STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA CORRECTIONAL PEACE OFFICERS ASSOCIATION, Charging Party, v. STATE OF CALIFORNIA (DEPARTMENT OF PERSONNEL ADMINISTRATION), Respondent.	Case No. SA-CE-1665-S PERB Decision No. 2102-S March 26, 2010

Appearances: Carroll, Burdick & McDonough by Gregg McLean Adam and Jonathan Yank, Attorneys, for California Correctional Peace Officers Association; Kronick, Moskovitz, Tiedemann & Girard by David W. Tyra, Attorney, and Paul M. Starkey, Assistant Chief Counsel, for State of California (Department of Personnel Administration).

Before Dowdin Calvillo, Acting Chair; McKeag and Wesley, Members.

DECISION

DOWDIN CALVILLO, Acting Chair: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the California Correctional Peace Officers Association (CCPOA) to the proposed decision (attached) of an administrative law judge (ALJ). The complaint alleged that the State of California (Department of Personnel Administration) (DPA) violated the Ralph C. Dills Act (Dills Act)[1] by refusing CCPOA's requests to resume bargaining over a successor memorandum of understanding following DPA's post-impasse implementation of its last, best and final offer. The ALJ dismissed the complaint on the ground that DPA had no duty to bargain with CCPOA because the parties' bargaining impasse had not been broken by "changed circumstances" at the time the bargaining requests were made.

[1] The Dills Act is codified at Government Code section 3512 et seq.

The Board has reviewed the proposed decision and the record in light of CCPOA's exceptions, DPA's response to the exceptions, and the relevant law. Based on this review, we find the proposed decision to be well-reasoned, adequately supported by the record and in accordance with applicable law. Accordingly, the Board adopts the proposed decision as the decision of the Board itself.[2]

ORDER

The complaint and underlying unfair practice charge in Case No. SA-CE-1665-S are hereby DISMISSED.

Members McKeag and Wesley joined in this Decision.

[2] CCPOA requested oral argument in this matter. Historically, the Board has denied requests for oral argument when an adequate record has been prepared, the parties had ample opportunity to present briefs and have availed themselves of that opportunity, and the issues before the Board are sufficiently clear to make oral argument unnecessary. (*United Teachers of Los Angeles (Valadez, et al.)* (2001) PERB Decision No. 1453; *Monterey County Office of Education* (1991) PERB Decision No. 913.) Based on our review of the record, all of the above criteria are met in this case. Therefore, CCPOA's request for oral argument is denied.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA CORRECTIONAL PEACE OFFICERS ASSOCIATION, Charging Party, v. STATE OF CALIFORNIA (DEPARTMENT OF PERSONNEL ADMINISTRATION), Respondent.	UNFAIR PRACTICE CASE NO. SA-CE-1665-S PROPOSED DECISION (August 19, 2009)

Appearances: Carroll, Burdick & McDonough, by Gregg McLean Adam and Jonathan Yank, Attorneys, for California Correctional Peace Officers Association; Kronick Moscovitz Tiedermann & Girard, by David W. Tyra, Attorney and Department of Personnel Administration by Paul M. Starkey, Assistant Chief Counsel, for State of California (Department of Personnel Administration).

Before Bernard McMonigle, Chief Administrative Law Judge.

PROCEDURAL HISTORY

In this matter, a union alleges that after impasse and implementation of a last, best, and final offer, the employer improperly refused to return to the bargaining table.

On March 11, 2008, the California Correctional Peace Officers Association (CCPOA or Association) filed an unfair practice charge against the State of California (Department of Personnel Administration) (DPA). On April 16, 2008, the Office of the General Counsel for the Public Employment Relations Board (PERB or Board) issued a complaint alleging that DPA had violated section 3519(c), (a) and (b) of the Ralph C. Dills Act (Dills Act or Act)[1] when it refused on January 30, and March 5, to resume bargaining after written CCPOA

[1] The Dills Act is codified at Government Code section 3512 et seq.

requests of December 27, 2007, and January 16, February 22, and 29, 2008, that cited "changed circumstances."[2]

On May 9, 2008, DPA answered the complaint, denying any violation of the Dills Act and asserting affirmative defenses.

