STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

AFSCME LOCAL 2620, Charging Party, v. STATE OF CALIFORNIA (DEPARTMENT OF PERSONNEL ADMINISTRATION), Respondent.	Case No. SF-CE-230-S PERB Decision No. 1978-S September 26, 2008

Appearances: Beeson, Tayer & Bodine by Andrew H. Baker, Attorney, for AFSCME Local 2620; Jennifer M. Garten, Legal Counsel, for State of California (Department of Personnel Administration).

Before McKeag, Wesley and Rystrom, Members.

DECISION

WESLEY, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by both parties to an administrative law judge's (ALJ) proposed decision. The charge filed by AFSCME Local 2620 (AFSCME) alleged that the State of California (Department of Personnel Administration) (DPA or State) violated the Ralph C. Dills Act (Dills Act)[1] by unilaterally changing employee benefits under the California Public Employees' Retirement System (CalPERS) as provided in the parties' memorandum of understanding (MOU) when the State approved and implemented Senate Bill 1105 (SB 1105),[2]

[1]The Dills Act is codified at Government Code section 3512 et seq. Unless otherwise indicated, all statutory references are to the Government Code.

[2]SB 1105 (Stats. 2004, ch. 214), an urgency statute, took effect on August 11, 2004.

the alternate retirement program (ARP) for new employees. AFSCME contends that by this conduct the State violated section 3519(a), (b) and (c) of the Dills Act. The ALJ found the charge timely filed but dismissed the charge finding no unilateral change in policy.

The Board has reviewed the entire record in this case, including the unfair practice charge, complaint, DPA's position statement, post-hearing briefs, the proposed decision, and the parties' exceptions and responses to exceptions. Based on our review, we affirm the dismissal of the charge based on the discussion below.

PROCEDURAL BACKGROUND

On August 11, 2004, the Governor signed into law SB 1105, which provided the ARP for new, first time State miscellaneous employees hired on or after the effective date of the law. Under the program, new employees do not accrue credit for service in the CalPERS system, and do not make employee contributions to the system until the first day of the first pay period commencing 24 months after becoming a member. Instead, new employees spend their first two years of employment contributing to a defined contribution retirement plan. After 46 months of employment, and until the end of the 49th month of employment, these employees can elect to receive credit in CalPERS for their first two years of employment by transferring the accumulated contributions from the defined contribution retirement plan into CalPERS.

AFSCME initiated this action on February 10, 2005, when it filed an unfair labor practice charge alleging that the enactment of SB 1105 and the implementation of the ARP by DPA unilaterally changed employee benefits regarding their CalPERS retirement options upon employment as provided in the MOU.[3] DPA filed a position statement on March 9, 2005,

[3]The charge alleged a violation of Article 11.3.C of the parties' MOU. The MOU was effective July 3, 2003 through July 1, 2006.

stating that it was currently involved in four separate actions regarding the ARP, including AFSCME's complaint. The letter also stated that DPA was awaiting a court decision regarding the program. DPA requested that this action be held in abeyance pending the court decision. AFSCME agreed to hold the charge in abeyance until the resolution of the case and abeyance of the charge was granted on April 19, 2005. On March 6, 2006, the California Court of Appeal issued its decision in California Assn. of Professional Scientists v. Schwarzenegger (2006) 137 Cal.App.4th 371 [40 Cal.Rptr.3d 354] (CAPS).[4]

After the decision in CAPS, AFSCME requested that the charge be taken out of abeyance. On July 17, 2006, PERB notified the parties that the charge had been removed from abeyance. A week later, DPA submitted a supplemental position letter. On July 25, 2006, the General Counsel's office completed its investigation of the charge and issued a complaint. A settlement conference was held on August 15, 2006, but the matter was not resolved. A formal hearing was scheduled for January 11-12, 2007. In lieu of a hearing, the parties submitted a stipulated statement of the facts and joint exhibits on January 23, 2007. Each party filed an opening brief on February 27, 2007, and reply briefs were submitted on March 16, 2007. The ALJ rendered a proposed decision on April 11, 2007, finding the charge timely filed and

---

[4]In CAPS, the Court interpreted language in the parties' MOU nearly identical to that in the present case to determine whether enactment of SB 1105 impaired contractual rights. The court stated:

> There is nothing in the agreement, however, that restricts the Legislature from making further changes to the Public Employees' Retirement Law that apply only to prospective employees, which is what the Legislature did when it enacted Bill No. 1105 in 2004. The agreement's incorporation of section 21070.5 (section 8.8(C) of the agreement) did not commit the Legislature to maintaining the same rights for all prospective bargaining unit 10 employees throughout the effective period of the agreement. Accordingly, Bill No. 1105 did not impair any vested contractual rights, and the trial court properly denied CAPS's mandamus petition. [CAPS, at pp. 385-386.]

concluding that AFSCME did not make a prima facie showing of an unlawful unilateral change. AFSCME filed a statement of exceptions to the proposed decision on May 15, 2007. DPA filed a response to the exceptions and its own cross-exceptions on June 4, 2007. AFSCME's response to DPA's exceptions was filed on June 8, 2007.

