STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA CORRECTIONAL PEACE OFFICERS ASSOCIATION, Charging Party, v. STATE OF CALIFORNIA (DEPARTMENT OF CORRECTIONS AND REHABILITATION, VENTURA YOUTH CORRECTIONAL FACILITY), Respondent.	Case No. SA-CE-1798-S PERB Decision No. 2131-S September 21, 2010

Appearances: Leanne M. Kent, Attorney, for California Correctional Peace Officers Association; State of California (Department of Personnel Administration) by Ronald R. Pearson, Labor Relations Counsel, for State of California (Department of Corrections and Rehabilitation, Ventura Youth Correctional Facility).

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

DECISION

WESLEY, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the California Correctional Peace Officers Association (CCPOA or Union) of a Board agent's dismissal of its unfair practice charge. The charge alleged that the State of California (Department of Corrections and Rehabilitation, Ventura Youth Correctional Facility) (State or CDCR) violated the Ralph C. Dills Act (Dills Act)[1] when it unilaterally changed the training policy. The Board agent found the unfair practice charge was untimely filed and therefore dismissed the charge.

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

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

BACKGROUND

On August 19, 2008, Joe Shofner (Shofner), treatment team supervisor at CDCR's Ventura Youth Correctional Facility (VYCF), sent an email to "All VYCF Users" regarding National Incident Management System (NIMS) training. The email stated that, "all employees who have not completed the required [NIMS] training will now have 60 days to go online and read the materials and take the tests and print the certificates." The email did not indicate where employees were to complete the on-line training. Two documents were attached to the email, a summary of the NIMS training requirements and an on-the-job training (OJT) form. The email instructed employees to submit the OJT form after completing the course. CDCR uses the OJT form to ensure that employees receive credit for required training.

On November 14, 2008, CCPOA Chapter President Daryl Lee (Lee) learned that Shofner had instructed a Bargaining Unit 6 employee[2] to complete the NIMS training at home "when he heard a Unit 6 member complain in passing about having to go home and do more work."

The charge alleges that NIMS training had previously been conducted during work hours. Lee filed a grievance challenging the home training requirement on November 19, 2008. CCPOA filed this unfair practice charge with PERB by facsimile on May 12, 2009.[3]

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[2] CCPOA is the exclusive representative of employees in State Bargaining Unit 6.

[3] PERB Regulation 32135 sets forth the requirements for filing documents by facsimile transmission. (PERB regs. are codified at Cal. Code Regs., tit. 8, § 31001 et seq.)

The Board agent dismissed the charge as untimely filed. Even if timely, the Board agent concluded the charge did not demonstrate that the conduct was more than an isolated event, rather than a change in policy, sufficient to establish a prima facie case of an unlawful unilateral change.

On appeal, CCPOA contends the Board agent erred in finding the charge untimely filed. CCPOA asserts it learned on November 14, 2008, that an employee was required to complete NIMS training at home. CCPOA argues this date is within six months of the filing of the charge.

CCPOA also disputes the Board agent's finding that this was an isolated incident rather than a change in policy. Although only one employee was instructed to complete the training at home, CCPOA argues the training is mandatory for all employees.

The State argues the Board agent correctly found both that the charge was untimely filed and, on the merits, the charge alleged facts demonstrating only an isolated event, not a change in policy.

DISCUSSION

Statute of Limitations

Dills Act section 3514.5(a)(1) prohibits PERB from issuing a complaint with respect to "any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge." The limitations period begins to run once the charging party knows, or should have known, of the conduct underlying the charge. (*Gavilan Joint Community College District* (1996) PERB Decision No. 1177.) A charging party bears the burden of demonstrating that the charge is timely filed. (*Tehachapi Unified School District* (1993) PERB Decision No. 1024; *State of California (Department of Insurance)* (1997) PERB Decision No. 1197-S.)

CCPOA filed its charge by facsimile on May 12, 2009. Accordingly, any alleged unlawful conduct must have occurred within six months prior to that date, in this case on or after November 12, 2008. The charge alleged that Lee learned on November 14, 2008, that an employee was instructed to complete the on-line training at home. As this date falls within six months of May 12, 2009, the charge was timely filed.

