STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA CORRECTIONAL PEACE OFFICERS ASSOCIATION, Charging Party, v. STATE OF CALIFORNIA (DEPARTMENT OF CORRECTIONS & REHABILITATION, DEPARTMENT OF PERSONNEL ADMINISTRATION), Respondent.	Case No. SA-CE-1676-S PERB Decision No. 2115-S June 10, 2010

Appearances: Carroll, Burdick & McDonough by Gregg McLean Adam and Erick V. Munoz, Attorneys, for California Correctional Peace Officers Association; Todd M. Ratshin, Legal Counsel, for State of California (Department of Corrections & Rehabilitation, Department of Personnel Administration).

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

DECISION

DOWDIN CALVILLO, Chair: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the California Correctional Peace Officers Association (CCPOA) of a Board agent's dismissal of its unfair practice charge. The charge, as amended, alleged that the State of California (Department of Corrections & Rehabilitation, Department of Personnel Administration) (DPA or State) violated the Ralph C. Dills Act (Dills Act)[1] by: (1) after deciding to close two juvenile correctional facilities and lay off employees, unilaterally establishing the geographic area of the layoffs without providing CCPOA with notice or an opportunity to bargain; and (2) engaging in surface bargaining over the area of

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

layoff.[2] The Board agent dismissed the charge for failure to state a prima facie case of unilateral change or surface bargaining.

The Board has reviewed the dismissal and the record in light of CCPOA's appeal, DPA'S response and the relevant law. Based on this review, the Board affirms the dismissal of the charge for the reasons discussed below.

BACKGROUND

CCPOA is the exclusive representative of State Bargaining Unit 6. In September 2007, the Governor signed Senate Bill No. 81, which realigned services for juvenile offenders by allowing certain juveniles incarcerated for less serious crimes to remain in, or be referred back to the counties. As a result of this bill, the Department of Corrections and Rehabilitation (CDCR) anticipated that the juvenile population housed by CDCR would drop to 1,840 by June 30, 2008 and to 1,575 by June 30, 2009. Therefore, based upon this and other legislation and court decisions affecting CDCR's adult services, CDCR began the process of closing some of its juvenile detention facilities. In November 2007, CDCR developed preliminary plans to close both the El Paso De Robles Youth Correctional Facility (El Paso) and the DeWitt Nelson Youth Correctional Facility (DeWitt) effective July 31, 2008. Given the language of Senate Bill No. 81, CDCR determined that closure of these two facilities was required in fiscal year 2008-2009. The Governor incorporated the closure of these facilities into his proposed budget in January 2008 by not including funding for juvenile services at those facilities. The Legislature adopted the Governor's proposal in this regard.

[2] The original charge also alleged that the State failed to provide CCPOA with information concerning the impending closure of two juvenile correctional facilities and the resulting layoffs of employees. The Board agent warned CCPOA that this allegation would be dismissed for failure to state a prima facie case and CCPOA did not amend the charge to cure the deficiencies with respect to this allegation. CCPOA has not appealed the dismissal of that aspect of the charge and it is therefore not addressed in this decision.

CDCR submitted its layoff plans to DPA for El Paso and DeWitt on March 10, 2008, and March 20, respectively.[3] DPA approved the plans on March 11, 2008, and March 21, 2008, respectively. Each approved plan proposed a "geographic area of layoff," defined as San Luis Obispo County (El Paso) and San Joaquin County (DeWitt). Thus, the plans included not only employees of facilities within DJJ but also employees employed at adult and administrative facilities within the designated counties. In general, a "geographic" area of layoff affects only those employees within a specific geographic region, while a "statewide" area of layoff affects all of the employees employed in a specific classification throughout the state.

On March 24, 2008, DPA gave written notice to CCPOA that CDCR was closing both the El Paso and the DeWitt facilities effective July 31, 2008. The notices stated that the closure of these two facilities would result in the permanent reduction of bargaining unit members in specified classifications and invited CCPOA to respond no later than April 14, 2008 if CCPOA wanted to meet and confer over the impact of the closures. The notices included CDCR's layoff plans for each facility, which indicated the "proposed area of layoff" was by county.

On March 28, 2008, CDCR sent a letter to affected employees at El Paso and DeWitt informing them that they were designated as "surplus" in their designated geographical location and advising them to seek out vacancies for which they were qualified and eligible to transfer.[4] The letters included two lists of "frequently asked questions" (FAQs), one dated

[3] CDCR preliminarily announced that the areas of layoff would be limited to Department of Juvenile Justice (DJJ) facilities only but, in its formal submissions to DPA, expanded the area of layoff to include adult and other facilities within the respective counties.

[4] Under state law, employees designated as surplus are entitled to preferential hiring procedures.