A PERB board agent conducted an informal settlement conference on May 9, 2008, but no agreement was reached.

An effort was made by the parties to stipulate to the facts in this matter, so a formal hearing would not be necessary. The undersigned determined that there was insufficient agreement on the relevant facts, and a formal hearing was required to develop a record sufficient to decide the matter. The formal hearing was held on January 12 and 13, 2009. With receipt of briefs on March 23, 2009, this case was submitted for decision.

FINDINGS OF FACT

Charging Party CCPOA is a recognized employee organization within the meaning of section 3513(b), and the exclusive representative for statewide bargaining unit 6. Respondent DPA is the State employer within the meaning of section 3513(j).

On July 2, 2006, the most recent memorandum of understanding (MOU) between the parties expired. They initiated negotiations for a successor agreement on June 9.

On September 12, 2007, after 18 months of unsuccessful negotiations that included mediation, DPA made a "last, best, and final" offer (LBFO) for a three year agreement. That package proposal was rejected by CCPOA, and implemented by DPA, on September 17, 2007.

The LBFO included certain increases in pay and benefits which required, but has not received approval by the Legislature.

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[2] CCPOA also filed a request for injunctive relief that was denied by the Board on March 18, 2008.

On December 13, 2007, after issuance of a PERB complaint in PERB Case No. SA-CE-1621-S, DPA withdrew implementation of the second and third year of the LBFO.[3] On December 27, 2007, CCPOA Executive Vice President Chuck Alexander sent a letter to DPA Director David Gilb. Alexander cited Government Code section 3517.8(b) which states:

> If the Governor and the recognized employee organization reach an impasse in negotiations for a new memorandum of understanding, the state employer may implement any or all of its last, best, and final offer. Any proposal in the state employer's last, best, and final offer that, if implemented, would conflict with existing statutes or require the expenditure of funds shall be presented to the Legislature for approval and, if approved, shall be controlling without further legislative action, notwithstanding Sections 3517.5, 3517.6, and 3517.7. Implementation of the last, best, and final offer does not relieve the parties of the obligation to bargain in good faith and reach an agreement on a memorandum of understanding if circumstances change, and does not waive rights that the recognized employee organization has under this chapter. (Emphasis added.)

The letter stated that issuance of the PERB complaint constituted:

> "a change in circumstances under section 3517.8. Accordingly, CCPOA demands that DPA immediately return to negotiations."

Alexander also stated that a return to good faith negotiations required DPA to rescind the LBFO and restore the status quo as it existed prior to implementation.

DPA Labor Relations Counsel Paul Starkey requested a clarification of the bargaining request and the CCPOA assertion that changed circumstances required a return to negotiations.

On January 10, 2008, the Governor issued a Fiscal Emergency Proclamation regarding insufficient revenues to fund the Fiscal Year 2007-2008 Budget Act. Shortly thereafter, California Department of Corrections and Rehabilitation (CDCR) Secretary James Tilton issued a press release announcing an agency budget cut of ten percent.

[3] That case is scheduled for a PERB formal hearing in October 2009.

On January 16, 2008, CCPOA Staff Legal Counsel Suzanne Branine (Branine) responded by letter to Starkey. Branine stated that the changed circumstances requiring additional bargaining included the issuance of the PERB complaint, DPA's withdrawal of implementation of the second and third year of the LBFO and the announced budget crisis which "will impact the likelihood that the State can carry out any portion of its one year economic LBFO." Branine added, "CCPOA reiterates its demand that, prior to commencement of negotiations, DPA return conditions to those in existence prior to September 18, 2007." She also inquired as to what terms the state would require to bargain if CCPOA's were not acceptable.