Although the Board agent acknowledged that the Union alleged facts that it first obtained knowledge of the alleged policy change within the limitations period, the Board agent erred in finding that the Union must also establish when the State implemented the change.

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 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 Assn. v. City of Stockton* (1984) 161 Cal.App.3d 813; *Grant Joint Union High School District* (1982) PERB Decision No. 196.)

It is undisputed that training is a matter within the scope of representation (*Healdsburg Union High School District and Healdsburg Union School District/San Mateo City School District* (1984) PERB Decision No. 375), and that the State did not provide CCPOA with notice and an opportunity to bargain a change in the training policy. Although the charge does not provide evidence of a written agreement addressing training during work hours,[4] the OJT form suggests there is a policy or practice that training is done during work hours. However, the conduct at issue does not demonstrate an unlawful unilateral change if it is merely an isolated breach that does not have a generalized effect or continuing impact on terms and conditions of employment.

Generally, the number of employees affected by a change does not alone determine whether the change has a generalized effect or continuing impact. (*Jamestown Elementary School District* (1990) PERB Decision No. 795.) PERB also considers whether the employer believes or acts as if it has a right to take the action without bargaining. (*County of Riverside* (2003) PERB Decision No. 1577-M; *Hacienda La Puente Unified School District* (1997) PERB Decision No. 1186 [employer belief contract allowed unilateral shift change]; *Fall River Joint Unified School District* (1998) PERB Decision No. 1259 [intention that mandatory transfer policy applied to all employees]; *Lake Elsinore School District* (1988) PERB Decision No. 666 [one-time change in hours did not demonstrate intended on-going effect].) In *Grant Joint Union High School District, supra,* PERB Decision No. 196, the Board explained:

> This is not to say that every breach of contract also violates the Act. Such a breach must amount to a change of policy, not merely a default in a contractual obligation, before it constitutes a violation of the duty to bargain. This distinction is crucial. A change of policy has, by definition, a generalized effect or continuing impact upon the terms and conditions of employment

[4] The parties were operating under the terms of the last, best and final offer implemented on September 18, 2007.

> of bargaining unit members. On the other hand, when an employer unilaterally breaches an agreement without instituting a new policy of general application or continuing effect, its conduct, though remediable through the courts or arbitration, does not violate the Act.

The charge alleges that a VYCF supervisor instructed a single employee to complete the on-line training at home. There are no facts the employee actually performed the training at home. Further, there are no facts that CDCR similarly directed other employees to complete the NIMS training at home. CCPOA contends the August 19, 2008 email, reminding all staff of the NIMS training obligation, establishes the existence of the at-home training policy. The Union states on appeal:

> CCPOA provided evidence that this policy applies to more than one member of the Bargaining Unit by providing the email sent out by the VYCF Treatment Team supervisor. The email in question does not articulate that NIMS training is to be completed off duty, however, at least one officer was ordered to complete the training off duty.

The email demonstrates only the requirement that all staff complete the training. Nothing in the email indicates where the training is to be done. As written, the charge simply speculates that other employees were required to perform the training at home. PERB Regulation 32615(a)(5) requires that an unfair practice charge include a "clear and concise statement of the facts and conduct alleged to constitute an unfair practice." The charging party's burden includes alleging the "who, what, when, where and how" of an unfair practice. (*State of California (Department of Food and Agriculture)* (1994) PERB Decision No. 1071-S, citing *United Teachers-Los Angeles (Ragsdale)* (1992) PERB Decision No. 944.)[5]

[5] The grievance filed by Lee states that "numerous" employees were directed to complete the training at home. Other than the broad statement, the grievance does not identify or give any indication which employees were affected. However, the facts alleged in the charge statement, and repeated on appeal, specifically reference that only a single employee was directed to train at home. A charging party must allege sufficient facts to state a prima facie case. PERB will not rely on a charging party's conjecture.

The charge does not allege facts that demonstrates CDCR believed or acted as if it had a right to direct employees to complete training outside duty hours. There is no indication of continued application of the at-home training requirement. As filed, the charge demonstrates only an isolated incident and not a change in policy. Thus, the charge does not establish a prima facie case of an unlawful unilateral change.

ORDER

The unfair practice charge in Case No. SA-CE-1798-S is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chair Dowdin Calvillo and Member McKeag joined in this Decision.