January 7, 2007 and one dated April 1, 2008. The January 7, 2007 FAQs stated that the "recommended area of layoff" was limited to DJJ facilities within the respective counties, and that DJJ employees would not be permitted to bump employees in CDCR Adult Operations. The April 1, 2008 FAQs, however, stated that the formal layoff plans submitted to and approved by DPA designated the approved areas of layoff included all CDCR entities within the respective counties, including both juvenile and adult facilities and administrative and training facilities.[5]

Also on March 28, 2008, CCPOA sent a request to DPA for specified information concerning the layoffs.[6] On April 8, 2008, CCPOA requested to meet and confer over the impact of the layoffs and reiterated its information request.

CCPOA filed the instant charge, dated April 16, 2008, on April 18, 2008.

On April 18, 2008, DPA advised CCPOA that it was gathering the requested information and invited CCPOA to contact it to schedule dates to meet and confer. On April 25, 2008, DPA provided some of the information requested by CCPOA. On May 8, 2008, CCPOA agreed it would meet and confer with the State "under protest."

The parties met and conferred on six occasions prior to the July 31, 2008 layoff implementation date: May 20, 27 and 29, and July 1, 2 and 15, 2008.[7] On May 27, 2008, CCPOA passed a proposal that the area of the layoffs be statewide. The State considered but

[5] According to the State, the plans approved by DPA expanded the area of layoff to include adult facilities within each county instead of limiting the area to DJJ facilities as originally recommended by CDCR.

[6] As indicated previously, CCPOA has not appealed the dismissal of the allegations concerning its information request.

[7] DPA asserts that it attempted to schedule further dates to meet and confer, including June 24, but the parties did not meet again until July 1, 2008. On June 18, 2008, CCPOA filed a request for injunctive relief, which PERB denied on June 25, 2008.

rejected that proposal and, on July 1, 2008, passed a proposal that continued to define the area of layoffs as geographic. The parties continued to discuss the effects of the layoff during the remaining bargaining sessions. In addition, CCPOA asserts that the State actually implemented the layoff in June 2008 by conducting "election interviews" with employees in order to determine employee preferences for relocation or demotion. Ultimately, both the State and CCPOA remained firm in their bargaining positions with respect to the area of layoff, with the State insisting that the area be geographic while CCPOA continued to seek a broader, statewide area of layoff.[8]

On July 31, 2008, the State closed the El Paso and DeWitt facilities as scheduled. Employees were relocated on August 1, 2008 but no employees were actually laid off. The parties held a final bargaining session on August 20, 2008. On August 29, 2008, DPA sent CCPOA a letter summarizing the negotiations, stating in part:

> The parties have met seven times. The State has presented its own proposals and considered and responded to CCPOA's proposals and counter proposals with no meaningful movement in position. Accordingly since neither party has any further movement to make in our respective proposals, we consider these negotiations completed.

DISCUSSION

Unilateral Change

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 Unified School District* (1980) PERB Decision No. 143.) Unilateral changes are considered "per se" violations if

[8] CCPOA's amended charge states: "[T]he parties have engaged in productive good faith negotiations regarding other layoff issues. However, good faith negotiation regarding the *area of layoff* has not taken place." (Emphasis in original.)

certain criteria are met. Those criteria are: (1) the employer breached or altered the parties' written agreement or its own established past practice; (2) such action was taken without giving the other party notice or an opportunity to bargain over the change; (3) the change was not merely an isolated breach of the contract, but amounts to a change in policy (i.e., it has a generalized effect or continuing impact upon bargaining unit members' terms and conditions of employment); and (4) the change in policy concerns a matter within the scope of representation. (*Vernon Fire Fighters v. City of Vernon* (1980) 107 Cal.App.3d 802; *Walnut Valley Unified School District* (1981) PERB Decision No. 160; *San Joaquin County Employees Association v. City of Stockton* (1984) 161 Cal.App.3d 813; *Grant Joint Union High School District* (1982) PERB Decision No. 196.)

PERB has long held that the decision to implement a layoff of employees is a fundamental management prerogative over which the employer is not obligated to bargain. (*State of California (Department of Personnel Administration)* (1987) PERB Decision No. 648-S; *Newman-Crows Landing Unified School District* (1982) PERB Decision No. 223; *Oakland Unified School District* (1985) PERB Decision No. 540 (*Oakland*).) The employer is, however, required to bargain over the effects of its decision that have an impact on matters within the scope of representation. (*Newark Unified School District, Board of Education* (1982) PERB Decision No. 225; *Oakland.*) In addition, "[n]otice must be given sufficiently in advance of a firm decision to make a change to allow the exclusive representative a reasonable amount of time to decide whether to make a demand to negotiate." (*Victor Valley Union High School District* (1986) PERB Decision No. 565.)