By letter of January 30, 2008, Starkey denied the request to bargain contending that there had been no change in circumstances that would revive the obligation to bargain. He interpreted the Dills Act to require a return to negotiations only when a change in circumstances created the possibility of fruitful discussions. He also denied the bargaining request because it was conditioned upon reinstatement of the expired terms of the MOU.

On February 7, 2008, CCPOA State President Mike Jimenez (Jiminez) wrote to DPA Director David Gilb (Gilb) informing him that the CCPOA Executive Council would be considering a strike that could be averted "by your immediate return to meaningful and unconditional negotiations, including the removal of the 'all or nothing' package deal requirement." Gilb responded on February 15, contending that any job action would be illegal, the parties remained at impasse, and CCPOA's offers to return to bargaining were conditioned on a return to the pre-implementation status quo. He denied Jimenez's request to return to bargaining.

On February 22, 2008, Alexander wrote to Gilb stating, "we don't necessarily agree with your characterization of our relative positions." He quoted from Branine's letter of

January 16, "[i]f the State is not prepared to return to the bargaining table based on terms outlined above, please advise me under what terms, if any, the State is prepared to return to the bargaining table."

On February 29, 2008, attorney Gregg McLean Adam (McLean Adam) wrote to Gilb on behalf of CCPOA. He asserted that since implementation of the LBFO in September 2007, the PERB complaint, DPA's rescission of years two and three of the implementation, the Governor's declaration of a fiscal state of emergency, and the lack of legislative approval of the pay increase constituted changed circumstances requiring DPA's return to bargaining.

On March 5, 2008, DPA Deputy Director Julie Chapman (Chapman) wrote to McLean Adam rejecting his bargaining demand. Chapman stated:

> A thorough review of such correspondence [letters above] leads to the conclusion that the State declined returning to the bargaining table because the parties remain at impasse and your client, CCPOA, has placed conditions upon the parties return to the table. Specifically, CCPOA, on numerous occasions, has conditioned *its* return to the negotiating table on reviving the terms and conditions of the expired MOU and rolling back the State's implementation of its LBFO. The State remains unwilling to return to the table subject to such conditions.

(Emphasis in original.)

Chapman also wrote that DPA has seen no change in CCPOA's bargaining position and disagreed with McLean Adam that the "items alleged by CCPOA constitute changed circumstances" that required a return to negotiations.[4]

[4] Testimony at the hearing established that after March 5, 2008, the timeframe at issue in this case, the parties continued discussions regarding the possibility of negotiations. Exhibits demonstrate that those discussions were unsuccessful at least through June 2, 2008.

ISSUE

Did DPA violate the Dills Act by refusing, from December 27, 2007 through March 5, 2008, CCPOA's requests to return to negotiations over a successor memorandum of understanding?

CONCLUSIONS OF LAW

It is well settled, in the private and public sectors, that once a legitimate impasse is reached in collective bargaining, an employer may implement changes that were contained in its "last, best and final offer." (*Public Employment Relations Bd. v. Modesto City Schools Dist.* (1982) 136 Cal.App.3d 881; *Charter Oak Unified School District* (1991) PERB Decision No. 873; cf. *NLRB v. Katz,* (1962) 369 U.S. 736.)

However, an impasse does not terminate an employer's duty to bargain. Rather, the obligation to bargain is suspended only until changed circumstances indicate that attempt to reach agreement is no longer futile. (*Modesto City Schools* (1983) PERB Decision No. 291; *Hi-Way Billboards, Inc.* (1973) 206 NLRB 22.)

The Board summarized an employer's obligation to return to negotiations in *Rowland Unified School District* (1994) PERB Decision No. 1053 (*Rowland USD*):

> Once impasse is reached either party may refuse to negotiate further and the employer is free to implement changes reasonably comprehended within its last, best and final offer. However, impasse suspends the parties' obligation to bargain only until changed circumstances indicate that an agreement may be possible. (*Modesto*; *Hi-Way Billboards, Inc.* (1973) 206 NLRB 22; *Providence Medical Center* (1979) 243 NLRB 714.)
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> . . .
>
> The [employer's] duty to resume negotiations following good faith completion of impasse arises only if the [union's] proposals contained a concession from its earlier position which demonstrates that circumstances have changed and agreement may be possible.