STIPULATION OF FACTS

AFSCME and DPA submitted two joint exhibits and a stipulation of facts to the ALJ. The parties' stipulation of facts states as follows:

1. AFSCME is an employee organization within the meaning of Government Code section 3513(a).

2. Charging Party is a recognized employee organization within the meaning of Government Code section 3513(b), recognized as the exclusive representative of the employees in an appropriate unit, namely State Bargaining Unit 19.

3. The Governor is the State employer pursuant to Government Code sections 35130, (sic) and 19815.4(g). The Governor has designated DPA as his designated representative for the purposes of meeting and conferring with AFSCME on matters within the scope of representation pursuant to Government Code section 3513(j).

4. Article 11.3.C. of the July 3, 2003-July 1, 2006, and the July 1, 2006-June 30, 2008, Unit 19 Memorandum of Understanding (MOU) between Charging Party and Respondent provides:

> New employees who meet the criteria for CalPERS membership would be enrolled in the First Tier plan and have the right to be covered under the Second Tier plan within 180 days of the date of their appointment. If a new employee does not make an election for Second Tier coverage during this period, he or she would remain in the First Tier plan.

5. Roughly half of the employees in Bargaining Unit 19 are classified as state miscellaneous and roughly half as state safety employees.

6. State miscellaneous employees enrolled in Tier I are covered by a two percent at 55 retirement formula. Employees enrolled in the Tier I retirement plan contribute roughly five percent of their earnings above $513.00 to their retirement account. State miscellaneous employees electing Tier II are covered by a 1.25% at 65 retirement formula. Employees electing to participate in Tier II are not required to contribute to the retirement plan. Employees enrolled in Tier I cannot receive any retirement benefits unless they accrue five years of service credit. Employees enrolled in Tier II cannot receive any retirement benefits unless they accrue ten years of service credit.

7. There are approximately 5,000 Bargaining Unit 19 employees of which 237 are currently enrolled in Tier II retirement. Of these 237 Bargaining Unit 19 employees, five employees elected Tier II retirement between January 1, 2000, and the present.

8. On August 11, 2004, the Legislature enacted Senate Bill 1105 (SB 1105) adding to and amending various provisions within the Government Code. Senate Bill 1105 added Government Code section 20281.5, which created ARP. SB 1105 is incorporated herein by reference.

9. Senate Bill 1105 and Government Code section 20281.5 mandates that state miscellaneous employees, including those in Bargaining Unit 19, hired after August 11, 2004, be enrolled in the ARP.

10. Government Code section 19999.31 provides in part: "[t]he Department of Personnel Administration shall administer the retirement program established by this chapter."

11. DPA began administering the retirement program established by SB 1105 effective August 11, 2004.

12. Under the ARP, employees hired after August 11, 2004, become members of

CalPERS, but are not initially eligible for Tier I or Tier II and will not initially accrue credit for service within the CalPERS system until the first day of the pay period starting 24 months after the employee becomes a member of CalPERS. Employees enrolled in the ARP contribute roughly five percent of their earnings above $513.00 to an alternate retirement account. Employee contributions are placed in an alternative retirement account, rather than deposited with CalPERS. During an election period, the ARP allows an employee to determine where his ARP contributions shall go. The election period begins on the first day of the 47th month and ends on the last day of the 49th month after the date the employee became a member of the system. Employees have three options during the election period. The employee may elect: (1) to move his contributions to a 401(k) plan; (2) to obtain a refund of the ARP contributions; or (3) to transfer the proceeds to CalPERS to receive credit in Tier I for the period the employee was participating in the ARP (i.e. the first 24 months). If the employee elects to transfer the ARP proceeds to CalPERS to receive Tier I credit (i.e., option 3), the State employer becomes responsible to fund the additional liability that was not paid for by the ARP member's contribution so that the employee receives the full credit service in Tier I. The ARP also allows for an employee to elect to transfer to Tier II.