PERB has held, however, that under certain circumstances, an employer may implement a nonnegotiable management decision after providing reasonable notice and a meaningful opportunity to bargain over the effects of that decision. (*Compton Community*

College District (1989) PERB Decision No. 720 (*Compton*).) Thus, PERB has held, implementation before the completion of the bargaining process is permissible where:

> 1. the implementation date is not an arbitrary one, but is based upon either an immutable deadline . . . or an important managerial interest, such that a delay in implementation beyond the date chosen would effectively undermine the employer's right to make the nonnegotiable decision;
>
> 2. notice of the decision and implementation date is given sufficiently in advance of the implementation date to allow for meaningful negotiations prior to implementation; and
>
> 3. the employer negotiates in good faith prior to implementation and continues to negotiate in good faith after implementation as to those subjects not necessarily resolved by virtue of the implementation.

(*Compton.*)

In *State of California (Department of Forestry and Fire Protection)* (1993) PERB Decision No. 999-S, PERB reaffirmed these principles, holding that "the state employer's prerogative to reduce its operations includes the authority to identify the specific positions in specific locations to be eliminated, and is not a negotiable subject under the Dills Act." The Board further held, however, that "subjects affecting the fundamental employment relationship, such as the designation of the area in which employees will be laid off, are negotiable subjects." Therefore, the Board found the state employer violated its duty to bargain under the Dills Act by refusing to bargain over whether the area of layoff should be limited to specified counties or instead to a statewide area.

In this case, CCPOA asserts that the State failed to bargain in good faith over the area of layoff because it had already made the decision to implement the layoff on a geographic basis before negotiating. Thus, CCPOA argues, the State "unequivocally" set the areas of layoff in March 2008, as evidenced by statements in correspondence to CCPOA and to employees stating that the area of layoff would be the individual counties, prior to bargaining

with CCPOA. In particular, CCPOA argues that, by sending surplus letters to employees in March 2008 and conducting "election interviews" with employees in June 2008, the State actually began implementing the layoff before bargaining commenced.

We disagree that the charge states facts sufficient to establish a prima facie case of refusal to bargain over the area of layoff. The State gave four months' notice to both CCPOA and affected employees of its fundamental management decision to close the two juvenile facilities and to lay off employees, and invited CCPOA to bargain about the impact of the staff reductions. While the March 24 and 28, 2008 letters described the area of layoff as geographic in the respective counties, the formal layoff plans indicated the geographic area of layoff was "proposed." Nothing in the letters indicated that the State would refuse to comply with its obligation to bargain over the effects of the layoff or foreclosed the possibility that the area of layoff may change during negotiations. To the contrary, the letters to CCPOA affirmatively invited bargaining. By giving notice more than four months before the planned implementation date, the State afforded CCPOA ample opportunity to negotiate over the effects of the layoff, including the area of layoff. (*Oakland.*)[9] CCPOA does not dispute that it met with DPA on six occasions prior to the July 31, 2008 implementation date to discuss the effects of the layoff, including the area of layoff and that both parties exchanged proposals on the subject. Adamant insistence on a bargaining position is not necessarily a refusal to bargain in good faith. (*Oakland Unified School District* (1982) PERB Decision No. 275.) "The obligation of the employer to bargain in good faith does not require the yielding of positions

[9] Indeed, the fact that the March 28, 2008 letters to employees contained conflicting information as to whether the area of layoff would be limited to DJJ facilities or include all facilities within the identified geographic areas suggests that the State had not made a firm decision as to the area of layoff to be implemented.

fairly maintained." (*National Labor Relations Bd. v. Herman Sausage Co.* (5th Cir. 1960) 275 F.2d 229, 231 (*Herman Sausage*).)

CCPOA has provided no authority to support its position that implementation of the layoff occurred when DPA notified CCPOA and the employees of the layoff. As noted above, DPA merely informed CCPOA and affected employees of its layoff decision, which was not negotiable, and offered to negotiate the effects of the layoff. Until such time as the layoff was actually implemented on July 31, 2008, and even thereafter, the parties could have negotiated changes to the area of layoff.[10] Therefore, we conclude that the charge fails to establish a prima facie violation of the duty to bargain under the Dills Act.

Moreover, the charge fails to allege sufficient facts to establish that the State violated its duty to bargain by implementing the layoff on July 31, 2008, while it continued to bargain until August 20, 2008. As noted above, implementation of the nonnegotiable decision to lay off employees prior to the completion of negotiations over the effects of the layoff is permissible where the decision to implement was not arbitrary, the employer gave sufficient notice of the implementation date to provide for meaningful negotiation, and the employer continues to negotiate in good faith. (*Compton.*) CCPOA has not alleged that the July 31, 2008 implementation date, in light of the Legislature's elimination of funding for El Paso and DeWitt, for the fiscal year 2008-2009, was arbitrary. It is undisputed that the State gave four