(Emphasis added.)

Additionally, "it is incumbent on the party asserting that the impasse has been broken to point to the changed circumstances" that suggests future bargaining might produce positive results. (*Serramonte Oldsmobile, Inc. v. NLRB* (1996) 86 F.3d 227, 233.) Here, CCPOA contends that three events necessarily presented changed circumstances that broke the impasse and required the parties to return to the bargaining table.

The first event is DPA's failure to secure legislative approval of the financial terms of the LBFO, including a five percent pay increase and improved health benefits that were offered in exchange for certain management reforms the employer sought. With its brief, CCPOA argues, "[t]his dramatically changes the bargaining-related circumstances, as it requires both parties to engage in a comprehensive reprioritization of bargaining concerns and expectations." CCPOA speculates that DPA would now make different concessions than a pay increase that the Association might find desirable, in exchange for the sought after management reforms.

Next, CCPOA contends that the Governor's declaration of a fiscal emergency combined with the CDCR announcement of a ten percent spending reduction sufficiently changed bargaining-related circumstances. The Association relies on *Kit Manufacturing Co., Inc. and Sheet Metal Workers Int'l Assn., Local 213, AFL-CIO* (1962) 138 NLRB 1290 (*Kit*). In that case, a union asked whether the employer's LBFO remained a valid offer, the employer said it was not and refused additional bargaining. Finding that the employer had violated its duty to bargain, the National Labor Relations Board (NLRB) noted that changed circumstances included the employer's <u>improved</u> financial status. According to CCPOA, the State's changed financial condition here similarly requires a return to bargaining.

The last event relied on by the Association involves the issuance of a complaint on December 7, 2007, by the PERB General Counsel. The complaint alleged that, by implementing economic terms for a three-year implementation, DPA violated its obligation to

bargain. On December 13, 2007, DPA withdrew the implementation of the LBFO years two and three. CCPOA contends that this action constituted a DPA bargaining concession, thus breaking impasse and creating a new possibility for fruitful discussion.

The record here does not demonstrate that the mere occurrence of these events led either party to indicate "a concession from its earlier bargaining position," the changed circumstances required by the Board in *Rowland USD*, *supra*, PERB Decision No. 1053.

The Association merely speculates that DPA might want to change its bargaining position after failure to secure legislative passage of the LBFO financial terms. As case law demonstrates, mere speculation regarding possible concessions by the other party is insufficient to revive bargaining. There must be substantial evidence that a party is committed to a new bargaining position. (*Serramonte Oldsmobile, Inc. v. NLRB, supra,* 86 F.3d 227, 233.) In addition, the incentive for DPA to change its position to gain agreement on management reforms is not clear, as the management reforms of the LBFO were already in effect.

Nor is it clear how the State's deteriorating finances necessarily creates a possibility of fruitful discussions. The contention that worsening employer finances would have the same positive bargaining impact as improving finances finds no support in *Kit*, *supra*, 138 NLRB 1290. In that case, the NLRB did find that improved finances were changed circumstance that could lead to a greater wage offer. However, the union had expressed a change in position by inquiring whether the LBFO was still a valid contract offer. Here, the record does not demonstrate that deteriorating finances led to a possible bargaining concession by either party.

Nor is the argument persuasive that the issuance of a PERB complaint followed by DPA's withdrawal of implementation of the LBFO years two and three, demonstrates a change in DPA's bargaining position. DPA may have recognized that the original implementation of

an LBFO of several years duration might violate the Dills Act. Or, as encouraged by PERB, it may have merely sought to settle an unfair practice case. However, nothing in the record indicates DPA was ready to change its bargaining position if negotiations resumed. PERB issuance and possible settlement of the complaint over implementation did not bind DPA at the bargaining table. DPA could continue to insist on the terms of the LBFO years two and three at the bargaining table. The record does not evince that DPA would make a concession in negotiations.

