commissioners employed by the Board of Prison Terms (BPT) require them to travel to prison facilities, jails, mental institutions and parole offices to conduct parole hearings. Since 1977, the residences of the Deputy Commissioners have been designated as their employee headquarters. Deputy Commissioners travel from their residences directly to the facility where hearings have been scheduled.

CASE and the State are parties to a MOU which expired on July 2, 2003. The parties are currently in negotiations for a successor agreement. The designation of Deputy Commissioners' residences as their headquarters has never been included in the MOU. On September 29, 2003, CASE submitted a proposal to include this practice in the contract. The proposal stated, in part, "Travel from a headquarters location to work places and between work places shall be counted as hours worked."

In a letter dated March 26, 2004, CASE was notified by Brigid Hanson, Assistant Director of the Department of Youth Authority, that BPT intended to discontinue the allowance of portal-to-portal for Deputy Commissioners. Ms. Hanson estimated that the change would be

[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.

implemented on June 1, 2004. She also stated that BPT had been delegated authority by DPA to meet and confer with CASE over the impact of the proposed change.

CASE Executive Director Susanne Paradis responded on April 29, 2004, indicating that CASE had made a proposal concerning this issue at the bargaining table. Ms. Paradis stated that because there were no provisions in the parties' ground rules for side table bargaining, the Union considered the matter currently on the table in successor contract negotiations and was waiting a response from the State to its proposal.

DPA Labor Relations Officer Tim Virga wrote to Ms. Paradis' in his June 15, 2004 letter, that the State did not believe the parties' main table negotiations precluded discussions of the portal-to-portal issue away from the main table. Mr. Virga stated, "it is DPA's position that the mere fact that a proposal was presented at main table negotiations, does not serve to preclude any Departments or DPA from noticing the Union about the need to change existing policies or procedures for operational needs." Mr. Virga advised that the proposed change would be implemented in 15 days unless the Union requested to meet and confer over the impact of the change

CASE continued to dispute the State's position but indicated that it would participate in impact bargaining.

Article 4, section 4.3, of the parties' MOU contains an entire agreement clause, which states, in relevant part:

> B. The parties agree that the provisions of this subsection shall apply only to matters which are not covered in this MOU.
>
> The parties recognize that during the term of this MOU, 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 CASE 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 2, when all three (3) of the following exist:
>
> 1. Where such changes would have an impact on working conditions of a significant number of employees in Unit 2;
>
> 2. Where the subject matter of the change is within the scope of representation pursuant to the Dills Act;
>
> 3. Where CASE requests to negotiate with the State.

Based on the facts stated above, the charge does not state a prima facie case.

In determining whether a party has violated the Dills Act section 3519(c), PERB utilizes either the "per se" or "totality of the conduct" test, depending on the specific conduct involved and the effect of such conduct on the negotiating process. (Stockton Unified School District (1980) PERB Decision No. 143.) Unilateral changes are considered "per se" violations if certain criteria are met. Those criteria are: (1) the employer implemented a change in policy concerning a matter within the scope of representation, and (2) the change was implemented before the employer notified the exclusive representative and gave it an opportunity to request negotiations. (Walnut Valley Unified School District (1981) PERB Decision No. 160; Grant Joint Union High School District (1982) PERB Decision No. 196.)

The entire agreement clause in the parties' MOU expressly authorizes the State to make changes in subjects not covered in the agreement. The provision requires the State to provide CASE with notice of the proposed change and an opportunity to negotiate any impact on working conditions. The facts demonstrate that the State acted in accordance with this provision when it notified the Union of its intention to change the portal-to-portal policy and invited the Union to negotiate any impact.

Generally, the provisions of an expired agreement which affect terms and conditions of employment must be maintained until the parties reach impasse in successor negotiations. Provisions which do not directly affect terms and conditions of employment, do not necessarily continue in effect. (State of California (Department of Corrections) (1994) PERB Decision No. 1056-S.) In 2000, Dills Act section 3517.8 was enacted, which requires the parties "to give effect to the provisions of the expired memorandum of understanding." Section 3517.8 establishes that provisions which would otherwise have expired with the contract, such as the entire agreement clause, survive expiration of the MOU and remain operative.

The Union contends that notwithstanding section 3517.8, the language of the entire agreement clause that states, ". . . during the term of this MOU, . . ." reflect the parties' intention that this provision terminate with the expiration of the contract.

The Board has previously addressed this issue, finding that this duration language does not demonstrate a "clear and unmistakable" waiver of rights under the contract. (State of California (Department of Personnel Administration) (1998) PERB Decision No. 1296-S; CSEA v. PERB (1996) 51 Cal.App.4th 923.) Thus, the entire agreement clause continues to be effective under the provisions of section 3517.8. Accordingly, this allegation does not state a prima facie violation of an unlawful unilateral change and must be dismissed.

The charge may also allege that the State refused to bargain the Union's portal-to-portal proposal at the main bargaining table.

An absolute refusal to bargain a matter within the scope of representation is a per se violation of the duty to bargain in good faith. (Sierra Joint Community College District (1981) PERB Decision No. 179.)

The charge alleges that CASE made a proposal to include a provision in the MOU related to the designation of Deputy Commissioners' residences as their headquarters. In the Union's April 29, 2004 letter, CASE stated that it is still waiting for a response to its proposal from the State. These facts do not demonstrate that the State has made an absolute refusal to negotiate this matter at the main bargaining table. Thus, this allegation must also be dismissed.

For these reasons the charge, as presently written, does not state a prima facie case. If there are any factual inaccuracies in this letter or 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 30, 2004, I shall dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Robin W. Wesley
Regional Attorney