[10] DPA has objected to consideration of documents submitted by CCPOA for the first time on appeal. Pursuant to PERB Regulation 32635(b), "Unless good cause is shown, a charging party may not present on appeal new charge allegations or new supporting evidence." (PERB regs. are codified at Cal. Code Regs., tit. 8, § 31001 et seq.) As there is no explanation why this information could not have been included in the charge, the Board does not find good cause and declines to consider the new evidence. We note, however, that even if the Board were to consider the DPA layoff procedures relied upon by CCPOA, those procedures do not support CCPOA's position, as nothing therein requires the State to refrain from noticing employees of an impending layoff until all negotiations over the effects of the layoff have been concluded.

months' notice prior to the implementation date and that the parties continued to negotiate even after implementation of the layoff. Accordingly, we conclude that the State did not violate its duty to negotiate in good faith over the effects of the layoff.

Surface Bargaining

The amended charge alleges that the employer violated Dills Act section 3519(c) by engaging in bad faith or "surface" bargaining. It is the essence of surface bargaining that a party goes through the motions of negotiations, but in fact is weaving otherwise unobjectionable conduct into an entangling fabric to delay or prevent agreement. (*Muroc Unified School District* (1978) PERB Decision No. 80.) Where there is an accusation of surface bargaining, PERB will resolve the question of good faith by analyzing the totality of the accused party's 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.)

The indicia of surface bargaining are many. Entering negotiations with a "take-it-or-leave-it" attitude evidences a failure of the duty to bargain because it amounts to merely going through the motions of negotiations. (*General Electric Co.* (1964) 150 NLRB 192, 194, enf. 418 F.2d 736.) Recalcitrance in the scheduling of meetings is evidence of manipulation to delay and obstruct a timely agreement. (*Oakland Unified School District* (1983) PERB Decision No. 326.) Dilatory and evasive tactics including canceling meetings or failing to prepare for meetings is evidence of bad faith. (*Ibid.*) Conditioning agreement on economic matters upon prior agreement on non-economic subjects is evidence of an unwillingness to engage in a give-and-take. (*State of California (Department of Personnel Administration)* (1998) PERB Decision No. 1249-S.)

Other factors that have been held to be indicia of surface bargaining include: negotiator's lack of authority which delays and thwarts the bargaining process (*Stockton Unified School District* (1980) PERB Decision No. 143); insistence on ground rules before negotiating substantive issues (*San Ysidro School District* (1980) PERB Decision No. 134); and reneging on tentative agreements the parties already have made (*Charter Oak Unified School District* (1991) PERB Decision No. 873; *Stockton Unified School District*, *supra*; *Placerville Union School District* (1978) PERB Decision No. 69).

It is clear, however, that while a party may not merely go through the motions, it may lawfully maintain an adamant position on any issue. Adamant insistence on a bargaining position is not necessarily refusal to bargain in good faith. (*Oakland Unified School District*, *supra*, PERB Decision No. 275.) "The obligation of the employer to bargain in good faith does not require the yielding of positions fairly maintained." (*Herman Sausage.*)

The amended charge fails to establish a prima facie case of surface bargaining. None of the indicia of surface bargaining set forth above have been alleged in this case. Instead, CCPOA argues that the State's failure to change its position regarding the area of layoff demonstrates that the State was merely "going through the motions of negotiations." (*Berkeley Unified School District* (2008) PERB Decision No. 1954.) CCPOA asserts that the following factors establish a prima facie case that the State engaged in surface bargaining based upon a "totality of conduct": (1) the State unilaterally set the area of layoff; (2) it disseminated that area to employees and the union; (3) employees relied upon this area in making life and career decisions; (4) the first bargaining session occurred days before the election interviews; (5) the State could not change the area of layoff in such a short time frame; (6) the State offered no counter proposal regarding the layoff area; and (7) the area of layoff remained unchanged through bargaining.

We disagree with CCPOA's contention that the above allegations establish a "take-it-or-leave-it" attitude on the part of the State so as to establish a prima facie case of surface bargaining. As discussed above, the State provided ample notice and an opportunity to bargain over the effects of its decision to implement the layoff and participated in seven negotiating sessions during which both sides presented proposals. In the absence of any evidence, CCPOA's speculation that the State could not have changed the area of layoff during bargaining is insufficient to establish a prima facie case. Furthermore, the evidence indicates that neither CCPOA nor the State side was willing to yield its position; while the State insisted on a geographic area of layoff, CCPOA was equally insistent on its demand for a statewide area of layoff. The State's adamant insistence on its bargaining position does not establish a failure to bargain in good faith. (*Oakland Unified School District*, *supra*, PERB Decision No. 275; *Herman Sausage*.)

Under the totality of the circumstances, we conclude that the charge fails to establish a prima facie case of surface bargaining over the impact of the State's layoff decision.

ORDER

The unfair practice charge in Case No. SA-CE-1676-S is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members McKeag and Wesley joined in this Decision.