13. A copy of the August 18, 2004, Personnel Management Liaison Memorandum issued by Respondent describing the ARP is incorporated herein by reference.

14. Like employees enrolled in Tier I, employees under the ARP cannot receive any retirement benefits unless they accrue five years of service credit.

15. Senate Bill 1105 applies prospectively to employees hired after its effective date of August 11, 2004.

16. Charging Party was on notice of the passage of SB 1105 by virtue of its enactment.

17. On July 23, 2004, representatives of AFSCME attended an informal meeting held between representatives of the Union of American Physicians and Dentists and representatives of DPA concerning the ARP and other issues. No agreement was finalized as a result of this meeting.

ALJ'S DECISION

In the proposed decision, the ALJ rejected DPA's claim that the charge was untimely filed because AFSCME was aware of the pending legislation. The ALJ held that "notice of the Legislature's consideration of a proposed bill is not actual or constructive notice of the clear intent to implement change." Rather, the ALJ found that the charge was timely as it was filed within six months of the date of SB 1105's enactment on August 11, 2004.

The ALJ then considered whether DPA breached its duty to bargain under the Dills Act when it implemented changes in retirement benefits for new employees contained in the ARP. The ALJ applied the "per se" test in Stockton Unified School District (1980) PERB Decision No. 143 (Stockton) and concluded that AFSCME failed to prove the first prong of the test. The ALJ held that "when it enacted and implemented . . . changes as part of the ARP, the State did not depart from the terms of the MOU; it made no change in the contractual status quo." The ALJ relied on the court's ruling in interpreting a similar contract provision in CAPS to find no change in policy under the MOU between AFSCME and the State.

DISCUSSION

First, we agree with the ALJ's determination that the charge was timely filed. Under Dills Act section 3514.5, PERB may not issue a complaint based on alleged conduct which occurred more than six months prior to the filing of the unfair practice charge. In a unilateral change case, the statute of limitations begins to run when the charging party has actual or constructive notice of the respondent's clear intent to implement the alleged change. (State of

California (Department of Forestry and Fire Protection) (1998) PERB Decision No. 1260-S.) Actual or constructive notice occurs when the exclusive representative has knowledge of the proposed change. (Marin Community College District (1995) PERB Decision No. 1092.) In this case, the ALJ properly found that knowledge of the pending legislation is not sufficient to demonstrate actual or constructive notice of the clear intent to implement a change in policy. Thus, AFSCME's filing of the charge within six months of the enactment of SB 1105 was timely.

We now consider whether the State unilaterally changed the policy on employee benefits under CalPERS without providing notice and an opportunity to bargain. 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 and the effect of such conduct on the negotiating process. (Stockton.) 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 ALJ held that implementation of the ARP did not amount to a change in policy under the parties' MOU, relying on the court's holding in CAPS. The proposed decision stated, "that the employer did not implement a change in policy concerning a matter within the scope of representation when it enacted and implemented the pension changes in the ARP has been determined [by the court] and has the force of precedent."

In its exceptions, AFSCME argues against the ALJ's reasoning, asserting that the CAPS Court did not decide the question of whether the State's change in pension policy constituted a violation of the Dills Act. AFSCME points to the court's statement, "The constitutional issue CAPS seeks to litigate here is separate and distinct from any issue of whether the state violated its collective bargaining obligations under the Dills Act." (Id., at pp. 381-382.) Nevertheless, we find that because the CAPS Court made findings about the ARP under the same facts and interpreting substantially identical MOU language, those findings are determinative of the Dills Act question before the Board as we discuss below.

Court of Appeal decisions are binding precedent on administrative agencies. (Auto Equity Sales, Inc. v. Superior Court of Santa Clara County (1962) 57 Cal.2d 450 [20 Cal.Rptr. 321].) Therefore, even though the CAPS Court did not decide whether the State committed an unfair practice under the Dills Act, the court's legal and factual determinations as to the ARP are binding to the extend they impact this Board's analysis of the ARP under the Dills Act.

AFSCME argues that even though the State was not contractually precluded from changing the pension benefits available to prospective employees, the State was obligated to provide it with notice and an opportunity to bargain the decision to implement the ARP. AFSCME argues that,

> An entirely separate issue, and the one raised in the present case, is whether the State, even though it was not contractually precluded from changing the pension benefits available to prospective employees, was nonetheless obligated to provide the Union notice and an opportunity to meet and confer over the decision to implement and/or the effects of the ARP.