In sum, the mere occurrence of these events did not demonstrate a change in the bargaining position of either party, the "change in circumstances" necessary to reestablish the obligation to bargain. As discussed, under *Rowland USD*, a possibility for fruitful discussion results "when one party proposes a concession from its earlier bargaining position." (*Rowland Unified School District, supra*, PERB Decision No. 1053, citing *NLRB v. Sharon Hats, Inc.* (5th Cir. 1961) 289 F.2d 628 enforcing (1960) 127 NLRB 947.)

Nor were the CCPOA requests to bargain following these events sufficient to obligate DPA to resume negotiations. A "request by one party for additional meetings, if unaccompanied by an indication of the areas in which that party foresees future concessions, is . . . insufficient to defeat impasse where the other party has clearly announced that its position is final." (*TruServe Corp. v. NLRB* (D.C. Cir. 2001) 254 F.3d 1105, 1117 (*TruServe*).)

Nothing in the Association's letters demanding a return to bargaining demonstrates CCPOA's willingness to make concessions or compromise. Under *Rowland USD, supra*, PERB Decision No. 1053, that alone is sufficient to find no violation of DPA's obligation to bargain.

In addition to not indicating any concession of its own, CCPOA's return to bargaining was conditioned upon one by DPA, rescission of its implementation of the LBFO. Although

the Association argues that it was merely suggesting or requesting a return to the pre-implementation status quo, the record demonstrates otherwise. Alexander's letter of December 27, 2007, states "[n]o good faith negotiations are possible" without a return to status quo and "[t]he State and CCPOA must return to good faith negotiations under section 3517.8, and can only do so if the LBFO dies, as it was forced on Unit 6 in one 'package proposal.'"

When clarifying CCPOA's demand to bargain on January 16, Branine states, "[f]urther, CCPOA reiterates its demand that, prior to commencement of negotiations, DPA return conditions to those in existence prior to September 18, 2007." This letter and others that followed ask whether DPA required other terms to begin bargaining. However, CCPOA's condition of a return to pre-implementation status quo was never withdrawn, despite DPA's consistent opposition.

Demanding this condition to resume bargaining can only contribute to a conclusion that impasse had not been broken, and the required change in circumstances had not yet occurred.

"Absent conduct demonstrating a willingness to compromise further, a bald statement of disagreement [that impasse continues] by one party to the negotiations is insufficient to defeat an impasse." (*TruServe*, *supra*, 254 F.3d 1105, 1117.) The events relied on by CCPOA did result in disagreement over whether impasse continued, however, the subsequent communications between the parties did not demonstrate the required "willingness to compromise." Accordingly, I find that DPA did not violate the Dills Act by refusing, through March 5, 2008, to participate in post-impasse negotiations.

PROPOSED ORDER

Based upon the foregoing findings of fact and conclusions of law and the entire record in this matter, it is found that the complaint and the underlying unfair practice charge in PERB

Case No. SA-CE-1665-S, *California Correctional Peace Officers Association v. State of California (Department of Personnel Administration)* 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 Public Employment Relations Board (PERB or Board) itself within 20 days of service of this Decision. The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95811-4124
(916) 322-8231
FAX: (916) 327-7960

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. (Cal. Code Regs., tit. 8, § 32300.)

A document is considered "filed" when actually received during a regular PERB business day. (Cal. Code Regs., tit. 8, §§ 32135, subd. (a) and 32130; see also Gov. Code, § 11020, subd. (a).) A document is also considered "filed" when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet which meets the requirements of California Code of Regulations, title 8, section 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. (Cal. Code Regs., tit. 8, § 32135, subds. (b), (c) and (d); see also Cal. Code Regs., tit. 8, §§ 32090 and 32130.)

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, §§ 32300, 32305, 32140, and 32135, subd. (c).)

Bernard McMonigle
Chief Administrative Law Judge