We find that no such duty exists under the facts before us. The California Constitution provides that the Legislature "may exercise any and all legislative powers which are not expressly, or by necessary implication denied to it by the Constitution." (Pacific Legal Foundation v. Brown (1981) 29 Cal.3d 168, 180 [172 Cal.Rptr. 487] citing Methodist Hosp. of

Sacramento v. Saylor (1971) 5 Cal.3d 685, 691 [97 Cal.Rptr. 1].) The Dills Act is a limited delegation of authority by the Legislature to the Governor, allowing DPA, as the State employer's representative, the authority to bargain with the State's unions to determine terms and conditions of employment. (Department of Personnel Administration v. Superior Court (1992) 5 Cal.App.4th 155, 177 [6 Cal.Rptr.2d 714].) The Dills Act, however, does not preclude the Legislature itself from unilaterally adopting, enacting or implementing terms and conditions of employment which, if implemented by DPA without legislative direction, would have been an unfair practice if not negotiated. Notwithstanding AFSCME's arguments to the contrary, DPA's implementation of the ARP amounted to the State's compliance with law as prescribed by the legislative process and not unilateral implementation of a change in policy on the part of the State as an employer.

AFSCME also argues that the ALJ's reading of CAPS was overbroad. AFSCME asserts the CAPS Court decided only that the State's change in pension benefits policy for "prospective employees" was not precluded by the contractual language in the MOU at issue in the case, and not that the State made no change in the pension benefits policy for bargaining unit employees overall. This argument is not persuasive, as we agree with the State that "the ARP, by its terms, became the new retirement plan for all state miscellaneous employees hired after August 11, 2004, without any qualifications." As the California Court of Appeal noted in Department of Personnel Administration v. Superior Court, supra, 5 Cal.App.4th 155, 181, fn. 17, the Legislature retains ultimate authority over state employees' wages, hours and working conditions. In that case, the court highlighted the fact that, "in its initial version, section 3532 of the act permitted the state and unions to reach 'binding agreements,' but this language was transferred to and amended in section 3517.5 to require submission of memoranda of understanding to the Legislature for approval."

The Court stated, in CAPS, that "Nothing in this provision [in the parties' MOU] abdicates the legislative power to make changes in the pension system for prospective employees." (Id., at p. 384.) Although the court's analysis relates to the changes themselves and not the question of whether the State was obligated to negotiate prior to implementing those changes, the court's reasoning is significant for our analysis. The court stated, "There is nothing in the agreement, however, that restricts the Legislature from making further changes to the Public Employees' Retirement Law that apply only to prospective employees, which is what the Legislature did when it enacted Bill No. 1105 in 2004." (Id., at p. 385.) Also, significant to the court's analysis and ours is the fact that the Legislature had expressly required the parties to negotiate over previous changes to pension benefits but declined to do so regarding the changes mandated by SB 1105. (Id., at p. 385.)

AFSCME also argues that the Governor was charged with negotiating the decision to implement SB 1105 before signing it into law. We find that the State did not commit an unlawful unilateral change in policy by virtue of the Governor's signing SB 1105 into law, because in signing new legislation, the Governor was carrying out a function directed by the California Constitution. PERB has acknowledged that when the Governor is acting as a participant in the legislative process and is fulfilling his/her constitutional responsibilities thereby, those acts are to be viewed separate and apart from his/her responsibilities as chief executive and employer of State employees. (State of California, Department of Personnel Administration (1988) PERB Decision No. 706-S (State of California (DPA)).)

In State of California (DPA), the Board held that the Governor's compliance with the constitutional mandate of Article IV, section 12 of the California Constitution in submitting a budget without first meeting and negotiating with a union, was not a unilateral implementation of a negotiable subject. Similarly, in considering and signing new legislation, the Governor is

fulfilling a legislative role identified in the California Constitution. Article IV, section 10(a) states that "each bill passed by the Legislature shall be presented to the Governor. It becomes a statute if it is signed by the Governor." Thus, the Governor's role in considering and signing legislation, as prescribed in the California Constitution, does not amount to a unilateral change in policy by the State.

Therefore, we find that the State did not violate its obligation under section 3519(c) of the Dills Act to meet and confer in good faith. Accordingly, the State also did not interfere with the rights of bargaining unit employees to be represented, nor did it deny AFSCME its rights to represent bargaining unit employees in violation of section 3519(a) and (b) of the Dills Act.

ORDER

The unfair practice charge and complaint in Case No. SF-CE-230-S are hereby DISMISSED WITOUT LEAVE TO AMEND.

Members McKeag and Rystrom joined in this Decision.